Central and East European Moot Court Competition 2019

Organised by:

Sponsored by:

CLIFFORD

CHANCE

The Honourable Society of the Inner Temple

3rd – 5th May 2019

In cooperation with:
The Court of Justice to the European Union
Centre for European Legal Studies (CELS) of the Faculty of Law, University of Cambridge and The University of Luxembourg

MOOT BUNDLE 2019

TABLE OF CONTENTS

Although the rules prevent competitors from citing authorities other than those in this bundle, should further background information be sought to prepare the case the following websites may be useful: http://curia.europa.eu http://www.amicuria.org
Equally, competitors may find it helpful to look at the following documents concerning the CJEU's rules and procedures:
CJEU Rules of procedure: http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf
CJEU Statute: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf

Notes for the guidance of Counsel in written and oral proceedings before the CJEU:
http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf

PART A. PRELIMINARIA

CENTRAL AND EASTERN EUROPEAN MOOT COMPETITION
(2019 edition)
MOOT COURT PROBLEM

A (Applicant)
v.
The State of Lortnoc (Respondent)

Serper

1. Atad, the applicant, is a national of Serper (a non-EU state). Since his early childhood, Atad has been a fervent and active supporter of human rights, having seen his grandparents arrested and sentenced to jail for alleged human rights infractions when he was a young boy. Atad's grandfather died during this jail sentence. When released, Atad's grandmother spent her remaining years in a mental asylum. Atad's family all believe that the grandmother's mental illness was a direct result of her incarceration.

2. Atad's entrepreneurial skills enabled him to become a successful business magnate by the age of 25. He set-up several media businesses in Serper and became an industry leader in innovation on social media and digital technology research. In 2016, Atad founded the 'Respect for Human Rights' civil rights movement ("the RHR") in Serper. His business skills, high profile and popularity have made him an important figure in the fight against all types of human right abuses in Serper. Atad and the RHR uncover and publicise evidence of multiple incidents of government corruption, human rights abuses and political interference with the judiciary in Serper.

3. In 2017, Atad agreed to act as the lead complainant in group litigation initiated against several Serperan government ministers. The claim sought compensation for alleged corruption, criminal negligence and human rights abuses committed by the minsters and the Serperan government. On the day after the claim was filed, Atad was arrested and charged with several administrative and criminal offences allegedly committed by Atad himself, his company and his research institutions. Atad vehemently denied all allegations. At the same time, the Serper Criminal Court issued a freezing order which prevented Atad from accessing his personal and commercial bank accounts. Atad's parents and other family members reported that they began to suffer harassment and intimidation by local state officials.

In 2018, Serper was included on a list of countries suspected of breaching human rights in reports prepared by several international human rights organisations including Amnesty International and Human Rights Watch ("the 2018 Human Rights Reports"). Those reports referred to at least some of the incidents uncovered and publicised by Atad and the RHR movement.

Yduts

4. In 2011, whilst studying at university in Yduts (an EU Member State bordering Serper), Atad met and fell in love with Modeerf, a national of Lortnoc (an EU Member State), who was also studying there. In 2014, when they both finished their studies, they returned to their respective home states, but their relationship continued at a distance and they remained very much in love. Modeerf qualified as a lawyer in Lortnoc where she opened a human rights practice, while Atad began his business career in Serper. They planned one day to live together.

5. In 2017, after the criminal charges were brought against him, and following his family's reports of being harassed and intimidated by state officials, Atad believed himself to be in danger in Serper. His experience in researching government and judicial corruption in Serper meant that he had no faith in the political independence of the courts which would be hearing the criminal charges against him. Accordingly, on 1st March 2017, he decided to leave Serper and travel to Lortnoc to be with Modeerf. He planned to leave Serper via Yduts, which was the closest border to his home.

6. At the Yduts border, Atad was arrested and informed that an international arrest warrant had just been issued against him by Serper. He was arrested and detained in Yduts until 2nd May 2017, on which date he was extradited to Serper. On 9th May 2017, a week after his extradition, primarily as a result of Modeerf's efforts, that extradition was declared unlawful following a direction from the Yduts Supreme Court.

7. Upon being extradited to Serper, Atad was detained in custody while awaiting trial for several economic crimes, each of which carried a potentially custodial sentence. The Serper Criminal Court denied Atad bail because of his previous attempt to flee the country. He was detained in a Serper prison, where he suffered a nervous breakdown caused by the threats and intimidation to which he was subjected by the prison guards. Atad's lawyer successfully relied upon Atad's ill-health to overturn the original decision to deny him bail.

8. On 2nd June 2017, almost immediately upon having been released from jail, Atad again attempted to leave Serper and enter Lortnoc. This time, he was arrested at the Lortnoc border and immigration proceedings were initiated against him, with a view to returning him to Serper. On the same day, Modeerf lodged an application on behalf of Atad for international protection in Lortnoc.

The original examination of Atad's claim for refugee status or subsidiary protection

9. The Lortnoc Immigration and Asylum Authority ("IAA") is the "determining authority" within the meaning of Article 2(f) of Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), which means that it is responsible for examining all applications for international protection. Any appeals initiated against IAA decisions are heard by the Administrative Appeals Court in Lortnoc.

10. The IAA adopts its decisions on the basis of the Asylum Act 2012 ("the 2012 Act") as amended by the Asylum Act 2015 ("the 2015 Act"). The 2012 Act was originally adopted to implement the provisions of Directive 2011/95 EU ("the Refugee Directive"), including Articles 2(f), 5 and 15 thereof, into Lortnoc national law. The 2012 Act contained the following provisions: -

Article 60 (principle of non-refoulement)
(1)- 'Lortnoc shall grant subsidiary protection to a foreigner who does not satisfy the criteria for recognition as a refugee but in respect of whom a risk exists that, in the event of his/her return to his/her country of origin, s/he would be exposed to serious harm and s/he is unable or, owing to fear of such risk, unwilling to avail himself/herself of the protection of his/her country of origin'

(2) The fear of serious harm or of the risk of harm may also be based on events which occurred following the foreigner's departure from his/her country of origin or on the activities in which the foreigner has engaged following departure from his/her country of origin.

11. On 1st August 2017, the IAA issued a decision ("the IAA's first refusal decision") dismissing Atad's application for international protection. The IAA concluded that Atad did not qualify as a refugee and that there was no evidence that he would suffer persecution in Serper for political or other reasons, as his alleged crimes were non-political, white-collar economic crimes. The IAA also concluded that Atad was not entitled to subsidiary protection in accordance with Article 60 of the Asylum Act 2012, as no evidence existed of any serious infringement of his rights and there was no evidence to show that the principle of non-refoulement would be infringed if he were to be returned to Serper.

The 2015 Resolution on Refugee Quotas and reform of Lortnoc's national law on immigration appeals

12. On 22nd September 2015, the Council of the European Union adopted a resolution ("the Refugee Quota Resolution") introducing a compulsory quota system, whose purpose was to combat some of the social and economic burdens suffered by certain EU countries as a result of extensive refugee numbers crossing their borders. The Refugee Quota Resolution was politically controversial in Lortnoc. It was followed by an anti-immigration campaign in the media and various public marches, the majority of which opposed the Refugee Quota Resolution and the quota system. Some marches were accompanied by breaches of public order.

13. On 14th October 2015, a new government was elected in Lortnoc. The new government was led by a right-wing, populist political party which had been extremely critical of the EU's refugee quotas during its election campaign, on the basis that these did not go far enough to deal with the underlying problem.

14. In December 2015, the Lortnoc government adopted the Asylum Act 2015 ("the 2015 Act") which reformed its immigration appeals procedure. The government stated that its reason for doing so was to improve the efficiency and fairness of the

immigration procedure. The main thrust of the reform was to remove the right of the Administrative Appeals Court, when hearing appeals from the IAA, to substitute its own decision to approve/ dismiss an application for international protection. Where the Administrative Appeals Court upheld an appeal against an IAA decision, it was now obliged to send the case back for re-examination by the IAA. The Administrative Appeals Court's power to take a final decision itself, without the need for re-examination by the relevant administrative body, had previously existed in respect of all appeals against administrative decisions (including, e.g., tax appeals and social security appeals as well as immigration appeals). The 2015 reforms amended the appeal procedure solely in relation to immigration appeals, leaving the procedure for all other administrative appeals unchanged.

15. The immigration procedure reforms in the 2015 Act were merely one aspect of a package of legal reforms introduced in Lortnoc since the change of government in October 2015. As well as several other measures denying or limiting rights for minorities, migrants and refugees, the government radically reduced funding for non-governmental organisations (NGOs) working with immigrants, refugees or asylum seekers and imposed restrictions on press and academic freedom. It also greatly extended search, detention and seizure powers at Lortnoc's national borders.

16. On 5th January 2017, in the light of growing international concern about the rule of law in Lortnoc and following a damning report by the 'Venice Commission', the EU Commission adopted a Recommendation on the Rule of Law in Lortnoc ("the Rule of Law Recommendation"). The EU Commission concluded that the various procedural and legal reforms since 2015, including the amended immigration appeals procedure, had created a systemic threat to the rule of law in Lortnoc. The Rule of Law Recommendation was issued on the basis of the Communication 'A New Framework to Strengthen the Rule of Law', as adopted by the Commission on 11 March 2014 ("the New Rule of Law Framework").

17. Paragraphs (12-17) of the EU Commission's Rule of Law Recommendation noted that, since the entry into force of the 2015 asylum law reforms, 98% of asylum applications made to the IAA had been rejected on the basis that the claimant was ineligible to claim refugee status or other subsidiary protection. That had resulted in a 200% increase in immigration appeals brought annually against IAA decisions to the Administrative Appeals Court, when compared with the annual statistics prior to October 2015. In addition, statistical data indicates that some 70% of appeals referred to the Administrative Appeals Court were successful and required the case to be referred back to the IAA for re-determination. Successful appeals commonly cited a number of procedural violations by the IAA in relation to its findings of fact and its failure to take account of all of the evidence presented to it.

18. Despite significant criticism from academia and opposition politicians, the government of Lortnoc has, to date, refused to take any action to reverse its reforms (including its amended immigration appeals procedures) so as to comply with the Rule of Law Recommendation. The Lortnoc government maintains that its national law is perfectly compliant with all applicable EU legislation. In June 2018, the Lortnoc Minister of Justice welcomed the CJEU decision (*Case C-585/16 Serin Alheto*) which, he said, '*acknowledged that Member States are entitled to exercise their own discretion and procedural autonomy when organising their asylum immigration systems'*. The government notes that the IAA is an independent body composed of experts who deal with extremely sensitive issues, and that it would be "entirely inappropriate" for the government to seek to interfere in the IAA's decision-making process by investigating or challenging the manner in which it has reached its decision in any individual case.

Atad's first appeal to the Administrative Appeals Court

19. On Atad's behalf, Modeerf appealed against the IAA's decision ("the first appeal") to the Administrative Appeals Court.

20. Given the sensitive nature of Atad's position and the risk to his family back in Serper, Modeerf applied for a special Anonymity Order to protect Atad's identity from disclosure during the appeal proceedings. She argued that Atad and his family faced a genuine risk of reprisal actions if details of his claim were made public. The Appeals Court accepted this application and ordered the anonymisation of any information which (directly or indirectly) could lead to Atad, his name, address, nationality or his business name being identifiable in any document issued by the Appeals Court.

21. The Administrative Appeals Court then ruled that the IAA's first refusal decision was unlawful. The Appeals Court's judgment stated that '*the IAA's decision contained inconsistencies in that the IAA failed not only to take account of and investigate a number of pertinent facts, but it also conducted a haphazard evaluation of the facts it did investigate, so that the decision was unfounded in its entirety.'* Pursuant to the 2015 Act, it ordered the IAA to re-examine Atad's case and to issue a new decision.

The IAA's re-examination of Atad's claim for refugee status or subsidiary protection

22. During the IAA's re-examination of Atad's claim for refugee status or subsidiary protection, Modeerf argued that clear evidence existed to prove that Atad had been the victim of political persecution. She referred *inter alia* to (i) the ruling of the Yduts Supreme Court of 9th May 2017; (ii) reports and data (from Amnesty International, Human Rights Watch and other recognised NGOs) which demonstrates that the Serper courts regularly hand down lengthy custodial sentences to those convicted of political offences and; (iii) the factual and medical evidence regarding the intimidation and consequent nervous breakdown that Atad suffered during his detention in Serper.

23. On 1st October 2017, the IAA dismissed Atad's application for a second time ("the IAA's second refusal decision"). That decision stated that, having evaluated all the documentation submitted by Atad, including the circumstances of his extradition from Yduts, the IAA found no evidence to conclude that Serper would not protect appropriately Atad's right to independent judicial proceedings in respect of the political offences and/or common crimes with which he was charged. It also found that the facts alleged by Atad were not, either by their nature, their reiteration or by taking account of their cumulative effects, sufficiently serious to reach the level of 'persecution' as defined in the Refugee Directive.

24. The IAA's second refusal decision also referred to evidence given by a representative of the Lortnoc Foreign Relations Ministry, which cited Amnesty International and Human Rights Watch reports from 2014-2015 ("the 2014-15 human rights reports"), none of which commented about problems with human rights in Serper or expressed concerns that Serper was failing to guarantee independent judicial proceedings, regardless of whether such proceedings are in respect of political, non-political or administrative offences.

25. During the second review procedure, the IAA also asked for an opinion from the Lortnoc Constitutional Protection Office ("the LCPO"), whose opinion is occasionally sought in individual sensitive asylum cases. The LCPO provides its opinion directly to the IAA. Although the LCPO's ultimate conclusions are made known to the parties, whether the facts on which the LCPO bases its conclusions are disclosed to the parties is at the discretion of the IAA. The LCPO concluded that there was well-founded evidence to show that Atad's presence in Lortnoc was contrary to the interests of national security and that Article 1(F)(c) of the 1951 Geneva Convention Relating to the Status of Refugees applied to his case.

26. Modeerf requested that the IAA order the LCPO to disclose all the material which had formed the basis for its conclusions, including any evidence regarding the *'well founded'* reasons for concluding that Atad's presence was contrary to the interests of Lortnoc's national security. The Lortnoc Ministry's representative objected to such disclosure on the grounds that some of the evidence analysed by the LCPO when reaching its conclusions was confidential for reasons of public policy and state security. That included the specific evidence concerning Atad. The IAA rejected Modeerf's disclosure application

Atad's second appeal to the Administrative Appeals Court

27. On 25 February 2018, the Administrative Appeals Court issued a judgment ("the second appeal judgment") annulling the IAA's second refusal decision. It held that the IAA's second refusal decision was unlawful for three main reasons: -

(1) it failed to take adequate account of the evidence presented by Atad that his life and liberty would be endangered in Serper owing to his political opinions and activism;

(2) it relied on outdated human rights reports; and

(3) the IAA should have ordered the LCPO to disclose the details of the evidence forming the basis for the LPCO's conclusion that Atad's presence was contrary to the interests of Lortnoc's national security.

28. The second appeal judgment instructed the IAA to re-examine Atad's case once again and to issue a new decision. It urged the IAA to pay greater attention to the evidence presented by Atad regarding his personal safety in Serper and noted that, were it not for the reforms implemented by the 2015 Act (which prevented the Administrative Appeals Court fromtaking a final decision) it would have concluded that Atad qualified for subsidiary protection.

29. The second appeal judgment was read out in open court.

Lortnoc law on the announcement of court judgments in open court

30. The Lortnoc Constitution of 1st February 1995 contains the following articles;

Article 180- 'The courts and tribunals shall constitute a separate branch of the State independent of other branches.'

Article 181- 'All judgments of Lortnoc courts are delivered in the name of the people. All trials are public, unless provided otherwise by law. The final judgment of the court deciding a matter on its merits must always be made public.'

31. The *Rules of Procedure (Administrative Appeals Court) Rules 2000* ("the Procedural Rules 2000") lay down the general rule that all judgments shall be read out in open court. By way of exception, the Rules enable the use of *Anonymity Orders* which enable a court to require that certain stated aspects of a party's identity (such as name, address, age, gender, nationality, marital status and occupation/business activity) may be anonymised in a judgment insofar as the court considers that to be necessary to protect the party in question or any other person, or in order to comply with procedural orders or other provisions of national law.

32. Whenever the identity of a party to administrative appeals proceedings has been anonymised (as Atad's had been during his first appeal) a copy of the Anonymity Order is attached as the first page of the case file. That informs the judicial panel of the existence and scope of the Anonymity Order and enables the judgment to be redacted accordingly by deleting any information falling within the scope of the order before the judgment is read out in open court or published in writing.

33. Due to an internal administrative error, the Anonymity Order in Atad's case incorrectly failed to describe the full extent of the anonymity order actually granted during Atad's first appeal. Accordingly, although some parts of the judgment had been properly redacted (e.g. by removing reference to Atad's name, address and nationality), certain details of Atad's business affairs had *not* been redacted. Thus, when the Administrative Appeals Court announced the judgment in open court, it referred to the fact that the IAA decision under appeal concerned the founder of a human rights movement, an entrepreneur who was active in social media and digital research and who had been charged with certain criminal offences in Serper.

34. Atad and Modeerf were not present when the judgment was read out in court. By the time the judgment was published, the administrative error had been noted and the text had been corrected. Atad and Modeerf were not informed by the Court that this mistake had ever happened. Unfortunately, Rebbalb (a journalist based in Lortnoc) *was* present when the judgment was read out in open court. He became intrigued and decided to investigate the identity of the person referred to in the appeal.

The IAA's second re-examination of Atad's claim for refugee status or subsidiary protection

35. On 1st March 2018, the IAA issued a third refusal decision ("the IAA's third refusal decision") in Atad's case. It handed down that decision without hearing any further facts or evidence and having refused to accept any oral submissions from the parties. The decision reiterated the IAA's earlier conclusions on Atad's claim for refugee status, that *'no evidence existed of persecution on political grounds'* and that '*as regards the principle of non-refoulement, there was no evidence that persons returning to Serper after an extended period would suffer any kind of disadvantage or sanction in that country*'.

36. By this time, Rebbalb had discovered Atad's identity. He wrote a story which was published in the *Daily Moon* newspaper and was widely circulated and read in Lortnoc, Yduts and Serper. The story specifically identified Atad as the relevant person. Following this publication, officials in Serper seized the passports of all the members of Atad's family, who were told they would not be allowed to leave Serper until Atad returned to stand trial. The house of Atad´s parents in Serper was put under surveillance. Atad was distraught and feared for the safety of his family in Serper.

The two cases before the Lortnoc Court of Appeal

37. Atad initiated a civil law claim ("the GDPR claim") against the state of Lortnoc, arguing a breach of EU data protection law. He hoped that would bring media and political attention to his situation. His claim sought substantial monetary compensation for the failure of the Lortnoc's Appeals Court, acting as a 'data controller', properly to secure the protection of his personal data and ensure that his data was processed lawfully. He alleged that that infringed Regulation 2016/679 (the General Data Protection Regulation)..

38. The admissibility of Atad's GDPR claim was initially assessed by a first instance court. Instead of proceeding to review the claim on its merits, it chose to utilise a special procedure available to any national court in Lortnoc which thinks that (a) a claim pending before it concerns the actions of a state body (in this case the Administrative Appeals Court) which may result in the state being liable in damages; or (b) a 'leapfrog' appeal to a higher jurisdiction is needed to resolve a repetitive problem in the jurisprudence. In such cases, it is possible for the first instance court to refer the case to be heard directly by a special panel of judges of the Lortnoc Court of Appeal. The first instance court used that procedure (on the basis of (a) above) and asked the Court of Appeal to review Atad's GDPR claim.

39. Modeerf in the meantime has filed yet another appeal, this time against the third refusal decision in Atad's case ("the third appeal proceedings"). The case again came before the Administrative Appeals Court. Modeerf suspects that the likely consequences of this third appeal is that the Appeals Court will again annul the IAA's decision and return the case to the IAA for yet another re-examination. She refers to the EU Commission's Rule of Law Recommendation in respect of Lortnoc's judicial reforms, particularly its conclusion that there was a systemic threat to the rule of law in Lortnoc, highlighting the post-2015 behaviour of the IAA and the fact that, notwithstanding that Lortnoc's legislation requires the IAA to comply with judgments of the Administrative Appeals Court, the IAA in practice frequently ignores the accompanying reasoning given by the Appeals Court and simply repeats its original conclusion and decision even after its original decision has been successfully appealed, sometimes on multiple occasions (as in Atad's case). Modeerf argued that this must surely demonstrate a systemic deficiency in the Lortnoc immigration appeal system (by analogy with *Case C-411/10 NS*.) She asks the Administrative Appeals Court to refer the case to the Court of Appeal (using the aforementioned special procedure, under (b) above) so that it can consider the legality of the 2015 reform to Lortnoc's immigration appeals procedure. Modeerf's motion is successful and the case is referred to the special panel of judges in the Court of Appeal.

40. When the Court of Appeal receives both Atad's GDPR claim and the third asylum appeal, it realises that they have a common factual background and, of its own motion, orders that the two cases be joined.

Modeerf's right to represent Atad before the national court

41. The freezing order against Atad, which still remained in place, had prevented him from accessing his personal funds. Both he and Modeerf were now short of money. Accordingly, as of 1st February 2018, Modeerf decided to enter full-time employment as a lawyer at the Lortnoc Ministry of Agriculture.

42. Before the joined cases were considered on their merits by the Court of Appeal, the parties had a standard pre-trial hearing (to discuss certain procedural aspects of the case, such as how many witnesses they planned to call, what documentary evidence would be filed etc.). When Lortnoc's lawyers realised that Modeerf intended to act as Atad's lawyer in respect of both claims, they filed a motion asking the Court of Appeal to exercise its discretion to preclude her from appearing in the proceedings.

43. The relevant part of the Court of Appeal's Rules of Procedure 2001 states as follows:

Article 18: Rights of audience before the Court of Appeal

(1) Any person who is qualified and entitled to act as a lawyer in Lortnoc may appear as legal counsel in proceedings pending before the Court of Appeal.

(2) *By way of exception to paragraph (1), the Court of Appeal may direct that a qualified lawyer may not appear as legal counsel in particular proceedings pending before it if the Court considers that that lawyer has a personal interest in the outcome of*

the case, whether for professional or personal reasons, which might adversely affect that lawyer's ability to act independently when exercising their functions before the court.

(3) *The Court may make a direction under paragraph (2) either of its own motion or at the request of another party to the proceedings. There shall be no right of appeal against such a finding.*

44. The Court of Appeal accepted Lortnoc's arguments that, as Modeerf was both linked by an employment contract to the state of Lortnoc and romantically involved with Atad, there were both professional and personal reasons for doubting her ability to act independently in the proceedings. Accordingly, the Court ruled that she was not entitled to act as Atad's representative in the joined cases. With some difficulty, Atad hired another lawyer to represent him. In practice, Modeerf continued to do much of the preparatory work required and liaised very closely with Atad's new lawyer.

Principal arguments of the parties in the proceedings before the Court of Appeal

Legality of Lortnoc's immigration appeals system

45. Atad claims that, following the changes brought about by Lortnoc's 2015 Act, the immigration appeals procedure is incompatible with the obligation of all EU Member States to ensure that they provide an appropriate and effective system to review appeals against first instance immigration decisions. Although Lortnoc's national law appears to oblige the IAA, as a matter of law, to comply with judgments of the Appeals Court, the *de facto* situation is that no effective procedures exist to guarantee an 'effective judicial remedy'. The Administrative Appeals Court ought, as a matter of EU law, to be allowed to alter any IAA decision which it reviews on appeal, so that it can make a definitive and binding ruling on whether an applicant is (or is not) entitled to refugee status or subsidiary protection.

46. Lortnoc contends that, given its geographical location (which makes it much more likely to be one of the first EU Member States through which those desiring international protection seek to enter the Union), it is perfectly entitled to adopt a robust procedure for immigration checks. The post-2015 procedure ensures that the ultimate factual assessment of any application for international protection is made by the experts at the IAA. The Administrative Appeals Court makes binding rulings of law on how the applicable legislation should be understood and applied; and the IAA is obliged, by Lortnoc's national law, to comply with such judgments. However, the judges of the Administrative Appeals Court are not the appropriate people to make findings of fact in sensitive immigration cases, which is why Lortnoc's 2015 Act reserves the ultimate fact-finding role to the IAA. That ensures that immigration decisions are taken fairly and consistently. Furthermore, EU law allows a significant margin of discretion to Member States as regards the organisation of immigration appeals procedures. It is therefore not incompatible with EU law for a Member State to require a court (such as the Administrative Appeals Court) to refer an immigration decision back to the original decision maker (the IAA) for re-examination.

The GDPR claim

47. Atad claims that, in its capacity as an official judicial authority which is responsible initially for obtaining and processing data obtained in judicial proceedings and subsequently for producing a public record of those proceedings, a Member State court is a 'controller' of data within the definition in Article 2, read in conjunction with Article 4 (7), of the GDPR. Accordingly, the court is required to put in place procedures to guarantee that the processing of a natural person's data is done lawfully in accordance with Articles 5 and 6 and the preamble to the GDPR and the provisions of Article 8 of the Charter of Fundamental Rights of the European Union ("the Charter"). Even were Rebbalb (the journalist) to be found to be a controller of Atad's personal data, Atad contends that the Lortnoc court should be considered as a joint controller within the meaning of the GDPR.

48. Atad further claims that he has been deprived of the right to an 'effective judicial remedy' against a data controller or processor (or joint controller), contrary to Article 79 of the GDPR and Article 47 of the Charter, as no judicial remedy exists in Lortnoc in situations where the unlawful processing of an individual's data is done by a national court in circumstances such as those which occurred in the Appeals Court.

49. Atad also claims that the state of Lortnoc is liable to pay him damages for the Administrative Appeal Court's failure to protect his personal data, as that amounts to a 'sufficiently serious breach' of EU law (*Francovich v Italy (1991) C-6/90*) which was caused by a national court (*Köbler v Austria (2003) C-224/01*) and therefore satisfies the requirements for State liability.

50. Lortnoc submits that a court when acting in a judicial capacity falls outside the definition of a 'controller' and is therefore not bound by the provisions of the GDPR. If there was any 'controller' of data who might be liable on the facts of the present case, it was Rebbalb the journalist who published the newspaper story disclosing Atad's identity.

51. In the alternative (i.e. even if the court *is* found to be a controller of Atad's data), Lortnoc submits that any processing of Atad's data by the Appeals Court was done in compliance with Articles 5 and 6 of the GDPR. Lortnoc also relies on Article 181 of the Lortnoc Constitution, which requires that justice be conducted openly and that court judgments must in principle always be pronounced in public. Finally, Lortnoc argues that in any event any infringements of the GDPR were not so serious as to make the state liable in damages to Atad. Any compensatory damages would be possible only against Rebbalb, pursuant to national rules on civil liability.

The grounds for the request for a preliminary ruling

52. Having heard the parties, the Court of Appeal considered that both cases raise several issues of European Union law which require interpretation by the CJEU. Accordingly, on 1st October 2018 it referred several questions for a preliminary ruling under Article 267 TFEU.

53. In its summary of the facts, the Court of Appeal specifically noted that Lortnoc's asylum law reforms in 2015 had been prompted by the number of IAA decisions refusing to grant refugee or subsidiary status which had been appealed and overturned by the Administrative Appeals Court between 2010-2015 and the associated media campaign against immigrants and refugees.

54. Following the 2015 Act, the Administrative Appeals Court was deprived of its earlier power to amend IAA decisions by substituting its own findings of fact for the IAA's conclusions (e.g. by deciding that a claimant qualified as a refugee or for subsidiary protection). Now, if the Appeals Court disagrees with a first instance decision, it can merely annul that decision and order the IAA to re-examine the case. Although under the provisions of the national Code of Administrative Procedure, the IAA is formally bound by the legal opinion expressed in a judgment annulling its decisions, this does not in practice preclude the IAA from arriving at an identical conclusion following re-examination of the file.

55. Upon its entry into force, the 2015 Act also applied automatically to any pending asylum appeals cases. The 2015 reforms did not affect the power of the Administrative Appeals Court to amend first instance decisions in other (non-asylum) administrative appeals, such as appeals concerning first instance decisions on social security rights or tax obligations) In all such (non-asylum) administrative appeals cases, the Administrative Appeals Court is still entitled to substitute its own findings of fact for those of the first instance authority and does not have to refer the case back to the IAA for re-examination by that authority.

56. The Court of Appeal also notes that the EU Commission has adoptedthe Rule of Law Recommendation, in which the EU Commission has concluded that there is a systemic threat to the rule of law in Lortnoc caused in part by the absence of an effective legal remedy in asylum/immigration cases. The government of Lortnoc has, to date, refused to take any action to reform its immigration law in compliance with the Rule of Law Recommendation.

57. The Court of Appeal notes that Atad continues to live in Lortnoc in an uncertain legal situation and with an irregular legal status, even though the Appeals Court has expressly stated that, if it were not precluded from doing so by the 2015 asylum reforms, it would have decided that he was entitled to subsidiary protection.

58. The Court of Appeal is uncertain as to whether it is compatible with EU law, in particular Article 46(3) of Directive 2013/32 on common procedures for granting and withdrawing international protection (recast) (The Asylum Procedure Directive Recast) and Article 47 of the Charter, for Lortnoc national law categorically to prevent the Administrative Appeals Court from deciding on the merits of the application in place of the first instance authority, and to require it to refer any annulled decisions back to the IAA for re-examination. The Court of Appeal likewise notes that the Administrative Appeals Court is unable to issue binding instructions

that the IAA must follow where it disagrees with the factual assessment of the case. Moreover, the Administrative Appeal Court does not have the power to sanctions the IAA if the latter ignores the Administrative Appeals Court's non-binding guidelines on how to resolve a particular case.

59. The Court of Appeal also noted the judgment of the CJEU in Case C-585/16, Alheto, stating that Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter of Fundamental Rights, must be interpreted as meaning that it does not establish common procedural standards in respect of the power to adopt a new decision concerning an application for international protection following the annulment, by the court hearing the appeal, of the initial decision taken on that application. However, the CJEU's judgment in Alheto also underlined the need to ensure that Article 46(3) has a practical effect and to ensure an effective remedy in accordance with Article 47 of the Charter of Fundamental Rights. That requires that, in the event that the file is referred back to the quasi-judicial or administrative body, a new decision must be adopted within a short period of time and must comply with the assessment and reasoning contained in the judgment annulling the initial decision. The Court of Appeal asks whether the reform on immigration appeals contained in the 2015 Act is in accordance with the ruling in Alheto.

60. Since Atad submitted that the absence of an effective judicial remedy in asylum cases in Lortnoc is clearly demonstrated by the Commission's Rule of Law Recommendation and that there is a systemic failure in its immigration appeal procedure, the Court of Appeal also wishes the CJEU to clarify what, if any, legal force that Recommendation has. It wishes to know to what extent, if any, it is obliged to consider the New Rule of Law Framework and/or the Commission's Rule of Law Recommendation (Grimaldi, Belgium-v- Commission). Likewise, it wishes to know whether Atad is correct that he is entitled to rely directly on the contents of the Rule of Law Recommendation as an instrument which confers rights upon him.

61. When filing his written observations with the Registry of the CJEU, Atad requested that Modeerf be identified as his legal representative in the Article 267 proceedings. That raises a preliminary procedural question to be dealt with by the Court, arising from Article 97 (3) of the Rules of Procedure of the Court of Justice, which states:

'*As regards the representation and attendance of the parties to the main proceedings, the Court shall take account of the rules of procedure in force before the court or tribunal which made the reference. In the event of any doubt as to whether a person may under national law represent a party to the main proceedings, the Court may obtain information from the referring court or tribunal on the rules of procedure applicable'*

62. Lortnoc's lawyers contend that, since the Court of Appeal had directed that Modeerf could not act as Atad's lawyer in the national proceedings, she was also precluded from acting as his lawyer of record in the Article 267 proceedings. Atad and Modeerf counter that Article 97 (3) RP merely requires the CJEU to take account of the rules of procedure in the national court, but that this does not oblige the CJEU to reach the same conclusion as the national court where a lawyer's rights of audience are subject to the exercise of discretion by the national court. In such cases, it is for the CJEU to make its own decision while applying national rules and exercising any potential discretion contained in its own Rules of Procedure with regard to representation in proceedings before it.

In these circumstances, the Lortnoc Court of Appeal decides to stay the proceedings and to refer the following questions to the Court of Justice to the EU, in accordance with the preliminary ruling procedure under Article 267 TFEU:-

1. a) In circumstances such as those in the main proceedings, does a judicial authority when pronouncing a judgment in open court act as a "controller" within the meaning of Article 2 read in conjunction with Article 4 (7) of Regulation (EU) 2016/679 ("the GDPR")?

b) If yes, should the concepts of 'controller' and 'joint controller' within Articles 4 (7) and 26 of the GDPR be interpreted as meaning that, in circumstances such as those in the main proceedings, a judicial authority and a journalist are (co)responsible as joint controllers within the meaning of Article 79 of that Regulation?

2. a) If question 1(a) is answered in the affirmative, in circumstances such as those in the main proceedings was the processing of personal data by the Administrative Appeals Court done in a way that complies with Article 5 and Article 6 of the GDPR, properly interpreted?

b) If question 2(a) is answered in the negative, should the resulting breach of EU law by the Administrative Appeals Court be considered sufficiently serious to give rise to state liability?

3. Does the Commission Recommendation on the Rule of Law in Lortnoc issued on 5th March 2017 produce binding legal effects? Are national courts obliged to take that Recommendation into consideration in order to decide disputes submitted to them, in particular where such a recommendation is capable of casting light on the interpretation of other provisions of national or EU law?

4. Should Article 46(3) of Directive 2013/32/EU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that, in a situation such as that in the main proceedings, an appeal court which is responsible under that Member State's national law for reviewing first-instance immigration decisions must, as a matter of EU law, be entitled to adopt its own definitive ruling on an application for international protection, even if that is precluded by national law?

Prior to considering the aforementioned questions, the CJEU intends to hear argument from each party on the preliminary procedural question whether Modeerf should be included as a lawyer of record in the Article 267 TFEU proceedings, pursuant to Article 19 of the Statute of the Court and Article 97 (3) of the Rules of Procedure of the Court of Justice, and thus be entitled to represent Atad in those proceedings before the Court of Justice.

COMPETITION RULES 2019

1. Competition

This is the twenty fifth year of this annual competition, this year to be held in Luxembourg at the Court of Justice.

This competition was originally designed to assist countries from the region which were associated with or trading with the European Union, to better understand its law and structure. In recognition of the enlargements in 2004 and later years the competition has widened its eligibility requirements. It will continue to include those countries who have joined the EU since 2004 as well as those which are associated countries or within the region of Central and Eastern Europe (at its widest definition), and allows entries from interested teams from Malta, Cyprus and Turkey.

IMPORTANT: To be eligible to participate written registration and acknowledgement is required by e-mail to the British Centre on or before **28th January 2019** (unless otherwise agreed with the CEEMC organisers). Each team must then pay the registration fee and submit written pleadings by e-mail attachment on or before **14th March 2019** (address and contact details at end). The 2019 question will be available to the general public from the CEEMC website, but anyone wishing access to the bundle of materials and registration form is first required to register on the CEEMC web site at www.ceemc.co.uk

A moot is an argument (and not a debate) between students acting as advocates representing different parties in a legal action (a case). The facts and history together with supporting material and authorities are given in advance to the students. The aim is to reproduce, as closely as possible, the discussion and argument of a genuine hearing in the Court of Justice to the European Union. The case is based upon an area of European Union Law and has been prepared by a writing committee of the organisers and external experts.

The organisers are aware that access of the competing teams to European Union law materials will vary greatly. Therefore a full bundle of supporting materials and authorities is included and encompasses all the authorities which teams are permitted to refer to in this case, to ensure that no unfair advantage is gained from those with less facilities.

2. Language

This official language of this competition shall be English

3. Participation

The competition is open to all students, nationals of Central and East European states including southern states who have applied for entry or have recently entered the EU (specifically Turkey, Cyprus and Malta), who are enrolled on a course at a participating University or comprises a team of students currently studying at one university made up entirely of eligible nationals and:

- are not older than 30 years
- are not practising as a lawyer and
- have not previously participated in the oral rounds of this competition.

Although it is possible for any university (with participants who are nationals from the regions mentioned) to enter more than one team (of 3-4 members accompanied by one academic/ coach) in the written round of the competition, only one team per University may be selected to proceed to the oral rounds. The choice of team will be based upon the best written pleading submitted. In cases of doubt, please e-mail the organizers directly at the address below.

4. The Case

This will be a problem based upon an area of European Union substantive and/or procedural law, containing a referral to the Court of Justice to the European Union from a Member State national court under Article 267 TFEU. Both written and oral pleadings on the part of applicant and respondent will be required from each competing team.

5. Scoring

The competition will be held over four rounds.

INITIAL ROUND

1. Submission of written pleadings
There are a maximum of 20 marks available from this round, where more than one team submits written pleadings then the team with the highest written pleading mark will be invited to participate in the oral round. Written pleadings should cover submissions on all questions unless teams are notified differently.

ORAL ROUNDS

First Round
In this round all teams will be invited to argue both the sides of the case. This will require members from the team to represent the appellant's case against another team arguing on behalf of the respondent and then represent the respondent's case against a different team arguing on behalf of the appellant. It is required that all members of the team speak as either respondent or applicant but it is not required that all members speak both as respondent and applicant during the first round. During this part of the competition, the courts will hear arguments on the preliminary procedural question and questions 1 and 2 of the questions referred by the fictitious EU Member State for a ruling by the Court to the European Union under the Article 267 TFEU procedure. Scores will be allocated at the conclusion of this round on the basis of both the written and oral pleadings.

The following scoring criteria will be applied throughout by the judges:-

Criteria	**Maximum Points Awarded**
Form and content of written pleadings (only in first round)	20
Style and quality of presentation in oral arguments	30
Effective and accurate use of provided materials	30
Team-work	10
Effectiveness of reply/rejoinder	20
Ability to respond effectively to judges' questions.	10
To this mark will be added the mark for the written pleadings	20

Second Round (Semi-Finals)
In this round, the best teams from the first round will be invited to plead both sides of the case against other teams. This round will focus on the remaining questions referred by the fictitious EU Member State national court for ruling by the CJEU as well as any additional questions required by the jury panel. Marks will be awarded for the same criteria as apply to the first round, with the exception that marks from written pleadings are no longer counted. It is necessary for all members of the team to speak both as applicant and respondent in the semi-finals.

Third Round (Final)
In the third round (final) each team will represent one side of the case (to be chosen by lot) and when announcing the teams to pass to the final, the judges will also indicate the questions on which they wish to hear submissions for the teams. Each member of the team is expected to speak in the final and so the team must be prepared to re-allocate those questions covered to ensure that each team member speaks. It is of course permissible for one member of the team to do the reply or rejoinder at this stage. The time allowed for the main argument of each party will be a maximum of 45 minutes and will not be extendable. Teams are expected at this stage to have the experience to ensure that their main arguments are fitted into the time allowed.
Three judges will sit in the first and second round. A plenary court will be convened for the final.

The decision of the judges will be conclusive in selecting the semi-finalists, finalists and eventual winning team and best speaker. A special prize of a short stage in the CJEU at Luxembourg will be awarded to the individual deemed to be the best speaker to be selected only from persons whose teams have participated in the Second and Third Oral rounds (i.e. semi-finalists or finalists). Individual speaker book prizes will also be awarded

Written and oral pleadings

Written pleadings
ALL participating teams must prepare written pleadings for both applicant and defendant. This should be an outline of your case for both applicant and defendant, (to include the preliminary procedural question) not exceeding 10 typed sides of argument on A4 paper each for the applicant and respondent respectively (no specific requirements for font or spacing are prescribed and an

attached list of authorities is not included in the 10 pages allowance). Arguments should be set out in numbered paragraphs, which should be supported and cross-referenced to a separate list of the authorities on which it is intended to rely (this may also be cross referenced to the relevant page of the bundle).
One copy of each of your written pleadings for the respondent and applicant must be submitted and received by the organisers prior to 22.00 on the **14th March 2019** and should be submitted online at the CEEMC web site at ceemc.co.uk and by e-mail attachment to organisers@ceemc.co.uk. Due receipt of written pleadings will be confirmed by the organizers by **16th March 2019**. No printed copies of the pleadings will be required.

ONLY teams lodging these pleadings in due time will be eligible to be invited to participate in the oral rounds of the competition. In the event that more than one team sends written pleadings from one university, the team to participate will be that submitting the written pleadings awarded the highest mark.

A prize for the best written pleadings will also be awarded.

Oral Argument
This argument need not be limited to the scope of the participant's written pleadings, but strict time limitations are to be maintained. Teams will be advised of the schedule of courts at registration on arrival in Luxembourg.

The main argument of each party shall be presented within 20 minutes (in the final this will be 45 minutes)

The applicant then has 5 minutes to reply, but is limited in this reply to the matters raised in the defendant's oral pleadings.

The defendant then has 5 minutes to reply in rejoinder and is also limited to matters raised in the applicant's reply.

Permission must be sought of the President of the Court, if any time limit is to be exceeded. Only a further 5 minutes can be allowed at his/ her discretion.

6. Roles
Each team may have up to four members. Teams should be in a position to argue both sides and can divide in which manner they wish to achieve that either as a full group or by dividing their teams so not all members of the teams will speak on each side. However the rules do require that the judges will have heard from each member of the team individually at least once during the first oral round of the competition.

In the second and third rounds of the competition however judges will expect to hear from each of the team members in their presentations on behalf of both the applicant and respondent.

Please note a guidance video on how to moot is available for downloading from the CEEMC site link how to moot, with guidance tips from the CEEMC President AG Eleanor Sharpston.

7. Fees
In 2019 there will be one CEEMC registration fee in the sum of **750 euros** to be paid by bank transfer no later than **1st March 2019** (unless otherwise agreed with the organisers), bank details are provided below. Payment confirmation should also be sent by e-mail by 1st March to organisers@ceemc.co.uk

The organising committee retain a discretion to consider applications from teams who have not registered their team or completed an expression of interest by **28th January 2019**, due to late awareness of the competition. In such a case teams should contact the organisers at organisers@ceemc.co.uk as soon as possible, heading their mail 'CEEMC- Late registration request'. Such requests will only be considered if received prior to 1st March 2019 and if granted teams will then be notified individually by mail of the decision and related terms.

Each participating team is responsible for their return travel and any administrative or visa charges to Luxembourg (details of consulates for visa applications and teams requiring visas will be available on the web site from early 2019) and any additional costs incurred due to earlier arrival or later departures. Our local organisers will be happy to arrange for team invitations for visa/ border crossings and any supporting sponsorship/ financial applications on request.

This fee will allow the participation of a one team to include their basic subsistence costs during the competition dates (a team may

include up to 3/4 team members and one accompanying coach).

In 2019 teams will be asked to organise their own accommodation for the event or book through the discounted accommodation arranged by the CEEMC, detailed instructions for which are available for registered teams on CEEMC site or which can be obtained by writing to organisers@ceemc.co.uk. This enables teams to choose accommodation best suited to their budget. Please note however that accommodation organised by CEEMC is limited and will be available on a first come first served basis. All teams who have registered/ sent expressions of interest by **28th January** will be directly notified of accommodation options.

No cash payments may be accepted for the registration fees.

In the event that a university has more than one team wishing to participate in the 2019 competition and to invoke the selection procedure set out in point 5 above, then an additional fee of 100 euros is payable by that university, to be paid at the time of submission of written pleadings and accompanied by written confirmation of payment as detailed above.

8. Bank Details and Organisers details

The event is organised by the Management Committee of the CEEMC (details of committee may be found on CEEMC web site and the British Law Centres of the English charity Juris Angliae Scientia, please mail organisers@ceemc.co.uk
Local organiser contact details will be posted later.

Bank details

Account name:	*Juris Angliae Scientia Ltd (10 West Road Cambridge England)*
Account no:	*PL 90 1750 0009 0000 0000 4001 2915 (Euro currency account)*
BIC/SWIFT code:	*RCBWPLPW*
Bank :	*Raiffeisen Bank Polska S.A.*

(Please ensure that payments received are net of any bank fees)

PRELIMINARY INFORMATION ON THE CJEU

The following is a short introductory guide to the role of the Court of Justice to the European Union (formerly – and still commonly – known as the European Court of Justice or ECJ) and its relationship with the national courts of the Member States.

- The CJEU's function is to rule upon the interpretation and application of the Treaties and on the interpretation, application and validity of secondary EU law. It is effectively the supreme court on such issues, with no appeal to any higher judicial body.

- Cases may be brought directly before the CJEU on behalf of an EU institution (i.e. Commission, Council, European Parliament), by a Member State or by a national of a Member State.

- The Commission's power to bring actions against a Member State it suspects to be in breach of Community law stems from Article 258. The power of one Member State to bring an action against another Member State comes from Article 259 but such cases are rare. Institutions or Member States may also challenge secondary legislation adopted by institutions of the TFEU on the basis that it exceeds the competences granted under the treaties or fails to comply with procedural requirements thereof.

- Where an individual wishes the CJEU to rule upon a certain issue of European Union law, it is most common for such a case to begin in that person's national courts and for the national court to make an Article 267 reference to the CJEU asking for guidance on the interpretation, application or validity of an EU measure. (NB. Remember that the Treaty article which describes the preliminary ruling procedure has been renumbered over the years and moved from the EEC Treaty to the EC Treaty to TFEU, so some (earlier) cases may refer to the earlier numbering of Article 177 or Article 234).

- The CJEU is assisted by Advocate-Generals, who produce reasoned opinions on a case before the CJEU rules on it. These opinions will discuss the applicable law and will recommend how the court should decide the case. Often these opinions are more detailed than the eventual judgment of the court. They are not binding on the CJEU but they are very influential and are often followed in practice.

- The CJEU is not bound by its own jurisprudence (case-law) and may depart from an earlier decision if it wishes. Although any court attempts to follow its earlier jurisprudence wherever possible, the CJEU has already been seen to have reversed its own jurisprudence on a number of occasions.

- National courts are bound to follow the CJEU's rulings on Union law but it is for the national court to apply that Union law to the facts of the case in front of it.

PROVISIONAL COMPETITION TIMETABLE*
[*NB. A final version of the timetable will be provided at the competition itself]

THURSDAY 2ND May 2019
16.00-18.00 Registration of teams
18.00 Welcome Reception

FRIDAY 3rd May 2019
09.00 Opening words by Organising Committee and Judges

Round 1 of Competition
09.30 - 11.00 Group 1
11.15 - 12.45 Group 2

13.00 - 14.00 LUNCH

14.15-15.45 Group 3
16.00-17.30 Group 4

20.00 DINNER (Announcement of semi-finalists)

SATURDAY 4th May 2019

Round 2 of Competition

09.00 - 11.00 First semi-finals
11.15-13.15 Second semi-finals

13.30 LUNCH BREAK (Announcement of finalists)

Round 3 of Competition
15.00 FINAL (followed immediately by presentation of moot-participation certificates and prize ceremony)

20.00 Celebration dinner and party

SUNDAY 5th May 2019
Departure of teams and time for sightseeing.

ACKNOWLEDGMENTS

The Organising Committee wishes to thank the following for their invaluable help:

- The Court of Justice of the European Union, in particular to Advocates General Michal Bobek and Eleanor Sharpston for their invaluable assistance in preparing the moot question.

- The Faculty of Law of the University of Cambridge, in particular the Centre for European Legal Studies (CELS), for its continuing support of the CEEMC and British Law Centres.

- The Organising Committee also wish to offer special thanks to the CEEMC primary sponsors; the Warsaw office of Clifford Chance and the Honourable Society of the Inner Temple as well as thanks to our local event sponsors..

PART B. EU LEGISLATIVE MATERIALS

EXTRACTED ARTICLES FROM THE CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION (TEU)

TITLE I: COMMON PROVISIONS

Article 1 (ex Article 1 TEU)

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common.

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3 (ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Article 5 (ex Article 5 TEC)

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. [...]

Article 7

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

Article 8

1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.

2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

TITLE II: PROVISIONS ON DEMOCRATIC PRINCIPLES

Article 9

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Article 10

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Article 11

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

Article 12

National Parliaments contribute actively to the good functioning of the Union:

(a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;

(b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;

(c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;

(d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;

(e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;

(f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.

TITLE III: PROVISIONS ON THE INSTITUTIONS

Article 13

1. The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.

The Union's institutions shall be:

- the European Parliament,

- the European Council,

- the Council,

- the European Commission (hereinafter referred to as "the Commission"),

- the Court of Justice of the European Union,

- the European Central Bank,

- the Court of Auditors.

2. Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.

3. The provisions relating to the European Central Bank and the Court of Auditors and detailed provisions on the other institutions are set out in the Treaty on the Functioning of the European Union.

4. The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.

Article 14

1. The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.

2. The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.

The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.

3. The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.

4. The European Parliament shall elect its President and its officers from among its members.

Article 15

1. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.

2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.

3. The European Council shall meet twice every six months, convened by its President. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. When the situation so requires, the President shall convene a special meeting of the European Council.

4. Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus.

5. The European Council shall elect its President, by a qualified majority, for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end the President's term of office in accordance with the same procedure.

6. The President of the European Council:

(a) shall chair it and drive forward its work;

(b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council;

(c) shall endeavour to facilitate cohesion and consensus within the European Council;

(d) shall present a report to the European Parliament after each of the meetings of the European Council.

The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

The President of the European Council shall not hold a national office.

Article 16

1. The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.

2. The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.

3. The Council shall act by a qualified majority except where the Treaties provide otherwise.

4. As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.

A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.

The other arrangements governing the qualified majority are laid down in Article 238(2) of the Treaty on the Functioning of the European Union.

5. The transitional provisions relating to the definition of the qualified majority which shall be applicable until 31 October 2014 and those which shall be applicable from 1 November 2014 to 31 March 2017 are laid down in the Protocol on transitional provisions.

6. The Council shall meet in different configurations, the list of which shall be adopted in accordance with Article 236 of the Treaty on the Functioning of the European Union.

The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission.

The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent.

7. A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council.

8. The Council shall meet in public when it deliberates and votes on a draft legislative act. To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities.

9. The Presidency of Council configurations, other than that of Foreign Affairs, shall be held by Member State representatives in the Council on the basis of equal rotation, in accordance with the conditions established in accordance with Article 236 of the Treaty on the Functioning of the European Union.

Article 17

1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.

2. Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.

3. The Commission's term of office shall be five years.

The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt.

In carrying out its responsibilities, the Commission shall be completely independent. Without prejudice to Article 18(2), the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks.

4. The Commission appointed between the date of entry into force of the Treaty of Lisbon and 31 October 2014, shall consist of one national of each Member State, including its President and the High Representative of the Union for Foreign Affairs and Security Policy who shall be one of its Vice-Presidents.

5. As from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number.

The members of the Commission shall be chosen from among the nationals of the Member States on the basis of a system of strictly equal rotation between the Member States, reflecting the demographic and geographical range of all the Member States. This system

shall be established unanimously by the European Council in accordance with Article 244 of the Treaty on the Functioning of the European Union.

6. The President of the Commission shall:

(a) lay down guidelines within which the Commission is to work;

(b) decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body;

(c) appoint Vice-Presidents, other than the High Representative of the Union for Foreign Affairs and Security Policy, from among the members of the Commission.

A member of the Commission shall resign if the President so requests. The High Representative of the Union for Foreign Affairs and Security Policy shall resign, in accordance with the procedure set out in Article 18(1), if the President so requests.

7. Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.

The Council, by common accord with the President-elect, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission. They shall be selected, on the basis of the suggestions made by Member States, in accordance with the criteria set out in paragraph 3, second subparagraph, and paragraph 5, second subparagraph.

The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.

8. The Commission, as a body, shall be responsible to the European Parliament. In accordance with Article 234 of the Treaty on the Functioning of the European Union, the European Parliament may vote on a motion of censure of the Commission. If such a motion is carried, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from the duties that he carries out in the Commission.

Article 18

1. The European Council, acting by a qualified majority, with the agreement of the President of the Commission, shall appoint the High Representative of the Union for Foreign Affairs and Security Policy. The European Council may end his term of office by the same procedure.

2. The High Representative shall conduct the Union's common foreign and security policy. He shall contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council. The same shall apply to the common security and defence policy.

3. The High Representative shall preside over the Foreign Affairs Council.

4. The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union's external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3. […]

Article 19

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

(c) rule in other cases provided for in the Treaties.

EXTRACTED ARTICLES FROM THE CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU)

PREAMBLE

HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF THE ITALIAN REPUBLIC, HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS (1),

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,

RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

DETERMINED to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating,

and to this end HAVE DESIGNATED as their Plenipotentiaries:

WHO, having exchanged their full powers, found in good and due form, have agreed as follows.

PART ONE: PRINCIPLES

Article 1

1. This Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences.

2. This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded. These two Treaties, which have the same legal value, shall be referred to as "the Treaties".

TITLE I : CATEGORIES AND AREAS OF UNION COMPETENCE

Article 2

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.

4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.

Article 3

1. The Union shall have exclusive competence in the following areas:

(a) customs union;

(b) the establishing of the competition rules necessary for the functioning of the internal market;

(c) monetary policy for the Member States whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

(e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Article 4

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

(a) internal market;

(b) social policy, for the aspects defined in this Treaty;

(c) economic, social and territorial cohesion;

(d) agriculture and fisheries, excluding the conservation of marine biological resources;

(e) environment;

(f) consumer protection;

(g) transport;

(h) trans-European networks;

(i) energy;

(j) area of freedom, security and justice;

(k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Article 5

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.

Specific provisions shall apply to those Member States whose currency is the euro.

2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.

3. The Union may take initiatives to ensure coordination of Member States' social policies.

Article 6

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:
(a) protection and improvement of human health;
(b) industry;
(c) culture;
(d) tourism;
(e) education, vocational training, youth and sport;
(f) civil protection;
(g) administrative cooperation.

TITLE II: PROVISIONS HAVING GENERAL APPLICATION

Article 7

The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

Article 8 (ex Article 3(2) TEC) [2]

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 9

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Article 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 11 (ex Article 6 TEC)

Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

Article 12 (ex Article 153(2) TEC)

Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.

Article 13

In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

Article 14 (ex Article 16 TEC)

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in

accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

Article 15 (ex Article 255 TEC)

1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.

2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.

The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.

Article 16 (ex Article 286 TEC)

1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.

Article 17

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

PART TWO: NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION

Article 18 (ex Article 12 TEC)

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Article 19 (ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Article 20 (ex Article 17 TEC)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Article 21 (ex Article 18 TEC)

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

Article 22 (ex Article 19 TEC)
1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Article 23 (ex Article 20 TEC)
Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.

The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.

Article 24 (ex Article 21 TEC)
The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come.

Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 227.

Every citizen of the Union may apply to the Ombudsman established in accordance with Article 228.

Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language.

Article 25 (ex Article 22 TEC)
The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this Part. This report shall take account of the development of the Union.

On this basis, and without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Article 20(2). These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

PART THREE: UNION POLICIES AND INTERNAL ACTIONS

TITLE I: THE INTERNAL MARKET

Article 26 (ex Article 14 TEC)
1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.

2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

Article 27 (ex Article 15 TEC)
When drawing up its proposals with a view to achieving the objectives set out in Article 26, the Commission shall take into account the extent of the effort that certain economies showing differences in development will have to sustain for the establishment of the internal market and it may propose appropriate provisions.

If these provisions take the form of derogations, they must be of a temporary nature and must cause the least possible disturbance to the functioning of the internal market.

[…]

TITLE IV: FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

[…]

CHAPTER 3: SERVICES

Article 56 (ex Article 49 TEC)

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

Article 57 (ex Article 50 TEC)

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

"Services" shall in particular include:

(a) activities of an industrial character;

(b) activities of a commercial character;

(c) activities of craftsmen;

(d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Article 58 (ex Article 51 TEC)

1. Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.

2. The liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the liberalisation of movement of capital.

Article 59 (ex Article 52 TEC)

1. In order to achieve the liberalisation of a specific service, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue directives.

2. As regards the directives referred to in paragraph 1, priority shall as a general rule be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods.

Article 60 (ex Article 53 TEC)

The Member States shall endeavour to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 59(1), if their general economic situation and the situation of the economic sector concerned so permit.

To this end, the Commission shall make recommendations to the Member States concerned.

Article 61 (ex Article 54 TEC)

As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 56.

Article 62 (ex Article 55 TEC)

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

TITLE V: AREA OF FREEDOM, SECURITY AND JUSTICE

CHAPTER 1:GENERAL PROVISIONS

Article 67 (ex Article 61 TEC and ex Article 29 TEU)

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

Article 68

The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice.

Article 69

National Parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality.

Article 70

Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

Article 71 (ex Article 36 TEU)

A standing committee shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. Without prejudice to Article 240, it shall facilitate coordination of the action of Member States' competent authorities. Representatives of the Union bodies, offices and agencies concerned may be involved in the proceedings of this committee. The European Parliament and national Parliaments shall be kept informed of the proceedings.

Article 72 (ex Article 64(1) TEC and ex Article 33 TEU)

This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Article 73

It shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security.

Article 74 (ex Article 66 TEC)

The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament.

Article 75 (ex Article 60 TEC)

Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards.

Article 76

The acts referred to in Chapters 4 and 5, together with the measures referred to in Article 74 which ensure administrative cooperation in the areas covered by these Chapters, shall be adopted:

(a) on a proposal from the Commission, or

(b) on the initiative of a quarter of the Member States.

CHAPTER 2: POLICIES ON BORDER CHECKS, ASYLUM AND IMMIGRATION

Article 77 (ex Article 62 TEC)

1. The Union shall develop a policy with a view to:

(a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;

(b) carrying out checks on persons and efficient monitoring of the crossing of external borders;

(c) the gradual introduction of an integrated management system for external borders.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:

(a) the common policy on visas and other short-stay residence permits;

(b) the checks to which persons crossing external borders are subject;

(c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;

(d) any measure necessary for the gradual establishment of an integrated management system for external borders;

(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

3. If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament.

4. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.

Article 78 (ex Articles 63, points 1 and 2, and 64(2) TEC)

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;

(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;

(c) a common system of temporary protection for displaced persons in the event of a massive inflow;

(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;

(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;

(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;

(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

Article 79 (ex Article 63, points 3 and 4, TEC)

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;

(b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;

(c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;

(d) combating trafficking in persons, in particular women and children.

3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.

5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

Article 80

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

PART SIX: INSTITUTIONAL AND FINANCIAL PROVISIONS

TITLE I: INSTITUTIONAL PROVISIONS

CHAPTER 1: THE INSTITUTIONS

***SECTION 5:* THE COURT OF JUSTICE OF THE EUROPEAN UNION**

***Article 251* (ex Article 221 TEC)**

The Court of Justice shall sit in chambers or in a Grand Chamber, in accordance with the rules laid down for that purpose in the Statute of the Court of Justice of the European Union. When provided for in the Statute, the Court of Justice may also sit as a full Court.

Article 252 **(ex Article 222 TEC)**

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Article 253 **(ex Article 223 TEC)**

The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255.

Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice of the European Union.

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

Retiring Judges and Advocates-General may be reappointed.

The Court of Justice shall appoint its Registrar and lay down the rules governing his service.

The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval of the Council.

Article 258 **(ex Article 226 TEC)**

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Article 259 **(ex Article 227 TEC)**

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

Article 260 **(ex Article 228 TEC)**

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

[…]

Article 263 **(ex Article 230 TEC)**

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 264 **(ex Article 231 TEC)**

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void. However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

Article 265 **(ex Article 232 TEC)**

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

Article 266 **(ex Article 233 TEC)**

The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.

Article 267 **(ex Article 234 TEC)**

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

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 to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 268 (ex Article 235 TEC)

The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.

Article 269

The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.
Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.

Article 270 (ex Article 236 TEC)

The Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.

Article 271 (ex Article 237 TEC)

The Court of Justice of the European Union shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning:
(a) the fulfilment by Member States of obligations under the Statute of the European Investment Bank. In this connection, the Board of Directors of the Bank shall enjoy the powers conferred upon the Commission by Article 258;
(b) measures adopted by the Board of Governors of the European Investment Bank. In this connection, any Member State, the Commission or the Board of Directors of the Bank may institute proceedings under the conditions laid down in Article 263;
(c) measures adopted by the Board of Directors of the European Investment Bank. Proceedings against such measures may be instituted only by Member States or by the Commission, under the conditions laid down in Article 263, and solely on the grounds of non-compliance with the procedure provided for in Article 19(2), (5), (6) and (7) of the Statute of the Bank;
(d) the fulfilment by national central banks of obligations under the Treaties and the Statute of the ESCB and of the ECB. In this connection the powers of the Governing Council of the European Central Bank in respect of national central banks shall be the same as those conferred upon the Commission in respect of Member States by Article 258. If the Court finds that a national central bank has failed to fulfil an obligation under the Treaties, that bank shall be required to take the necessary measures to comply with the judgment of the Court.

Article 272 (ex Article 238 TEC)

The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.

Article 273 (ex Article 239 TEC)

The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.

Article 274 (ex Article 240 TEC)
Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.

Article 275
The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.
However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

Article 276
In exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Article 277 (ex Article 241 TEC)
Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.

Article 278 (ex Article 242 TEC)
Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

Article 279 (ex Article 243 TEC)
The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.

Article 280 (ex Article 244 TEC)
The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299.

Article 281 (ex Article 245 TEC)
The Statute of the Court of Justice of the European Union shall be laid down in a separate Protocol.
The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may amend the provisions of the Statute, with the exception of Title I and Article 64. The European Parliament and the Council shall act either at the request of the Court of Justice and after consultation of the Commission, or on a proposal from the Commission and after consultation of the Court of Justice.

CHAPTER 2: LEGAL ACTS OF THE UNION, ADOPTION PROCEDURES AND OTHER PROVISIONS

SECTION 1: THE LEGAL ACTS OF THE UNION

Article 288
To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

Article 289

1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.

2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.

3. Legal acts adopted by legislative procedure shall constitute legislative acts.

4. In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.

Article 290

1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

(a) the European Parliament or the Council may decide to revoke the delegation;

(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. The adjective "delegated" shall be inserted in the title of delegated acts.

Article 291

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.

3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

4. The word "implementing" shall be inserted in the title of implementing acts.

Article 292

The Council shall adopt recommendations. It shall act on a proposal from the Commission in all cases where the Treaties provide that it shall adopt acts on a proposal from the Commission. It shall act unanimously in those areas in which unanimity is required for the adoption of a Union act. The Commission, and the European Central Bank in the specific cases provided for in the Treaties, shall adopt recommendations.

PROTOCOL (No 2) ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

THE HIGH CONTRACTING PARTIES,

WISHING to ensure that decisions are taken as closely as possible to the citizens of the Union,

RESOLVED to establish the conditions for the application of the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union, and to establish a system for monitoring the application of those principles,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1
Each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union.

Article 2
Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal.

Article 3
For the purposes of this Protocol, "draft legislative acts" shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act.

Article 4
The Commission shall forward its draft legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator.

The European Parliament shall forward its draft legislative acts and its amended drafts to national Parliaments.

The Council shall forward draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank and amended drafts to national Parliaments.

Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to national Parliaments.

Article 5
Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

Article 6
Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

If the draft legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States.

If the draft legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the opinion to the institution or body concerned.

Article 7

1. The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament.

Each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote.

2. Where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice.

After such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.

3. Furthermore, under the ordinary legislative procedure, where reasoned opinions on the non-compliance of a proposal for a legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the proposal must be reviewed. After such review, the Commission may decide to maintain, amend or withdraw the proposal.

If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of the national Parliaments, will have to be submitted to the Union legislator, for consideration in the procedure:

(a) before concluding the first reading, the legislator (the European Parliament and the Council) shall consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission;

(b) if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.

Article 8

The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.

In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.

Article 9

The Commission shall submit each year to the European Council, the European Parliament, the Council and national Parliaments a report on the application of Article 5 of the Treaty on European Union. This annual report shall also be forwarded to the Economic and Social Committee and the Committee of the Regions.

PROTOCOL (No 24) ON ASYLUM FOR NATIONALS OF MEMBER STATES OF THE EUROPEAN UNION

WHEREAS, in accordance with Article 6(1) of the Treaty on European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights,

WHEREAS pursuant to Article 6(3) of the Treaty on European Union, fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, constitute part of the Union's law as general principles,

WHEREAS the Court of Justice of the European Union has jurisdiction to ensure that in the interpretation and application of Article 6, paragraphs (1) and (3) of the Treaty on European Union the law is observed by the European Union,

WHEREAS pursuant to Article 49 of the Treaty on European Union any European State, when applying to become a Member of the Union, must respect the values set out in Article 2 of the Treaty on European Union,

BEARING IN MIND that Article 7 of the Treaty on European Union establishes a mechanism for the suspension of certain rights in the event of a serious and persistent breach by a Member State of those values,

RECALLING that each national of a Member State, as a citizen of the Union, enjoys a special status and protection which shall be guaranteed by the Member States in accordance with the provisions of Part Two of the Treaty on the Functioning of the European Union,

BEARING IN MIND that the Treaties establish an area without internal frontiers and grant every citizen of the Union the right to move and reside freely within the territory of the Member States,

WISHING to prevent the institution of asylum being resorted to for purposes alien to those for which it is intended,

WHEREAS this Protocol respects the finality and the objectives of the Geneva Convention of 28 July 1951 relating to the status of refugees,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Sole Article

Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in the following cases:

(a) if the Member State of which the applicant is a national proceeds after the entry into force of the Treaty of Amsterdam, availing itself of the provisions of Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to take measures derogating in its territory from its obligations under that Convention;

(b) if the procedure referred to in Article 7(1) of the Treaty on European Union has been initiated and until the Council, or, where appropriate, the European Council, takes a decision in respect thereof with regard to the Member State of which the applicant is a national;

(c) if the Council has adopted a decision in accordance with Article 7(1) of the Treaty on European Union in respect of the Member State of which the applicant is a national or if the European Council has adopted a decision in accordance with Article 7(2) of that Treaty in respect of the Member State of which the applicant is a national;

(d) if a Member State should so decide unilaterally in respect of the application of a national of another Member State; in that case the Council shall be immediately informed; the application shall be dealt with on the basis of the presumption that it is manifestly unfounded without affecting in any way, whatever the cases may be, the decision-making power of the Member State.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION [Extracts]

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

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION
Preamble

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

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

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

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

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

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

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

TITLE I: DIGNITY

Article 1: Human dignity

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

Article 2: Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Article 3: Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:

(a) the free and informed consent of the person concerned, according to the procedures laid down by law;

(b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;

(c) the prohibition on making the human body and its parts as such a source of financial gain;

(d) the prohibition of the reproductive cloning of human beings.

Article 4: Prohibition of torture and inhuman or degrading treatment or punishment

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

Article 5: Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

TITLE II: FREEDOMS

Article 6: Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7: Respect for private and family life

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

Article 8: Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Article 9: Right to marry and right to found a family

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

Article 10: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11: Freedom of expression and information

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

Article 12: Freedom of assembly and of association

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

Article 13: Freedom of the arts and sciences

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

Article 14: Right to education

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

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

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15: Freedom to choose an occupation and right to engage in work

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

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

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

Article 16: Freedom to conduct a business

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

Article 17: Right to property

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

2. Intellectual property shall be protected.

Article 18: Right to asylum

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

Article 19: Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.

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

TITLE III: EQUALITY

Article 20: Equality before the law

Everyone is equal before the law.

Article 21: Non-discrimination

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

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

Article 22: Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23: Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

[…]

CHAPTER VI: JUSTICE

Article 47: Right to an effective remedy and to a fair trial

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

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

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

Article 48: Presumption of innocence and right of defence

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

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

Article 49: Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

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

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

Article 50: Right not to be tried or punished twice in criminal proceedings for the same criminal offence

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

TITLE VII: GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Article 51: Field of application

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

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

Article 52: Scope and interpretation of rights and principles

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

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

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

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

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

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

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

Article 53: Level of protection
Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54: Prohibition of abuse of rights
Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

Rules of Procedure of the Court of Justice (extracts)

TITLE III: REFERENCES FOR A PRELIMINARY RULING

Chapter 1: GENERAL PROVISIONS

Article 93: Scope

The procedure shall be governed by the provisions of this Title:

(a) in the cases covered by Article 23 of the Statute,
(b) as regards references for interpretation which may be provided for by agreements to which the European Union or the Member States are parties.

Article 94: Content of the request for a preliminary ruling

In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

(a) a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;

(b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

Article 95: Anonymity

1. Where anonymity has been granted by the referring court or tribunal, the Court shall respect that anonymity in the proceedings pending before it.

2. At the request of the referring court or tribunal, at the duly reasoned request of a party to the main proceedings or of its own motion, the Court may also, if it considers it necessary, render anonymous one or more persons or entities concerned by the case.

Article 96: Participation in preliminary ruling proceedings

1. Pursuant to Article 23 of the Statute, the following shall be authorised to submit observations to the Court:

(a) the parties to the main proceedings,
(b) the Member States,
(c) the European Commission,
(d) the institution which adopted the act the validity or interpretation of which is in dispute,
(e) the States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, where a question concerning one of the fields of application of that Agreement is referred to the Court for a preliminary ruling,
(f) non-Member States which are parties to an agreement relating to a specific subject-matter, concluded with the Council, where the agreement so provides and where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of that agreement.

2. Non-participation in the written part of the procedure does not preclude participation in the oral part of the procedure.

Article 97: Parties to the main proceedings

1. The parties to the main proceedings are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure.

2. Where the referring court or tribunal informs the Court that a new party has been admitted to the main proceedings, when the proceedings before the Court are already pending, that party must accept the case as he finds it at the time when the Court was so informed. That party shall receive a copy of every procedural document already served on the interested persons referred to in Article 23 of the Statute.

3. As regards the representation and attendance of the parties to the main proceedings, the Court shall take account of the rules of procedure in force before the court or tribunal which made the reference. In the event of any doubt as to whether a person may under national law represent a party to the main proceedings, the Court may obtain information from the referring court or tribunal on the rules of procedure applicable.

Statute of the Court of Justice of he European Union (extracts)

TITLE III: PROCEDURE BEFORE THE COURT OF JUSTICE

Article 19

The Member States and the institutions of the Union shall be represented before the Court of Justice by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer.

The States, other than the Member States, which are parties to the Agreement on the European Economic Area and also the EFTA Surveillance Authority referred to in that Agreement shall be represented in same manner.

Other parties must be represented by a lawyer.

Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court.

Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the Rules of Procedure.

As regards such advisers and lawyers who appear before it, the Court shall have the powers normally accorded to courts of law, under conditions laid down in the Rules of Procedure.

University teachers being nationals of a Member State whose law accords them a right of audience shall have the same rights before the Court as are accorded by this Article to lawyers.

DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 13 December 2011

on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

(recast)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular points (a) and (b) of Article 78(2) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee [(1)],

Acting in accordance with the ordinary legislative procedure [(2)],

Whereas:

(1) A number of substantive changes are to be made to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [(3)]. In the interests of clarity, that Directive should be recast.

(2) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union.

(3) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention of 28 July 1951 relating to the Status of Refugees ('the Geneva Convention'), as supplemented by the New York Protocol of 31 January 1967 ('the Protocol'), thus affirming the principle of *non-refoulement* and ensuring that nobody is sent back to persecution.

(4) The Geneva Convention and the Protocol provide the cornerstone of the international legal regime for the protection of refugees.

(5) The Tampere conclusions provide that a Common European Asylum System should include, in the short term, the approximation of rules on the recognition of refugees and the content of refugee status.

(6) The Tampere conclusions also provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection.

(7) The first phase in the creation of a Common European Asylum System has now been achieved. The European Council of 4 November 2004 adopted the Hague Programme, which sets the objectives to be implemented in the area of freedom, security and justice in the period 2005-2010. In this respect, the Hague Programme invited the European Commission to conclude the evaluation of the first-phase legal instruments and to submit the second-phase instruments and measures to the European Parliament and the Council, with a view to their adoption before the end of 2010.

(8) In the European Pact on Immigration and Asylum, adopted on 15 and 16 October 2008, the European Council noted that considerable disparities remain between one Member State and another concerning the grant of protection and the forms that protection takes and called for new initiatives to complete the establishment of a Common European Asylum System, provided for in the Hague Programme, and thus to offer a higher degree of protection.

(9) In the Stockholm Programme, the European Council reiterated its commitment to the objective of establishing a common area of protection and solidarity, based on a common asylum procedure and a uniform status, in accordance with Article 78 of the Treaty on the Functioning of the European Union (TFEU), for those granted international protection, by 2012 at the latest.

(10) In the light of the results of the evaluations undertaken, it is appropriate, at this stage, to confirm the principles underlying Directive 2004/83/EC as well as to seek to achieve a higher level of approximation of the rules on the recognition and content of international protection on the basis of higher standards.

(11)The resources of the European Refugee Fund and of the European Asylum Support Office should be mobilised to provide adequate support to Member States' efforts in implementing the standards set in the second phase of the Common European Asylum System, in particular to those Member States which are faced with specific and disproportionate pressure on their asylum systems, due in particular to their geographical or demographic situation.

(12)The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for those persons in all Member States.

(13)The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movement of applicants for international protection between Member States, where such movement is purely caused by differences in legal frameworks.

(14)Member States should have the power to introduce or maintain more favourable provisions than the standards laid down in this Directive for third-country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person eligible for subsidiary protection.

(15)Those third-country nationals or stateless persons who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds fall outside the scope of this Directive.

(16)This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members and to promote the application of Articles 1, 7, 11, 14, 15, 16, 18, 21, 24, 34 and 35 of that Charter, and should therefore be implemented accordingly.

(17)With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party, including in particular those that prohibit discrimination.

(18)The 'best interests of the child' should be a primary consideration of Member States when implementing this Directive, in line with the 1989 United Nations Convention on the Rights of the Child. In assessing the best interests of the child, Member States should in particular take due account of the principle of family unity, the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity.

(19)It is necessary to broaden the notion of family members, taking into account the different particular circumstances of dependency and the special attention to be paid to the best interests of the child.

(20)This Directive is without prejudice to the Protocol on asylum for nationals of Member States of the European Union as annexed to the Treaty on European Union (TEU) and the TFEU.

(21) The recognition of refugee status is a declaratory act.

(22)Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention.

(23)Standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

(24)It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.

(25)In particular, it is necessary to introduce common concepts of protection needs arising *sur place*, sources of harm and protection, internal protection and persecution, including the reasons for persecution.

(26)Protection can be provided, where they are willing and able to offer protection, either by the State or by parties or organisations, including international organisations, meeting the conditions set out in this Directive, which control a region or a larger area within the territory of the State. Such protection should be effective and of a non-temporary nature.

(27)Internal protection against persecution or serious harm should be effectively available to the applicant in a part of the country of origin where he or she can safely and legally travel to, gain admittance to and can reasonably be expected to settle. Where the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant. When the applicant is an unaccompanied minor, the availability of appropriate care and custodial

arrangements, which are in the best interest of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available.

(28)It is necessary, when assessing applications from minors for international protection, that Member States should have regard to child-specific forms of persecution.

(29)One of the conditions for qualification for refugee status within the meaning of Article 1(A) of the Geneva Convention is the existence of a causal link between the reasons for persecution, namely race, religion, nationality, political opinion or membership of a particular social group, and the acts of persecution or the absence of protection against such acts.

(30)It is equally necessary to introduce a common concept of the persecution ground 'membership of a particular social group'. For the purposes of defining a particular social group, issues arising from an applicant's gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant's well-founded fear of persecution.

(31)Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations resolutions relating to measures combating terrorism, which declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations' and that 'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'.

(32) As referred to in Article 14, 'status' can also include refugee status.

(33)Standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention.

(34)It is necessary to introduce common criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.

(35)Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.

(36)Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status.

(37)The notion of national security and public order also covers cases in which a third-country national belongs to an association which supports international terrorism or supports such an association.

(38)When deciding on entitlements to the benefits included in this Directive, Member States should take due account of the best interests of the child, as well as of the particular circumstances of the dependency on the beneficiary of international protection of close relatives who are already present in the Member State and who are not family members of that beneficiary. In exceptional circumstances, where the close relative of the beneficiary of international protection is a married minor but not accompanied by his or her spouse, the best interests of the minor may be seen to lie with his or her original family.

(39)While responding to the call of the Stockholm Programme for the establishment of a uniform status for refugees or for persons eligible for subsidiary protection, and with the exception of derogations which are necessary and objectively justified, beneficiaries of subsidiary protection status should be granted the same rights and benefits as those enjoyed by refugees under this Directive, and should be subject to the same conditions of eligibility.

(40)Within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, healthcare and access to integration facilities requires the prior issue of a residence permit.

(41)In order to enhance the effective exercise of the rights and benefits laid down in this Directive by beneficiaries of international protection, it is necessary to take into account their specific needs and the particular integration challenges with which they are confronted. Such taking into account should normally not result in a more favourable treatment than that provided to their own nationals, without prejudice to the possibility for Member States to introduce or retain more favourable standards.

(42)In that context, efforts should be made in particular to address the problems which prevent beneficiaries of international protection from having effective access to employment-related educational opportunities and vocational training, inter alia, relating to financial constraints.

(43) This Directive does not apply to financial benefits from the Member States which are granted to promote education.

(44) Special measures need to be considered with a view to effectively addressing the practical difficulties encountered by beneficiaries of international protection concerning the authentication of their foreign diplomas, certificates or other evidence of formal qualifications, in particular due to the lack of documentary evidence and their inability to meet the costs related to the recognition procedures.

(45) Especially to avoid social hardship, it is appropriate to provide beneficiaries of international protection with adequate social welfare and means of subsistence, without discrimination in the context of social assistance. With regard to social assistance, the modalities and detail of the provision of core benefits to beneficiaries of subsidiary protection status should be determined by national law. The possibility of limiting such assistance to core benefits is to be understood as covering at least minimum income support, assistance in the case of illness, or pregnancy, and parental assistance, in so far as those benefits are granted to nationals under national law.

(46) Access to healthcare, including both physical and mental healthcare, should be ensured to beneficiaries of international protection.

(47) The specific needs and particularities of the situation of beneficiaries of refugee status and of subsidiary protection status should be taken into account, as far as possible, in the integration programmes provided to them including, where appropriate, language training and the provision of information concerning individual rights and obligations relating to their protection status in the Member State concerned.

(48) The implementation of this Directive should be evaluated at regular intervals, taking into consideration in particular the evolution of the international obligations of Member States regarding *non-refoulement*, the evolution of the labour markets in the Member States as well as the development of common basic principles for integration.

(49) Since the objectives of this Directive, namely to establish standards for the granting of international protection to third-country nationals and stateless persons by Member States, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(50) In accordance with Articles 1, 2 and Article 4a(1) of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Directive and are not bound by it or subject to its application.

(51) In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.

(52) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with Directive 2004/83/EC. The obligation to transpose the provisions which are unchanged arises under that Directive.

(53) This Directive should be without prejudice to the obligations of the Member States relating to the time limit for transposition into national law of Directive 2004/83/EC set out in Annex I, Part B,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I
GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection-granted.

Article 2

Definitions

For the purposes of this Directive the following definitions shall apply:

(a) 'international protection' means refugee status and subsidiary protection status as defined in points (e) and (g);

(b) 'beneficiary of international protection' means a person who has been granted refugee status or subsidiary protection status as defined in points (e) and (g);

(c) 'Geneva Convention' means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967;

(d) 'refugee' means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(e) 'refugee status' means the recognition by a Member State of a third-country national or a stateless person as a refugee;

(f) 'person eligible for subsidiary protection' means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

(g) 'subsidiary protection status' means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection;

(h) 'application for international protection' means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;

(i) 'applicant' means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

(j) 'family members' means, in so far as the family already existed in the country of origin, the following members of the family of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection:

— the spouse of the beneficiary of international protection or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,

— the minor children of the couples referred to in the first indent or of the beneficiary of international protection, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,

— the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried;

(k) 'minor' means a third-country national or stateless person below the age of 18 years;

(l) 'unaccompanied minor' means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States;

(m) 'residence permit' means any permit or authorisation issued by the authorities of a Member State, in the form provided for under that State's law, allowing a third-country national or stateless person to reside on its territory;

(n) 'country of origin' means the country or countries of nationality or, for stateless persons, of former habitual residence.

Article 3

More favourable standards

Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.

CHAPTER II
ASSESSMENT OF APPLICATIONS FOR INTERNATIONAL PROTECTION

Article 4

Assessment of facts and circumstances

1. Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in paragraph 1 consist of the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.

4. The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met:

(a) the applicant has made a genuine effort to substantiate his application;

(b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements;

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;

(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and

(e) the general credibility of the applicant has been established.

Article 5

International protection needs arising sur place

1. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.

2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which the applicant has engaged in since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.

3. Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.

Article 6

Actors of persecution or serious harm

Actors of persecution or serious harm include:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

Article 7

Actors of protection

1. Protection against persecution or serious harm can only be provided by:

(a) the State; or

(b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State;

provided they are willing and able to offer protection in accordance with paragraph 2.

2. Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.

3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Union acts.

Article 8

Internal protection

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she:

(a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or

(b) has access to protection against persecution or serious harm as defined in Article 7;

and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.

2. In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Article 4. To that end, Member States shall ensure

that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office.

CHAPTER III
QUALIFICATION FOR BEING A REFUGEE

Article 9

Acts of persecution

1. In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:

(a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

2. Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of:

(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(c) prosecution or punishment which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2);

(f) acts of a gender-specific or child-specific nature.

3. In accordance with point (d) of Article 2, there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1 of this Article or the absence of protection against such acts.

Article 10

Reasons for persecution

1. Member States shall take the following elements into account when assessing the reasons for persecution:

(a) the concept of race shall, in particular, include considerations of colour, descent, or membership of a particular ethnic group;

(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

(c) the concept of nationality shall not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

(d) a group shall be considered to form a particular social group where in particular:

— members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

— that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due

consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group;

(e)the concept of political opinion shall, in particular, include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

Article 11

Cessation

1. A third-country national or a stateless person shall cease to be a refugee if he or she:

(a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or

(b) having lost his or her nationality, has voluntarily re-acquired it; or

(c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or

(d)has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or

(e)can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality; or

(f)being a stateless person, he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence.

2. In considering points (e) and (f) of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

3. Points (e) and (f) of paragraph 1 shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality or, being a stateless person, of the country of former habitual residence.

Article 12

Exclusion

1. A third-country national or a stateless person is excluded from being a refugee if:

(a)he or she falls within the scope of Article 1(D) of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, those persons shall *ipso facto* be entitled to the benefits of this Directive;

(b)he or she is recognised by the competent authorities of the country in which he or she has taken up residence as having the rights and obligations which are attached to the possession of the nationality of that country, or rights and obligations equivalent to those.

2. A third-country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

(a)he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b)he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c)he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and

Articles 1 and 2 of the Charter of the United Nations.

3. Paragraph 2 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.

CHAPTER IV
REFUGEE STATUS

Article 13

Granting of refugee status

Member States shall grant refugee status to a third-country national or a stateless person who qualifies as a refugee in accordance with Chapters II and III.

Article 14

Revocation of, ending of or refusal to renew refugee status

1. Concerning applications for international protection filed after the entry into force of Directive 2004/83/EC, Member States shall revoke, end or refuse to renew the refugee status of a third-country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body if he or she has ceased to be a refugee in accordance with Article 11.

2. Without prejudice to the duty of the refugee in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his or her disposal, the Member State which has granted refugee status shall, on an individual basis, demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article.

3. Member States shall revoke, end or refuse to renew the refugee status of a third-country national or a stateless person if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;

(b) his or her misrepresentation or omission of facts, including the use of false documents, was decisive for the granting of refugee status.

4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:

(a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;

(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.

6. Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31, 32 and 33 of the Geneva Convention in so far as they are present in the Member State.

CHAPTER V
QUALIFICATION FOR SUBSIDIARY PROTECTION

Article 15

Serious harm

Serious harm consists of:

(a) the death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Article 16

Cessation

1. A third-country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.

2. In applying paragraph 1, Member States shall have regard to whether the change in circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm.

3. Paragraph 1 shall not apply to a beneficiary of subsidiary protection status who is able to invoke compelling reasons arising out of previous serious harm for refusing to avail himself or herself of the protection of the country of nationality or, being a stateless person, of the country of former habitual residence.

Article 17

Exclusion

1. A third-country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious crime;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;

(d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.

2. Paragraph 1 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.

3. Member States may exclude a third-country national or a stateless person from being eligible for subsidiary protection if he or she, prior to his or her admission to the Member State concerned, has committed one or more crimes outside the scope of paragraph 1 which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from those crimes.

CHAPTER VI
SUBSIDIARY PROTECTION STATUS

Article 18

Granting of subsidiary protection status

Member States shall grant subsidiary protection status to a third-country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V.

Article 19

Revocation of, ending of or refusal to renew subsidiary protection status

1. Concerning applications for international protection filed after the entry into force of Directive 2004/83/EC, Member States shall revoke, end or refuse to renew the subsidiary protection status of a third-country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body if he or she has ceased to be eligible for subsidiary protection in accordance with Article 16.

2. Member States may revoke, end or refuse to renew the subsidiary protection status of a third-country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if after having been granted subsidiary protection status, he or she should have been excluded from being eligible for subsidiary protection in accordance with Article 17(3).

3. Member States shall revoke, end or refuse to renew the subsidiary protection status of a third-country national or a stateless person, if:

(a)he or she, after having been granted subsidiary protection status, should have been or is excluded from being eligible for subsidiary protection in accordance with Article 17(1) and (2);

(b)his or her misrepresentation or omission of facts, including the use of false documents, was decisive for the granting of subsidiary protection status.

4. Without prejudice to the duty of the third-country national or stateless person in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his or her disposal, the Member State which has granted the subsidiary protection status shall, on an individual basis, demonstrate that the person concerned has ceased to be or is not eligible for subsidiary protection in accordance with paragraphs 1, 2 and 3 of this Article.

CHAPTER VII
CONTENT OF INTERNATIONAL PROTECTION

Article 20

General rules

1. This Chapter shall be without prejudice to the rights laid down in the Geneva Convention.

2. This Chapter shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated.

3. When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

4. Paragraph 3 shall apply only to persons found to have special needs after an individual evaluation of their situation.

5. The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors.

Article 21

Protection from refoulement

1. Member States shall respect the principle of *non-refoulement* in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may *refoule* a refugee, whether formally recognised or not, when:

(a)there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

(b)he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

3. Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies.

Article 22

Information

Member States shall provide beneficiaries of international protection, as soon as possible after refugee status or subsidiary protection

status has been granted, with access to information, in a language that they understand or are reasonably supposed to understand, on the rights and obligations relating to that status.

Article 23

Maintaining family unity

1. Member States shall ensure that family unity can be maintained.

2. Member States shall ensure that family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in Articles 24 to 35, in accordance with national procedures and as far as is compatible with the personal legal status of the family member.

3. Paragraphs 1 and 2 are not applicable where the family member is or would be excluded from international protection pursuant to Chapters III and V.

4. Notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw the benefits referred to therein for reasons of national security or public order.

5. Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time.

Article 24

Residence permits

1. As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least 3 years and renewable, unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3).

Without prejudice to Article 23(1), the residence permit to be issued to the family members of the beneficiaries of refugee status may be valid for less than 3 years and renewable.

2. As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of subsidiary protection status and their family members a renewable residence permit which must be valid for at least 1 year and, in case of renewal, for at least 2 years, unless compelling reasons of national security or public order otherwise require.

Article 25

Travel document

1. Member States shall issue to beneficiaries of refugee status travel documents, in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require.

2. Member States shall issue to beneficiaries of subsidiary protection status who are unable to obtain a national passport, documents which enable them to travel outside their territory, unless compelling reasons of national security or public order otherwise require.

[…**redacted by Organising Committee…]**

Article 26: **Access to employment**

Article 27: **Access to education**

Article 28: **Access to procedures for recognition of qualifications**

Article 29: **Social welfare**

Article 30: **Healthcare**

Article 31: **Unaccompanied minors***Article 32:* **Access to accommodation**

Article 33: **Freedom of movement within the Member State**

Article 34: **Access to integration facilities**

Article 35: **Repatriation**

CHAPTER VIII
ADMINISTRATIVE COOPERATION

Article 36

Cooperation

Member States shall each appoint a national contact point and communicate its address to the Commission. The Commission shall communicate that information to the other Member States.

Member States shall, in liaison with the Commission, take all appropriate measures to establish direct cooperation and an exchange of information between the competent authorities.

Article 37

Staff

Member States shall ensure that authorities and other organisations implementing this Directive have received the necessary training and shall be bound by the confidentiality principle, as defined in the national law, in relation to any information they obtain in the course of their work.

CHAPTER IX
FINAL PROVISIONS

Article 38

Reports

1. By 21 June 2015, the Commission shall report to the European Parliament and the Council on the application of this Directive and shall propose any amendments that are necessary. Those proposals for amendment shall be made by way of priority in Articles 2 and 7. Member States shall send the Commission all the information that is appropriate for drawing up that report by 21 December 2014.

2. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive at least every 5 years.

Article 39

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1, 2, 4, 7, 8, 9, 10, 11, 16, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 by 21 December 2013. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference

on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law covered by this Directive.

Article 40

Repeal

Directive 2004/83/EC is repealed for the Member States bound by this Directive with effect from 21 December 2013, without prejudice to the obligations of the Member States relating to the time limit for transposition into national law of the Directive set out in Annex I, Part B.

For the Member States bound by this Directive, references to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 41

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Articles 1, 2, 4, 7, 8, 9, 10, 11, 16, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 shall apply from 22 December 2013.

Article 42

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.
Done at Strasbourg, 13 December 2011.

For the European Parliament
The President
J. BUZEK
For the Council
The President
M. SZPUNAR

---

(1) OJ C 18, 19.1.2011, p. 80.

(2) Position of the European Parliament of 27 October 2011 (not yet published in the Official Journal) and decision of the Council of 24 November 2011.

(3) OJ L 304, 30.9.2004, p. 12.

(4) OJ L 255, 30.9.2005, p. 22.

DIRECTIVE 2013/32/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 78(2)(d) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee [(1)],

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure [(2)],

Whereas:

(1) A number of substantive changes are to be made to Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures for granting and withdrawing refugee status [(3)]. In the interest of clarity, that Directive should be recast.

(2) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union. Such a policy should be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.

(3) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967 ('the Geneva Convention'), thus affirming the principle of *non-refoulement* and ensuring that nobody is sent back to persecution.

(4) The Tampere Conclusions provide that a Common European Asylum System should include, in the short term, common standards for fair and efficient asylum procedures in the Member States and, in the longer term, Union rules leading to a common asylum procedure in the Union.

(5) The first phase of a Common European Asylum System was achieved through the adoption of relevant legal instruments provided for in the Treaties, including Directive 2005/85/EC, which was a first measure on asylum procedures.

(6) The European Council, at its meeting of 4 November 2004, adopted The Hague Programme, which set the objectives to be implemented in the area of freedom, security and justice in the period 2005-10. In this respect, The Hague Programme invited the European Commission to conclude the evaluation of the first-phase legal instruments and to submit the second-phase instruments and measures to the European Parliament and to the Council. In accordance with The Hague Programme, the objective to be pursued for the creation of the Common European Asylum System is the establishment of a common asylum procedure and a uniform status valid throughout the Union.

(7) In the European Pact on Immigration and Asylum, adopted on 16 October 2008, the European Council noted that considerable disparities remained between one Member State and another concerning the grant of protection and called for new initiatives, including a proposal for establishing a single asylum procedure comprising common guarantees, to complete the establishment of a Common European Asylum System, provided for in The Hague Programme.

(8) The European Council, at its meeting of 10-11 December 2009, adopted the Stockholm Programme which reiterated the commitment to the objective of establishing by 2012 a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection based on high protection standards and fair and effective procedures. The Stockholm Programme affirmed that people in need of international protection must be ensured access to legally safe and efficient asylum procedures. In accordance with the Stockholm Programme, individuals should be offered the same level of treatment as regards procedural arrangements and status determination, regardless of the Member State in which their application for international protection is lodged. The objective is that similar cases should be treated alike and result in the same outcome.

(9) The resources of the European Refugee Fund and of the European Asylum Support Office (EASO) should be mobilised to provide adequate support to Member States' efforts in implementing the standards set in the second phase of the Common European Asylum System, in particular to those Member States which are faced with specific and disproportionate pressures on their asylum systems, due in particular to their geographical or demographic situation.

(10) When implementing this Directive, Member States should take into account relevant guidelines developed by EASO.

(11) In order to ensure a comprehensive and efficient assessment of the international protection needs of applicants within the meaning of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [(4)], the Union framework on procedures for granting and withdrawing international protection should be based on the concept of a single procedure.

(12) The main objective of this Directive is to further develop the standards for procedures in Member States for granting and withdrawing international protection with a view to establishing a common asylum procedure in the Union.

(13) The approximation of rules on the procedures for granting and withdrawing international protection should help to limit the secondary movements of applicants for international protection between Member States, where such movements would be caused by differences in legal frameworks, and to create equivalent conditions for the application of Directive 2011/95/EU in Member States.

(14) Member States should have the power to introduce or maintain more favourable provisions for third-country nationals or stateless persons who ask for international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is in need of international protection within the meaning of Directive 2011/95/EU.

(15) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party.

(16) It is essential that decisions on all applications for international protection be taken on the basis of the facts and, in the first instance, by authorities whose personnel has the appropriate knowledge or has received the necessary training in the field of international protection.

(17) In order to ensure that applications for international protection are examined and decisions thereon are taken objectively and impartially, it is necessary that professionals acting in the framework of the procedures provided for in this Directive perform their activities with due respect for the applicable deontological principles.

(18) It is in the interests of both Member States and applicants for international protection that a decision is made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out.

(19) In order to shorten the overall duration of the procedure in certain cases, Member States should have the flexibility, in accordance with their national needs, to prioritise the examination of any application by examining it before other, previously made applications, without derogating from normally applicable procedural time limits, principles and guarantees.

(20) In well-defined circumstances where an application is likely to be unfounded or where there are serious national security or public order concerns, Member States should be able to accelerate the examination procedure, in particular by introducing shorter, but reasonable, time limits for certain procedural steps, without prejudice to an adequate and complete examination being carried out and to the applicant's effective access to basic principles and guarantees provided for in this Directive.

(21) As long as an applicant can show good cause, the lack of documents on entry or the use of forged documents should not *per se* entail an automatic recourse to border or accelerated procedures.

(22) It is also in the interests of both Member States and applicants to ensure a correct recognition of international protection needs already at first instance. To that end, applicants should be provided at first instance, free of charge, with legal and procedural information, taking into account their particular circumstances. The provision of such information should, inter alia, enable the applicants to better understand the procedure, thus helping them to comply with the relevant obligations. It would be disproportionate to require Member States to provide such information only through the services of qualified lawyers. Member States should therefore have the possibility to use the most appropriate means to provide such information, such as through non-governmental organisations or professionals from government authorities or specialised services of the State.

(23) In appeals procedures, subject to certain conditions, applicants should be granted free legal assistance and representation provided by persons competent to provide them under national law. Furthermore, at all stages of the procedure, applicants should have the right to consult, at their own cost, legal advisers or counsellors admitted or permitted as such under national law.

(24) The notion of public order may, inter alia, cover a conviction for having committed a serious crime.

(25) In the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention or as persons eligible for subsidiary protection, every applicant should have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant

facts of his or her case and sufficient procedural guarantees to pursue his or her case throughout all stages of the procedure. Moreover, the procedure in which an application for international protection is examined should normally provide an applicant at least with: the right to stay pending a decision by the determining authority; access to the services of an interpreter for submitting his or her case if interviewed by the authorities; the opportunity to communicate with a representative of the United Nations High Commissioner for Refugees (UNHCR) and with organisations providing advice or counselling to applicants for international protection; the right to appropriate notification of a decision and of the reasons for that decision in fact and in law; the opportunity to consult a legal adviser or other counsellor; the right to be informed of his or her legal position at decisive moments in the course of the procedure, in a language which he or she understands or is reasonably supposed to understand; and, in the case of a negative decision, the right to an effective remedy before a court or a tribunal.

(26)With a view to ensuring effective access to the examination procedure, officials who first come into contact with persons seeking international protection, in particular officials carrying out the surveillance of land or maritime borders or conducting border checks, should receive relevant information and necessary training on how to recognise and deal with applications for international protection, inter alia, taking due account of relevant guidelines developed by EASO. They should be able to provide third-country nationals or stateless persons who are present in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and who make an application for international protection, with relevant information as to where and how applications for international protection may be lodged. Where those persons are present in the territorial waters of a Member State, they should be disembarked on land and have their applications examined in accordance with this Directive.

(27)Given that third-country nationals and stateless persons who have expressed their wish to apply for international protection are applicants for international protection, they should comply with the obligations, and benefit from the rights, under this Directive and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [(5)]. To that end, Member States should register the fact that those persons are applicants for international protection as soon as possible.

(28)In order to facilitate access to the examination procedure at border crossing points and in detention facilities, information should be made available on the possibility to apply for international protection. Basic communication necessary to enable the competent authorities to understand if persons declare their wish to apply for international protection should be ensured through interpretation arrangements.

(29)Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.

(30)Where adequate support cannot be provided to an applicant in need of special procedural guarantees in the framework of accelerated or border procedures, such an applicant should be exempted from those procedures. The need for special procedural guarantees of a nature that could prevent the application of accelerated or border procedures should also mean that the applicant is provided with additional guarantees in cases where his or her appeal does not have automatic suspensive effect, with a view to making the remedy effective in his or her particular circumstances.

(31)National measures dealing with identification and documentation of symptoms and signs of torture or other serious acts of physical or psychological violence, including acts of sexual violence, in procedures covered by this Directive may, inter alia, be based on the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).

(32)With a view to ensuring substantive equality between female and male applicants, examination procedures should be gender-sensitive. In particular, personal interviews should be organised in a way which makes it possible for both female and male applicants to speak about their past experiences in cases involving gender-based persecution. The complexity of gender-related claims should be properly taken into account in procedures based on the concept of safe third country, the concept of safe country of origin or the notion of subsequent applications.

(33)The best interests of the child should be a primary consideration of Member States when applying this Directive, in accordance with the Charter of Fundamental Rights of the European Union (the Charter) and the 1989 United Nations Convention on the Rights of the Child. In assessing the best interest of the child, Member States should in particular take due account of the minor's well-being and social development, including his or her background.

(34)Procedures for examining international protection needs should be such as to enable the competent authorities to conduct a

rigorous examination of applications for international protection.

(35)When, in the framework of an application being processed, the applicant is searched, that search should be carried by a person of the same sex. This should be without prejudice to a search carried out, for security reasons, on the basis of national law.

(36)Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In those cases, Member States should be able to dismiss an application as inadmissible in accordance with the *res judicata* principle.

(37)With respect to the involvement of the personnel of an authority other than the determining authority in conducting timely interviews on the substance of an application, the notion of 'timely' should be assessed against the time limits provided for in Article 31.

(38)Many applications for international protection are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant. Member States should be able to provide for admissibility and/or substantive examination procedures which would make it possible for such applications to be decided upon at those locations in well-defined circumstances.

(39)In determining whether a situation of uncertainty prevails in the country of origin of an applicant, Member States should ensure that they obtain precise and up-to-date information from relevant sources such as EASO, UNHCR, the Council of Europe and other relevant international organisations. Member States should ensure that any postponement of conclusion of the procedure fully complies with their obligations under Directive 2011/95/EU and Article 41 of the Charter, without prejudice to the efficiency and fairness of the procedures under this Directive.

(40)A key consideration for the well-foundedness of an application for international protection is the safety of the applicant in his or her country of origin. Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he or she presents counter-indications.

(41)Given the level of harmonisation achieved on the qualification of third-country nationals and stateless persons as beneficiaries of international protection, common criteria should be established for designating third countries as safe countries of origin.

(42)The designation of a third country as a safe country of origin for the purposes of this Directive cannot establish an absolute guarantee of safety for nationals of that country. By its very nature, the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in that country. For this reason, it is important that, where an applicant shows that there are valid reasons to consider the country not to be safe in his or her particular circumstances, the designation of the country as safe can no longer be considered relevant for him or her.

(43)Member States should examine all applications on the substance, i.e. assess whether the applicant in question qualifies for international protection in accordance with Directive 2011/95/EU, except where this Directive provides otherwise, in particular where it can reasonably be assumed that another country would do the examination or provide sufficient protection. In particular, Member States should not be obliged to assess the substance of an application for international protection where a first country of asylum has granted the applicant refugee status or otherwise sufficient protection and the applicant will be readmitted to that country.

(44)Member States should not be obliged to assess the substance of an application for international protection where the applicant, due to a sufficient connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country, and there are grounds for considering that the applicant will be admitted or readmitted to that country. Member States should only proceed on that basis where that particular applicant would be safe in the third country concerned. In order to avoid secondary movements of applicants, common principles should be established for the consideration or designation by Member States of third countries as safe.

(45)Furthermore, with respect to certain European third countries, which observe particularly high human rights and refugee protection standards, Member States should be allowed to not carry out, or not to carry out full examination of, applications for international protection regarding applicants who enter their territory from such European third countries.

(46)Where Member States apply safe country concepts on a case-by-case basis or designate countries as safe by adopting lists to that effect, they should take into account, inter alia, the guidelines and operating manuals and the information on countries of origin and activities, including EASO Country of Origin Information report methodology, referred to in Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [(6)], as well as relevant UNHCR guidelines.

(47) In order to facilitate the regular exchange of information about the national application of the concepts of safe country of origin, safe third country and European safe third country as well as a regular review by the Commission of the use of those concepts by Member States, and to prepare for a potential further harmonisation in the future, Member States should notify or periodically inform the Commission about the third countries to which the concepts are applied. The Commission should regularly inform the European Parliament on the result of its reviews.

(48) In order to ensure the correct application of the safe country concepts based on up-to-date information, Member States should conduct regular reviews of the situation in those countries based on a range of sources of information, including in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations. When Member States become aware of a significant change in the human rights situation in a country designated by them as safe, they should ensure that a review of that situation is conducted as soon as possible and, where necessary, review the designation of that country as safe.

(49) With respect to the withdrawal of refugee or subsidiary protection status, Member States should ensure that persons benefiting from international protection are duly informed of a possible reconsideration of their status and have the opportunity to submit their point of view before the authorities can take a reasoned decision to withdraw their status.

(50) It reflects a basic principle of Union law that the decisions taken on an application for international protection, the decisions concerning a refusal to reopen the examination of an application after its discontinuation, and the decisions on the withdrawal of refugee or subsidiary protection status are subject to an effective remedy before a court or tribunal.

(51) In accordance with Article 72 of the Treaty on the Functioning of the European Union (TFEU), this Directive does not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

(52) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [(7)] governs the processing of personal data carried out in the Member States pursuant to this Directive.

(53) This Directive does not deal with procedures between Member States governed by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [(8)].

(54) This Directive should apply to applicants to whom Regulation (EU) No 604/2013 applies, in addition and without prejudice to the provisions of that Regulation.

(55) The implementation of this Directive should be evaluated at regular intervals.

(56) Since the objective of this Directive, namely to establish common procedures for granting and withdrawing international protection, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(57) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011 [(9)], Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(58) In accordance with Articles 1, 2 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and the TFEU, and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Directive and are not bound by it or subject to its application.

(59) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.

(60) This Directive respects the fundamental rights and observes the principles recognised by the Charter. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 18, 19, 21, 23, 24, and 47 of the Charter and has to be implemented accordingly.

(61)The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with Directive 2005/85/EC. The obligation to transpose the provisions which are unchanged arises under that Directive.

(62)This Directive should be without prejudice to the obligations of the Member States relating to the time limit for transposition into national law of Directive 2005/85/EC set out in Annex II, Part B,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I
GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to establish common procedures for granting and withdrawing international protection pursuant to Directive 2011/95/EU.

Article 2

Definitions

For the purposes of this Directive:

(a)'Geneva Convention' means the Convention of 28 July 1951 Relating to the Status of Refugees, as amended by the New York Protocol of 31 January 1967;

(b)'application for international protection' or 'application' means a request made by a third- country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection outside the scope of Directive 2011/95/EU, that can be applied for separately;

(c)'applicant' means a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

(d)'applicant in need of special procedural guarantees' means an applicant whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances;

(e)'final decision' means a decision on whether the third-country national or stateless person be granted refugee or subsidiary protection status by virtue of Directive 2011/95/EU and which is no longer subject to a remedy within the framework of Chapter V of this Directive, irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome;

(f)'determining authority' means any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases;

(g)'refugee' means a third-country national or a stateless person who fulfils the requirements of Article 2(d) of Directive 2011/95/EU;

(h)'person eligible for subsidiary protection' means a third-country national or a stateless person who fulfils the requirements of Article 2(f) of Directive 2011/95/EU;

(i) 'international protection' means refugee status and subsidiary protection status as defined in points (j) and (k);

(j) 'refugee status' means the recognition by a Member State of a third-country national or a stateless person as a refugee;

(k)'subsidiary protection status' means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection;

(l) 'minor' means a third-country national or a stateless person below the age of 18 years;

(m) 'unaccompanied minor' means an unaccompanied minor as defined in Article 2(l) of Directive 2011/95/EU;

(n)'representative' means a person or an organisation appointed by the competent bodies in order to assist and represent an

unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor, in accordance with this Directive;

(o)'withdrawal of international protection' means the decision by a competent authority to revoke, end or refuse to renew the refugee or subsidiary protection status of a person in accordance with Directive 2011/95/EU;

(p)'remain in the Member State' means to remain in the territory, including at the border or in transit zones, of the Member State in which the application for international protection has been made or is being examined;

(q)'subsequent application' means a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1).

Article 3

Scope

1. This Directive shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and to the withdrawal of international protection.

2. This Directive shall not apply to requests for diplomatic or territorial asylum submitted to representations of Member States.

3. Member States may decide to apply this Directive in procedures for deciding on applications for any kind of protection falling outside of the scope of Directive 2011/95/EU.

Article 4

Responsible authorities

1. Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of applications in accordance with this Directive. Member States shall ensure that such authority is provided with appropriate means, including sufficient competent personnel, to carry out its tasks in accordance with this Directive.

2. Member States may provide that an authority other than that referred to in paragraph 1 shall be responsible for the purposes of:

(a) processing cases pursuant to Regulation (EU) No 604/2013; and

(b)granting or refusing permission to enter in the framework of the procedure provided for in Article 43, subject to the conditions as set out therein and on the basis of the reasoned opinion of the determining authority.

3. Member States shall ensure that the personnel of the determining authority referred to in paragraph 1 are properly trained. To that end, Member States shall provide for relevant training which shall include the elements listed in Article 6(4)(a) to (e) of Regulation (EU) No 439/2010. Member States shall also take into account the relevant training established and developed by the European Asylum Support Office (EASO). Persons interviewing applicants pursuant to this Directive shall also have acquired general knowledge of problems which could adversely affect the applicants' ability to be interviewed, such as indications that the applicant may have been tortured in the past.

4. Where an authority is designated in accordance with paragraph 2, Member States shall ensure that the personnel of that authority have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing this Directive.

5. Applications for international protection made in a Member State to the authorities of another Member State carrying out border or immigration controls there shall be dealt with by the Member State in whose territory the application is made.

Article 5

More favourable provisions

Member States may introduce or retain more favourable standards on procedures for granting and withdrawing international protection, insofar as those standards are compatible with this Directive.

CHAPTER II
BASIC PRINCIPLES AND GUARANTEES

Article 6

Access to the procedure

1. When a person makes an application for international protection to an authority competent under national law for registering such applications, the registration shall take place no later than three working days after the application is made.

If the application for international protection is made to other authorities which are likely to receive such applications, but not competent for the registration under national law, Member States shall ensure that the registration shall take place no later than six working days after the application is made.

Member States shall ensure that those other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged.

2. Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible. Where the applicant does not lodge his or her application, Member States may apply Article 28 accordingly.

3. Without prejudice to paragraph 2, Member States may require that applications for international protection be lodged in person and/or at a designated place.

4. Notwithstanding paragraph 3, an application for international protection shall be deemed to have been lodged once a form submitted by the applicant or, where provided for in national law, an official report, has reached the competent authorities of the Member State concerned.

5. Where simultaneous applications for international protection by a large number of third-country nationals or stateless persons make it very difficult in practice to respect the time limit laid down in paragraph 1, Member States may provide for that time limit to be extended to 10 working days.

Article 7

Applications made on behalf of dependants or minors

1. Member States shall ensure that each adult with legal capacity has the right to make an application for international protection on his or her own behalf.

2. Member States may provide that an application may be made by an applicant on behalf of his or her dependants. In such cases, Member States shall ensure that dependent adults consent to the lodging of the application on their behalf, failing which they shall have an opportunity to make an application on their own behalf.

Consent shall be requested at the time the application is lodged or, at the latest, when the personal interview with the dependent adult is conducted. Before consent is requested, each dependent adult shall be informed in private of the relevant procedural consequences of the lodging of the application on his or her behalf and of his or her right to make a separate application for international protection.

3. Member States shall ensure that a minor has the right to make an application for international protection either on his or her own behalf, if he or she has the legal capacity to act in procedures according to the law of the Member State concerned, or through his or her parents or other adult family members, or an adult responsible for him or her, whether by law or by the practice of the Member State concerned, or through a representative.

4. Member States shall ensure that the appropriate bodies referred to in Article 10 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [(10)] have the right to lodge an application for international protection on behalf of an unaccompanied minor if, on the basis of an individual assessment of his or her personal situation, those bodies are of the opinion that the minor may have protection needs pursuant to Directive 2011/95/EU.

5. Member States may determine in national legislation:

(a) the cases in which a minor can make an application on his or her own behalf;

(b) the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Article 25(1)(a);

(c) the cases in which the lodging of an application for international protection is deemed to constitute also the lodging of an application for international protection for any unmarried minor.

Article 8

Information and counselling in detention facilities and at border crossing points

1. Where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so. In those detention facilities and crossing points, Member States shall make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure.

2. Member States shall ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders. Member States may provide for rules covering the presence of such organisations and persons in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States. Limits on such access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible.

Article 9

Right to remain in the Member State pending the examination of the application

1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. That right to remain shall not constitute an entitlement to a residence permit.

2. Member States may make an exception only where a person makes a subsequent application referred to in Article 41 or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant [(11)] or otherwise, or to a third country or to international criminal courts or tribunals.

3. A Member State may extradite an applicant to a third country pursuant to paragraph 2 only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect *refoulement* in violation of the international and Union obligations of that Member State.

Article 10

Requirements for the examination of applications

1. Member States shall ensure that applications for international protection are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible.

2. When examining applications for international protection, the determining authority shall first determine whether the applicants qualify as refugees and, if not, determine whether the applicants are eligible for subsidiary protection.

3. Member States shall ensure that decisions by the determining authority on applications for international protection are taken after an appropriate examination. To that end, Member States shall ensure that:

(a) applications are examined and decisions are taken individually, objectively and impartially;

(b) precise and up-to-date information is obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;

(c) the personnel examining applications and taking decisions know the relevant standards applicable in the field of asylum and refugee law;

(d)the personnel examining applications and taking decisions have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues.

4. The authorities referred to in Chapter V shall, through the determining authority or the applicant or otherwise, have access to the general information referred to in paragraph 3(b), necessary for the fulfilment of their task.

5. Member States shall provide for rules concerning the translation of documents relevant for the examination of applications.

Article 11

Requirements for a decision by the determining authority

1. Member States shall ensure that decisions on applications for international protection are given in writing.

2. Member States shall also ensure that, where an application is rejected with regard to refugee status and/or subsidiary protection status, the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing.

Member States need not provide information on how to challenge a negative decision in writing in conjunction with a decision where the applicant has been provided with such information at an earlier stage either in writing or by electronic means accessible to the applicant.

3. For the purposes of Article 7(2), and whenever the application is based on the same grounds, Member States may take a single decision, covering all dependants, unless to do so would lead to the disclosure of particular circumstances of an applicant which could jeopardise his or her interests, in particular in cases involving gender, sexual orientation, gender identity and/or age-based persecution. In such cases, a separate decision shall be issued to the person concerned.

Article 12

Guarantees for applicants

1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants enjoy the following guarantees:

(a)they shall be informed in a language which they understand or are reasonably supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities. They shall be informed of the time-frame, the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive 2011/95/EU, as well as of the consequences of an explicit or implicit withdrawal of the application. That information shall be given in time to enable them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Article 13;

(b)they shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary. Member States shall consider it necessary to provide those services at least when the applicant is to be interviewed as referred to in Articles 14 to 17 and 34 and appropriate communication cannot be ensured without such services. In that case and in other cases where the competent authorities call upon the applicant, those services shall be paid for out of public funds;

(c)they shall not be denied the opportunity to communicate with UNHCR or with any other organisation providing legal advice or other counselling to applicants in accordance with the law of the Member State concerned;

(d)they and, if applicable, their legal advisers or other counsellors in accordance with Article 23(1), shall have access to the information referred to in Article 10(3)(b) and to the information provided by the experts referred to in Article 10(3)(d), where the determining authority has taken that information into consideration for the purpose of taking a decision on their application;

(e)they shall be given notice in reasonable time of the decision by the determining authority on their application. If a legal adviser or other counsellor is legally representing the applicant, Member States may choose to give notice of the decision to him or her instead of to the applicant;

(f)they shall be informed of the result of the decision by the determining authority in a language that they understand or are reasonably supposed to understand when they are not assisted or represented by a legal adviser or other counsellor. The information provided shall include information on how to challenge a negative decision in accordance with the provisions of Article 11(2).

2. With respect to the procedures provided for in Chapter V, Member States shall ensure that all applicants enjoy guarantees equivalent to the ones referred to in paragraph 1(b) to (e).

Article 13

Obligations of the applicants

1. Member States shall impose upon applicants the obligation to cooperate with the competent authorities with a view to establishing their identity and other elements referred to in Article 4(2) of Directive 2011/95/EU. Member States may impose upon applicants other obligations to cooperate with the competent authorities insofar as such obligations are necessary for the processing of the application.

2. In particular, Member States may provide that:

(a) applicants are required to report to the competent authorities or to appear before them in person, either without delay or at a specified time;

(b) applicants have to hand over documents in their possession relevant to the examination of the application, such as their passports;

(c) applicants are required to inform the competent authorities of their current place of residence or address and of any changes thereof as soon as possible. Member States may provide that the applicant shall have to accept any communication at the most recent place of residence or address which he or she indicated accordingly;

(d) the competent authorities may search the applicant and the items which he or she is carrying. Without prejudice to any search carried out for security reasons, a search of the applicant's person under this Directive shall be carried out by a person of the same sex with full respect for the principles of human dignity and of physical and psychological integrity;

(e) the competent authorities may take a photograph of the applicant; and

(f) the competent authorities may record the applicant's oral statements, provided he or she has previously been informed thereof.

The following Articles have been redacted by the CEEMC Organising Committee:

Article 14: **Personal interview**

Article 15: **Requirements for a personal interview**

Article 16: **Content of a personal interview**

Article 17: **Report and recording of personal interviews**

Article 18: **Medical examination**

Article 19

Provision of legal and procedural information free of charge in procedures at first instance

1. In the procedures at first instance provided for in Chapter III, Member States shall ensure that, on request, applicants are provided with legal and procedural information free of charge, including, at least, information on the procedure in the light of the applicant's particular circumstances. In the event of a negative decision on an application at first instance, Member States shall also, on request, provide applicants with information — in addition to that given in accordance with Article 11(2) and Article 12(1)(f) — in order to clarify the reasons for such decision and explain how it can be challenged.

2. The provision of legal and procedural information free of charge shall be subject to the conditions laid down in Article 21.

Article 20

Free legal assistance and representation in appeals procedures

1. Member States shall ensure that free legal assistance and representation is granted on request in the appeals procedures provided for in Chapter V. It shall include, at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant.

2. Member States may also provide free legal assistance and/or representation in the procedures at first instance provided for in

Chapter III. In such cases, Article 19 shall not apply.

3. Member States may provide that free legal assistance and representation not be granted where the applicant's appeal is considered by a court or tribunal or other competent authority to have no tangible prospect of success.

Where a decision not to grant free legal assistance and representation pursuant to this paragraph is taken by an authority which is not a court or tribunal, Member States shall ensure that the applicant has the right to an effective remedy before a court or tribunal against that decision.

In the application of this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

4. Free legal assistance and representation shall be subject to the conditions laid down in Article 21.

Article 21

Conditions for the provision of legal and procedural information free of charge and free legal assistance and representation

1. Member States may provide that the legal and procedural information free of charge referred to in Article 19 is provided by non-governmental organisations, or by professionals from government authorities or from specialised services of the State.

The free legal assistance and representation referred to in Article 20 shall be provided by such persons as admitted or permitted under national law.

2. Member States may provide that legal and procedural information free of charge referred to in Article 19 and free legal assistance and representation referred to in Article 20 are granted:

(a) only to those who lack sufficient resources; and/or

(b) only through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants.

Member States may provide that the free legal assistance and representation referred to in Article 20 is granted only for appeals procedures in accordance with Chapter V before a court or tribunal of first instance and not for any further appeals or reviews provided for under national law, including rehearings or reviews of appeals.

Member States may also provide that the free legal assistance and representation referred to in Article 20 is not granted to applicants who are no longer present on their territory in application of Article 41(2)(c).

3. Member States may lay down rules concerning the modalities for filing and processing requests for legal and procedural information free of charge under Article 19 and for free legal assistance and representation under Article 20.

4. Member States may also:

(a) impose monetary and/or time limits on the provision of legal and procedural information free of charge referred to in Article 19 and on the provision of free legal assistance and representation referred to in Article 20, provided that such limits do not arbitrarily restrict access to the provision of legal and procedural information and legal assistance and representation;

(b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

5. Member States may demand to be reimbursed wholly or partially for any costs granted if and when the applicant's financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.

Article 22

Right to legal assistance and representation at all stages of the procedure

1. Applicants shall be given the opportunity to consult, at their own cost, in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their applications for international protection, at all stages of the procedure, including following a negative decision.

2. Member States may allow non-governmental organisations to provide legal assistance and/or representation to applicants in the

procedures provided for in Chapter III and Chapter V in accordance with national law.

Article 23

Scope of legal assistance and representation

1. Member States shall ensure that a legal adviser or other counsellor admitted or permitted as such under national law, who assists or represents an applicant under the terms of national law, shall enjoy access to the information in the applicant's file upon the basis of which a decision is or will be made.

Member States may make an exception where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications for international protection by the competent authorities of the Member States or the international relations of the Member States would be compromised. In such cases, Member States shall:

(a) make access to such information or sources available to the authorities referred to in Chapter V; and

(b) establish in national law procedures guaranteeing that the applicant's rights of defence are respected.

In respect of point (b), Member States may, in particular, grant access to such information or sources to a legal adviser or other counsellor who has undergone a security check, insofar as the information is relevant for examining the application or for taking a decision to withdraw international protection.

2. Member States shall ensure that the legal adviser or other counsellor who assists or represents an applicant has access to closed areas, such as detention facilities and transit zones, for the purpose of consulting that applicant, in accordance with Article 10(4) and Article 18(2)(b) and (c) of Directive 2013/33/EU.

3. Member States shall allow an applicant to bring to the personal interview a legal adviser or other counsellor admitted or permitted as such under national law.

Member States may stipulate that the legal adviser or other counsellor may only intervene at the end of the personal interview.

4. Without prejudice to this Article or to Article 25(1)(b), Member States may provide rules covering the presence of legal advisers or other counsellors at all interviews in the procedure.

Member States may require the presence of the applicant at the personal interview, even if he or she is represented under the terms of national law by a legal adviser or counsellor, and may require the applicant to respond in person to the questions asked.

Without prejudice to Article 25(1)(b), the absence of a legal adviser or other counsellor shall not prevent the competent authority from conducting a personal interview with the applicant.

Article 24

Applicants in need of special procedural guarantees

1. Member States shall assess within a reasonable period of time after an application for international protection is made whether the applicant is an applicant in need of special procedural guarantees.

2. The assessment referred to in paragraph 1 may be integrated into existing national procedures and/or into the assessment referred to in Article 22 of Directive 2013/33/EU and need not take the form of an administrative procedure.

3. Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure.

Where such adequate support cannot be provided within the framework of the procedures referred to in Article 31(8) and Article 43, in particular where Member States consider that the applicant is in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence, Member States shall not apply, or shall cease to apply, Article 31(8) and Article 43. Where Member States apply Article 46(6) to applicants to whom Article 31(8) and Article 43 cannot be applied pursuant to this subparagraph, Member States shall provide at least the guarantees provided for in Article 46(7).

4. Member States shall ensure that the need for special procedural guarantees is also addressed, in accordance with this Directive, where such a need becomes apparent at a later stage of the procedure, without necessarily restarting the procedure.

The following Articles have been redacted by the CEEMC Organising Committee:

Article 25: **Guarantees for unaccompanied minors**

Article 26

Detention

1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant. The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with Directive 2013/33/EU.

2. Where an applicant is held in detention, Member States shall ensure that there is a possibility of speedy judicial review in accordance with Directive 2013/33/EU.

The following Articles have been redacted by the CEEMC Organising Committee:

Article 27: **Procedure in the event of withdrawal of the application**

Article 28: **Procedure in the event of implicit withdrawal or abandonment of the application**

Article 29

The role of UNHCR

1. Member States shall allow UNHCR:

(a) to have access to applicants, including those in detention, at the border and in the transit zones;

(b) to have access to information on individual applications for international protection, on the course of the procedure and on the decisions taken, provided that the applicant agrees thereto;

(c) to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure.

2. Paragraph 1 shall also apply to an organisation which is working in the territory of the Member State concerned on behalf of UNHCR pursuant to an agreement with that Member State.

Article 30

Collection of information on individual cases

For the purposes of examining individual cases, Member States shall not:

(a) disclose information regarding individual applications for international protection, or the fact that an application has been made, to the alleged actor(s) of persecution or serious harm;

(b) obtain any information from the alleged actor(s) of persecution or serious harm in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant or his or her dependants, or the liberty and security of his or her family members still living in the country of origin.

CHAPTER III
PROCEDURES AT FIRST INSTANCE

SECTION I

Article 31

Examination procedure

1. Member States shall process applications for international protection in an examination procedure in accordance with the basic principles and guarantees of Chapter II.

2. Member States shall ensure that the examination procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.

3. Member States shall ensure that the examination procedure is concluded within six months of the lodging of the application.

Where an application is subject to the procedure laid down in Regulation (EU) No 604/2013, the time limit of six months shall start to run from the moment the Member State responsible for its examination is determined in accordance with that Regulation, the applicant is on the territory of that Member State and has been taken in charge by the competent authority.

Member States may extend the time limit of six months set out in this paragraph for a period not exceeding a further nine months, where:

(a) complex issues of fact and/or law are involved;

(b) a large number of third-country nationals or stateless persons simultaneously apply for international protection, making it very difficult in practice to conclude the procedure within the six-month time limit;

(c) where the delay can clearly be attributed to the failure of the applicant to comply with his or her obligations under Article 13.

By way of exception, Member States may, in duly justified circumstances, exceed the time limits laid down in this paragraph by a maximum of three months where necessary in order to ensure an adequate and complete examination of the application for international protection.

4. Without prejudice to Articles 13 and 18 of Directive 2011/95/EU, Member States may postpone concluding the examination procedure where the determining authority cannot reasonably be expected to decide within the time-limits laid down in paragraph 3 due to an uncertain situation in the country of origin which is expected to be temporary. In such a case, Member States shall:

(a) conduct reviews of the situation in that country of origin at least every six months;

(b) inform the applicants concerned within a reasonable time of the reasons for the postponement;

(c) inform the Commission within a reasonable time of the postponement of procedures for that country of origin.

5. In any event, Member States shall conclude the examination procedure within a maximum time limit of 21 months from the lodging of the application.

6. Member States shall ensure that, where a decision cannot be taken within six months, the applicant concerned shall:

(a) be informed of the delay; and

(b) receive, upon his or her request, information on the reasons for the delay and the time-frame within which the decision on his or her application is to be expected.

7. Member States may prioritise an examination of an application for international protection in accordance with the basic principles and guarantees of Chapter II in particular:

(a) where the application is likely to be well-founded;

(b) where the applicant is vulnerable, within the meaning of Article 22 of Directive 2013/33/EU, or is in need of special procedural guarantees, in particular unaccompanied minors.

8. Member States may provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be accelerated and/or conducted at the border or in transit zones in accordance with Article 43 if:

(a) the applicant, in submitting his or her application and presenting the facts, has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU; or

(b) the applicant is from a safe country of origin within the meaning of this Directive; or

(c) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity and/or nationality that could have had a negative impact on the decision; or

(d) it is likely that, in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality; or

(e) the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information, thus making his or her claim clearly unconvincing in relation to whether he or she qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU; or

(f) the applicant has introduced a subsequent application for international protection that is not inadmissible in accordance with Article 40(5); or

(g) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his or her removal; or

(h) the applicant entered the territory of the Member State unlawfully or prolonged his or her stay unlawfully and, without good reason, has either not presented himself or herself to the authorities or not made an application for international protection as soon as possible, given the circumstances of his or her entry; or

(i) the applicant refuses to comply with an obligation to have his or her fingerprints taken in accordance with Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes [(12)]; or

(j) the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.

9. Member States shall lay down time limits for the adoption of a decision in the procedure at first instance pursuant to paragraph 8. Those time limits shall be reasonable.

Without prejudice to paragraphs 3 to 5, Member States may exceed those time limits where necessary in order to ensure an adequate and complete examination of the application for international protection.

Article 32

Unfounded applications

1. Without prejudice to Article 27, Member States may only consider an application to be unfounded if the determining authority has established that the applicant does not qualify for international protection pursuant to Directive 2011/95/EU.

2. In cases of unfounded applications in which any of the circumstances listed in Article 31(8) apply, Member States may also consider an application to be manifestly unfounded, where it is defined as such in the national legislation.

SECTION II

Article 33

Inadmissible applications

1. In addition to cases in which an application is not examined in accordance with Regulation (EU) No 604/2013, Member States are not required to examine whether the applicant qualifies for international protection in accordance with Directive 2011/95/EU where an application is considered inadmissible pursuant to this Article.

2. Member States may consider an application for international protection as inadmissible only if:

(a) another Member State has granted international protection;

(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38;

(d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU have arisen or have been presented by the applicant; or

(e) a dependant of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or

her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant's situation which justify a separate application.

Article 34

Special rules on an admissibility interview

1. Member States shall allow applicants to present their views with regard to the application of the grounds referred to in Article 33 in their particular circumstances before the determining authority decides on the admissibility of an application for international protection. To that end, Member States shall conduct a personal interview on the admissibility of the application. Member States may make an exception only in accordance with Article 42 in the case of a subsequent application.

This paragraph shall be without prejudice to Article 4(2)(a) of this Directive and to Article 5 of Regulation (EU) No 604/2013.

2. Member States may provide that the personnel of authorities other than the determining authority conduct the personal interview on the admissibility of the application for international protection. In such cases, Member States shall ensure that such personnel receive in advance the necessary basic training, in particular with respect to international human rights law, the Union asylum *acquis* and interview techniques.

SECTION III

Article 35

The concept of first country of asylum

A country can be considered to be a first country of asylum for a particular applicant if:

(a) he or she has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection; or

(b) he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*,

provided that he or she will be readmitted to that country.

In applying the concept of first country of asylum to the particular circumstances of an applicant, Member States may take into account Article 38(1). The applicant shall be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances.

Article 36

The concept of safe country of origin

1. A third country designated as a safe country of origin in accordance with this Directive may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant only if:

(a) he or she has the nationality of that country; or

(b) he or she is a stateless person and was formerly habitually resident in that country,

and he or she has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her qualification as a beneficiary of international protection in accordance with Directive 2011/95/EU.

2. Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept.

Article 37

National designation of third countries as safe countries of origin

1. Member States may retain or introduce legislation that allows, in accordance with Annex I, for the national designation of safe countries of origin for the purposes of examining applications for international protection.

2. Member States shall regularly review the situation in third countries designated as safe countries of origin in accordance with this

Article.

3. The assessment of whether a country is a safe country of origin in accordance with this Article shall be based on a range of sources of information, including in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations.

4. Member States shall notify to the Commission the countries that are designated as safe countries of origin in accordance with this Article.

Article 38

The concept of safe third country

1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

(b) there is no risk of serious harm as defined in Directive 2011/95/EU;

(c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected;

(d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

(e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

2. The application of the safe third country concept shall be subject to rules laid down in national law, including:

(a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;

(b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;

(c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a).

3. When implementing a decision solely based on this Article, Member States shall:

(a) inform the applicant accordingly; and

(b) provide him or her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

4. Where the third country does not permit the applicant to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

5. Member States shall inform the Commission periodically of the countries to which this concept is applied in accordance with the provisions of this Article.

Article 39

The concept of European safe third country

1. Member States may provide that no, or no full, examination of the application for international protection and of the safety of the applicant in his or her particular circumstances as described in Chapter II shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.

2. A third country can only be considered as a safe third country for the purposes of paragraph 1 where:

(a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;

(b) it has in place an asylum procedure prescribed by law; and

(c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies.

3. The applicant shall be allowed to challenge the application of the concept of European safe third country on the grounds that the third country concerned is not safe in his or her particular circumstances.

4. The Member States concerned shall lay down in national law the modalities for implementing the provisions of paragraph 1 and the consequences of decisions pursuant to those provisions in accordance with the principle of *non-refoulement*, including providing for exceptions from the application of this Article for humanitarian or political reasons or for reasons of public international law.

5. When implementing a decision solely based on this Article, the Member States concerned shall:

(a) inform the applicant accordingly; and

(b) provide him or her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

6. Where the safe third country does not readmit the applicant, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

7. Member States shall inform the Commission periodically of the countries to which this concept is applied in accordance with this Article.

SECTION IV

Article 40

Subsequent application

1. Where a person who has applied for international protection in a Member State makes further representations or a subsequent application in the same Member State, that Member State shall examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.

2. For the purpose of taking a decision on the admissibility of an application for international protection pursuant to Article 33(2)(d), a subsequent application for international protection shall be subject first to a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant which relate to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU.

3. If the preliminary examination referred to in paragraph 2 concludes that new elements or findings have arisen or been presented by the applicant which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection by virtue of Directive 2011/95/EU, the application shall be further examined in conformity with Chapter II. Member States may also provide for other reasons for a subsequent application to be further examined.

4. Member States may provide that the application will only be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting the situations set forth in paragraphs 2 and 3 of this Article in the previous procedure, in particular by exercising his or her right to an effective remedy pursuant to Article 46.

5. When a subsequent application is not further examined pursuant to this Article, it shall be considered inadmissible, in accordance with Article 33(2)(d).

6. The procedure referred to in this Article may also be applicable in the case of:

(a) a dependant who lodges an application after he or she has, in accordance with Article 7(2), consented to have his or her case be part of an application lodged on his or her behalf; and/or

(b) an unmarried minor who lodges an application after an application has been lodged on his or her behalf pursuant to Article 7(5)(c).

In those cases, the preliminary examination referred to in paragraph 2 will consist of examining whether there are facts relating to the

dependant's or the unmarried minor's situation which justify a separate application.

7. Where a person with regard to whom a transfer decision has to be enforced pursuant to Regulation (EU) No 604/2013 makes further representations or a subsequent application in the transferring Member State, those representations or subsequent applications shall be examined by the responsible Member State, as defined in that Regulation, in accordance with this Directive.

Article 41

Exceptions from the right to remain in case of subsequent applications

1. Member States may make an exception from the right to remain in the territory where a person:

(a) has lodged a first subsequent application, which is not further examined pursuant to Article 40(5), merely in order to delay or frustrate the enforcement of a decision which would result in his or her imminent removal from that Member State; or

(b) makes another subsequent application in the same Member State, following a final decision considering a first subsequent application inadmissible pursuant to Article 40(5) or after a final decision to reject that application as unfounded.

Member States may make such an exception only where the determining authority considers that a return decision will not lead to direct or indirect *refoulement* in violation of that Member State's international and Union obligations.

2. In cases referred to in paragraph 1, Member States may also:

(a) derogate from the time limits normally applicable in accelerated procedures, in accordance with national law, when the examination procedure is accelerated in accordance with Article 31(8)(g);

(b) derogate from the time limits normally applicable to admissibility procedures provided for in Articles 33 and 34, in accordance with national law; and/or

(c) derogate from Article 46(8).

Article 42

Procedural rules

1. Member States shall ensure that applicants whose application is subject to a preliminary examination pursuant to Article 40 enjoy the guarantees provided for in Article 12(1).

2. Member States may lay down in national law rules on the preliminary examination pursuant to Article 40. Those rules may, inter alia:

(a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;

(b) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview, with the exception of the cases referred to in Article 40(6).

Those rules shall not render impossible the access of applicants to a new procedure or result in the effective annulment or severe curtailment of such access.

3. Member States shall ensure that the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, if the application is not to be further examined, of the reasons why and the possibilities for seeking an appeal or review of the decision.

SECTION V

Article 43

Border procedures

1. Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on:

(a) the admissibility of an application, pursuant to Article 33, made at such locations; and/or

(b) the substance of an application in a procedure pursuant to Article 31(8).

2. Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 1 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant shall be granted entry to the territory of the Member State in order for his or her application to be processed in accordance with the other provisions of this Directive.

3. In the event of arrivals involving a large number of third-country nationals or stateless persons lodging applications for international protection at the border or in a transit zone, which makes it impossible in practice to apply there the provisions of paragraph 1, those procedures may also be applied where and for as long as these third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.

CHAPTER IV

PROCEDURES FOR THE WITHDRAWAL OF INTERNATIONAL PROTECTION

Article 44

Withdrawal of international protection

Member States shall ensure that an examination to withdraw international protection from a particular person may commence when new elements or findings arise indicating that there are reasons to reconsider the validity of his or her international protection.

Article 45

Procedural rules

1. Member States shall ensure that, where the competent authority is considering withdrawing international protection from a third-country national or stateless person in accordance with Article 14 or 19 of Directive 2011/95/EU, the person concerned enjoys the following guarantees:

(a) to be informed in writing that the competent authority is reconsidering his or her qualification as a beneficiary of international protection and the reasons for such a reconsideration; and

(b) to be given the opportunity to submit, in a personal interview in accordance with Article 12(1)(b) and Articles 14 to 17 or in a written statement, reasons as to why his or her international protection should not be withdrawn.

2. In addition, Member States shall ensure that within the framework of the procedure set out in paragraph 1:

(a) the competent authority is able to obtain precise and up-to-date information from various sources, such as, where appropriate, from EASO and UNHCR, as to the general situation prevailing in the countries of origin of the persons concerned; and

(b) where information on an individual case is collected for the purposes of reconsidering international protection, it is not obtained from the actor(s) of persecution or serious harm in a manner that would result in such actor(s) being directly informed of the fact that the person concerned is a beneficiary of international protection whose status is under reconsideration, or jeopardise the physical integrity of the person or his or her dependants, or the liberty and security of his or her family members still living in the country of origin.

3. Member States shall ensure that the decision of the competent authority to withdraw international protection is given in writing. The reasons in fact and in law shall be stated in the decision and information on how to challenge the decision shall be given in writing.

4. Once the competent authority has taken the decision to withdraw international protection, Article 20, Article 22, Article 23(1) and Article 29 are equally applicable.

5. By way of derogation from paragraphs 1 to 4 of this Article, Member States may decide that international protection shall lapse by law where the beneficiary of international protection has unequivocally renounced his or her recognition as such. A Member State may also provide that international protection shall lapse by law where the beneficiary of international protection has become a national of that Member State.

CHAPTER V

APPEALS PROCEDURES

Article 46

The right to an effective remedy

1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:

(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;

(ii) considering an application to be inadmissible pursuant to Article 33(2);

(iii) taken at the border or in the transit zones of a Member State as described in Article 43(1);

(iv) not to conduct an examination pursuant to Article 39;

(b) a refusal to reopen the examination of an application after its discontinuation pursuant to Articles 27 and 28;

(c) a decision to withdraw international protection pursuant to Article 45.

2. Member States shall ensure that persons recognised by the determining authority as eligible for subsidiary protection have the right to an effective remedy pursuant to paragraph 1 against a decision considering an application unfounded in relation to refugee status.

Without prejudice to paragraph 1(c), where the subsidiary protection status granted by a Member State offers the same rights and benefits as those offered by the refugee status under Union and national law, that Member State may consider an appeal against a decision considering an application unfounded in relation to refugee status inadmissible on the grounds of insufficient interest on the part of the applicant in maintaining the proceedings.

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance.

4. Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy pursuant to paragraph 1. The time limits shall not render such exercise impossible or excessively difficult.

Member States may also provide for an *ex officio* review of decisions taken pursuant to Article 43.

5. Without prejudice to paragraph 6, Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.

6. In the case of a decision:

(a) considering an application to be manifestly unfounded in accordance with Article 32(2) or unfounded after examination in accordance with Article 31(8), except for cases where these decisions are based on the circumstances referred to in Article 31(8)(h);

(b) considering an application to be inadmissible pursuant to Article 33(2)(a), (b) or (d);

(c) rejecting the reopening of the applicant's case after it has been discontinued according to Article 28; or

(d) not to examine or not to examine fully the application pursuant to Article 39,

a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon the applicant's request or acting *ex officio*, if such a decision results in ending the applicant's right to remain in the Member State and where in such cases the right to remain in the Member State pending the outcome of the remedy is not provided for in national law.

7. Paragraph 6 shall only apply to procedures referred to in Article 43 provided that:

(a) the applicant has the necessary interpretation, legal assistance and at least one week to prepare the request and submit to the court or tribunal the arguments in favour of granting him or her the right to remain on the territory pending the outcome of the remedy; and

(b) in the framework of the examination of the request referred to in paragraph 6, the court or tribunal examines the negative decision

of the determining authority in terms of fact and law.

If the conditions referred to in points (a) and (b) are not met, paragraph 5 shall apply.

8. Member States shall allow the applicant to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory, laid down in paragraphs 6 and 7.

9. Paragraphs 5, 6 and 7 shall be without prejudice to Article 26 of Regulation (EU) No 604/2013.

10. Member States may lay down time limits for the court or tribunal pursuant to paragraph 1 to examine the decision of the determining authority.

11. Member States may also lay down in national legislation the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his or her remedy pursuant to paragraph 1, together with the rules on the procedure to be followed.

CHAPTER VI
GENERAL AND FINAL PROVISIONS

Article 47

Challenge by public authorities

This Directive does not affect the possibility for public authorities of challenging the administrative and/or judicial decisions as provided for in national legislation.

Article 48

Confidentiality

Member States shall ensure that authorities implementing this Directive are bound by the confidentiality principle as defined in national law, in relation to any information they obtain in the course of their work.

Article 49

Cooperation

Member States shall each appoint a national contact point and communicate its address to the Commission. The Commission shall communicate that information to the other Member States.

Member States shall, in liaison with the Commission, take all appropriate measures to establish direct cooperation and an exchange of information between the competent authorities.

When resorting to the measures referred to in Article 6(5), the second subparagraph of Article 14(1) and Article 31(3)(b), Member States shall inform the Commission as soon as the reasons for applying those exceptional measures have ceased to exist and at least on an annual basis. That information shall, where possible, include data on the percentage of the applications for which derogations were applied to the total number of applications processed during that period.

Article 50

Report

No later than 20 July 2017, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose any amendments that are necessary. Member States shall send to the Commission all the information that is appropriate for drawing up its report. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States at least every five years.

As part of the first report, the Commission shall also report, in particular, on the application of Article 17 and the various tools used in relation to the reporting of the personal interview.

Article 51

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 30, Article 31(1), (2) and (6) to (9), Articles 32 to 46, Articles 49 and 50 and Annex I by 20 July 2015 at the latest. They shall forthwith communicate the text of those measures to the Commission.

2. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Article 31(3), (4) and (5) by 20 July 2018. They shall forthwith communicate the text of those measures to the Commission.

3. When Member States adopt the provisions referred to in paragraphs 1 and 2, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

4. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 52

Transitional provisions

Member States shall apply the laws, regulations and administrative provisions referred to in Article 51(1) to applications for international protection lodged and to procedures for the withdrawal of international protection started after 20 July 2015 or an earlier date. Applications lodged before 20 July 2015 and procedures for the withdrawal of refugee status started before that date shall be governed by the laws, regulations and administrative provisions adopted pursuant to Directive 2005/85/EC.

Member States shall apply the laws, regulations and administrative provisions referred to in Article 51(2) to applications for international protection lodged after 20 July 2018 or an earlier date. Applications lodged before that date shall be governed by the laws, regulations and administrative provisions in accordance with Directive 2005/85/EC.

Article 53

Repeal

Directive 2005/85/EC is repealed for the Member States bound by this Directive with effect from 21 July 2015, without prejudice to the obligations of the Member States relating to the time limit for transposition into national law of the Directive set out in Annex II, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex III.

Article 54

Entry into force and application

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Articles 47 and 48 shall apply from 21 July 2015.

Article 55

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.
Done at Brussels, 26 June 2013.

For the European Parliament
The President
M. SCHULZ
For the Council
The President

(1) OJ C 24, 28.1.2012, p. 79.

(2) Position of the European Parliament of 6 April 2011 (OJ C 296 E, 2.10.2012, p. 184) and position of the Council at first reading of 6 June 2013 (not yet published in the Official Journal). Position of the European Parliament of 10 June 2013 (not yet published in the Official Journal).

(3) OJ L 326, 13.12.2005, p. 13.

(4) OJ L 337, 20.12.2011, p. 9.

(5) See page 96 of this Official Journal.

(6) OJ L 132, 29.5.2010, p. 11.

(7) OJ L 281, 23.11.1995, p. 31.

(8) See page 31 of this Official Journal.

(9) OJ C 369, 17.12.2011, p. 14.

(10) OJ L 348, 24.12.2008, p. 98.

(11) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

(12) See page 1 of this Official Journal.

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL A new EU Framework to strengthen the Rule of Law /* COM/2014/0158 final */ (11th March 2014)

1. Introduction

The rule of law is the backbone of any modern constitutional democracy. It is one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU and, as such, one of the main values upon which the Union is based. This is recalled by Article 2 of the Treaty on European Union (TEU), as well as by the Preambles to the Treaty and to the Charter of Fundamental Rights of the EU. This is also why, under Article 49 TEU, respect for the rule of law is a precondition for EU membership. Along with democracy and human rights, the rule of law is also one of the three pillars of the Council of Europe and is endorsed in the Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[1] .

Mutual trust among EU Member States and their respective legal systems is the foundation of the Union. The way the rule of law is implemented at national level plays a key role in this respect. The confidence of all EU citizens and national authorities in the functioning of the rule of law is particularly vital for the further development of the EU into "an area of freedom, security and justice without internal frontiers"[2]. This confidence will only be built and maintained if the rule of law is observed in all Member States.

The different constitutions and judicial systems of the EU Member States are, in principle, well designed and equipped to protect citizens against any threat to the rule of law. However, recent events in some Member States have demonstrated that a lack of respect for the rule of law and, as a consequence, also for the fundamental values which the rule of law aims to protect, can become a matter of serious concern. During these events, there has been a clear request from the public at large for the EU, and notably for the Commission, to take action. Results have been achieved. However, the Commission and the EU had to find ad hoc solutions since current EU mechanisms and procedures have not always been appropriate in ensuring an effective and timely response to threats to the rule of law.

The Commission is the guardian of the Treaties and has the responsibility of ensuring the respect of the values on which the EU is founded and of protecting the general interest of the Union. It must therefore play an active role in this respect[3]. In September 2012, in his annual State of the Union speech to the European Parliament, President Barroso said: "We need a better developed set of instruments, not just the alternative between the 'soft power' of political persuasion and the 'nuclear option' of Article 7 TEU. In the following year's speech, he said that "experience has confirmed the usefulness of the Commission role as an independent and objective referee. We should consolidate this experience through a more general framework […]. The Commission will come forward with a communication on this. I believe it is a debate that is key to our idea of Europe."[4]

In June 2013, the Justice and Home Affairs Council underlined that "respecting the rule of law is a prerequisite for the protection of fundamental rights" and called on the Commission "to take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle these issues". In April 2013, the General Affairs Council held a comprehensive discussion on the topic.[5]

In July 2013, the European Parliament requested that "Member States be regularly assessed on their continued compliance with the fundamental values of the Union and the requirement of democracy and the rule of law"[6].

This Communication responds to these requests. On the basis of the Commission's experience, the inter-institutional debate and broad consultations[7], the Communication sets out a new framework to ensure an effective and coherent protection of the rule of law in all Member States. It is a framework to address and resolve a situation where there is a systemic threat to the rule of law.[8]

The framework seeks to resolve future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met. It is therefore meant to fill a gap. It is not an alternative to but rather precedes and complements Article 7 TEU mechanisms. It is also without prejudice to the Commission's powers to address specific situations falling within the scope of EU law by means of infringement procedures under Article 258 of the Treaty on the Functioning of the European Union (TFEU).

From a broader European perspective, the framework is meant to contribute to reaching the objectives of the Council of Europe, including on the basis of the expertise of the European Commission for Democracy through Law (Venice Commission)[9].

2. Why the rule of law is of fundamental importance for the EU

The principle of the rule of law has progressively become a dominant organisational model of modern constitutional law and international organisations (including the United Nations and the Council of Europe) to regulate the exercise of public powers. It

makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.

The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system. Nevertheless, case law of the Court of Justice of the European Union ("the Court of Justice") and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU.

Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law[10].

Both the Court of Justice and the European Court of Human Rights confirmed that those principles are not purely formal and procedural requirements. They are the vehicle for ensuring compliance with and respect for democracy and human rights. The rule of law is therefore a constitutional principle with both formal and substantive components[11].

This means that respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa. Fundamental rights are effective only if they are justiciable. Democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process.

Within the EU, the rule of law is of particular importance. Compliance with the rule of law is not only a prerequisite for the protection of all fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law. The confidence of all EU citizens and national authorities in the legal systems of all other Member States is vital for the functioning of the whole EU as "an area of freedom, security and justice without internal frontiers". Today, a judgment in civil and commercial matters of a national court must be automatically recognised and enforced in another Member State and a European Arrest Warrant against an alleged criminal issued in one Member State must be executed as such in another Member State[12]. Those are clear examples of why all Member States need to be concerned if the rule of law principle is not fully respected in one Member State. This is why the EU has a strong interest in safeguarding and strengthening the rule of law threats across the Union.

3. Why a new EU Framework to strengthen the rule of law

In cases where the mechanisms established at national level to secure the rule of law cease to operate effectively, there is a systemic threat to the rule of law and, hence, to the functioning of the EU as an area of freedom, security and justice without internal frontiers. In such situations, the EU needs to act to protect the rule of law as a common value of the Union.

However, experience has shown that a systemic threat to the rule of law in Member States cannot, in all circumstances, be effectively addressed by the instruments currently existing at the level of the Union.

Action taken by the Commission to launch infringement procedures, based on Article 258 TFEU, has proven to be an important instrument in addressing certain rule of law concerns[13]. But infringement procedures can be launched by the Commission only where these concerns constitute, at the same time, a breach of a specific provision of EU law.[14]

There are situations of concern which fall outside the scope of EU law and therefore cannot be considered as a breach of obligations under the Treaties but still pose a systemic threat to the rule of law. For these situations, the preventive and sanctioning mechanisms provided for in Article 7 TEU may apply. The Commission is among the actors which are empowered by the Treaty to issue a reasoned proposal in order to activate those mechanisms. Article 7 TEU aims at ensuring that all Member States respect the common values of the EU, including the rule of law. Its scope is not confined to areas covered by EU law, but empowers the EU to intervene with the purpose of protecting the rule of law also in areas where Member States act autonomously. As explained in the Commission's Communication on Article 7 TEU, this is justified by the fact that "if a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundation of the EU and the trust between its members, whatever the field in which the breach occurs"[15].

Nevertheless, the preventive mechanism of Article 7(1) TEU can be activated only in case of a "clear risk of a serious breach" and the sanctioning mechanism of Article 7(2) TEU only in case of a "serious and persistent breach by a Member State" of the values set out in Article 2 TEU. The thresholds for activating both mechanisms of Article 7 TEU are very high and underline the nature of these

mechanisms as a last resort.

Recent developments in some Member States have shown that these mechanisms are not always appropriate to quickly respond to threats to the rule of law in a Member State.

There are therefore situations where threats relating to the rule of law cannot be effectively addressed by existing instruments[16]. A new EU Framework to strengthen the Rule of Law as a key common value of the EU is needed in addition to infringement procedures and Article 7 TEU mechanisms. The Framework will be complementary to all the existing mechanisms already in place at the level of the Council of Europe to protect the rule of law[17]. It reflects both the objectives of the EU to protect its founding values and to reach a further degree of mutual trust and integration in the area of freedom, security and justice without internal frontiers.

By setting up a new Framework to strengthen the Rule of Law the Commission seeks to provide clarity and enhance predictability as to the actions it may be called upon to take in the future, whilst ensuring that all Member States are treated equally. On the basis of this Communication, the Commission is willing to engage in further discussions with the Member States, the Council and the European Parliament on these issues.

4. How the new EU Rule of Law Framework will work

The purpose of the Framework is to enable the Commission to find a solution with the Member State concerned in order to prevent the emerging of a systemic threat to the rule of law in that Member State that could develop into a "clear risk of a serious breach" within the meaning of Article 7 TEU, which would require the mechanisms provided for in that Article to be launched.

In order to ensure the equality of Member States, the Framework will apply in the same way to all Member States and will operate on the basis of the same benchmarks as to what is a systemic threat to the rule of law.

4.1. What will trigger the new Framework

The Framework will be activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.

The new EU Rule of Law Framework is not designed to be triggered by individual breaches of fundamental rights or by a miscarriage of justice. These cases can and should be dealt with by the national judicial systems, and in the context of the control mechanisms established under the European Convention on Human Rights to which all EU Member States are parties.

The main purpose of the Framework is to address threats to the rule of law (as defined in Section 2) which are of a systemic nature[18]. The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress. The Framework will be activated when national "rule of law safeguards" do not seem capable of effectively addressing those threats.

The Framework would not prevent the Commission from using its powers under Article 258 TFEU in situations falling within the scope of EU law. Nor would it prevent the mechanisms set out in Article 7 TEU being activated directly, should a sudden deterioration in a Member State require a stronger reaction from the EU[19].

4.2. The Framework as a three stage process

Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission will initiate a structured exchange with that Member State. The process is based on the following principles:

- focusing on finding a solution through a dialogue with the Member State concerned;

- ensuring an objective and thorough assessment of the situation at stake;

- respecting the principle of equal treatment of Member States;

- indicating swift and concrete actions which could be taken to address the systemic threat and to avoid the use of Article 7 TEU mechanisms.

The process is composed, as a rule, of three stages: a Commission assessment, a Commission recommendation and a follow-up to the recommendation.

The Commission's assessment

The Commission will collect and examine all the relevant information and assess whether there are clear indications of a systemic threat to the rule of law as described above. This assessment can be based on the indications received from available sources and recognized institutions, including notably the bodies of the Council of Europe and the European Union Agency for Fundamental Rights[20].

If, as a result of this preliminary assessment, the Commission is of the opinion that there is indeed a situation of systemic threat to the rule of law, it will initiate a dialogue with the Member State concerned, by sending a "rule of law opinion" and substantiating its concerns, giving the Member State concerned the possibility to respond. The opinion could be the result of an exchange of correspondence and meetings with the relevant authorities and, where appropriate, be followed by further exchanges.

The Commission expects that the Member State concerned cooperates throughout the process and refrains from adopting any irreversible measure in relation to the issues of concern raised by the Commission, pending the assessment of the latter, in line with the duty of sincere cooperation set out in Article 4(3) TEU. Whether a Member State fails to cooperate in this process, or even obstructs it, will be an element to take into consideration when assessing the seriousness of the threat.

At this stage of the process, while the launching of the Commission assessment and the sending of its opinion will be made public by the Commission, the content of the exchanges with the Member State concerned will, as a rule, be kept confidential, in order to facilitate quickly reaching a solution.

The Commission's recommendation

In a second stage, unless the matter has already been satisfactorily resolved in the meantime, the Commission will issue a "rule of law recommendation" addressed to the Member State concerned, if it finds that there is objective evidence of a systemic threat and that the authorities of that Member State are not taking appropriate action to redress it.

In its recommendation the Commission will clearly indicate the reasons for its concerns and recommend that the Member State solves the problems identified within a fixed time limit and informs the Commission of the steps taken to that effect. Where appropriate, the recommendation may include specific indications on ways and measures to resolve the situation.

The Commission’s assessment and conclusions will be based on the results of the dialogue with the Member State concerned as well as on any additional evidence on which the Member State would also need to be heard in advance.

The sending of its recommendation and its main content will be made public by the Commission.

Follow-up to the Commission's recommendation

In a third stage, the Commission will monitor the follow-up given by the Member State concerned to the recommendation addressed to it. This monitoring can be based on further exchanges with the Member State concerned and could, for example, focus on whether certain practices which raise concerns continue to occur, or on how the Member State implements the commitments it has made in the meantime to resolve the situation.

If there is no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set, the Commission will assess the possibility of activating one of the mechanisms set out in Article 7 TEU[21].

Institutional interaction

The European Parliament and the Council will be kept regularly and closely informed of progress made in each of the stages.

Benefitting from third party expertise

In order to obtain expert knowledge on particular issues relating to the rule of law in Member States, the Commission may, notably during the phase of assessment, seek external expertise, including from the EU Agency for Fundamental Rights[22]. Such external expertise could notably help to provide for a comparative analysis about existing rules and practices in other Member States in order to ensure equal treatment of the Member States, on the basis of a common understanding of the rule of law within the EU.

Depending on the situation, the Commission may decide to seek advice and assistance from members of the judicial networks in the EU, such as the networks of the Presidents of Supreme Courts of the EU[23], the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU[24] or the Judicial Councils[25]. The Commission will examine, together with these networks, how such assistance could be provided swiftly where appropriate, and whether particular arrangements are necessary to that end.

The Commission will, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission, and will coordinate its analysis with them in all cases where the matter is also under their consideration and analysis.

5. Conclusion

This Communication sets out a new EU Framework for the Rule of Law as the Commission's contribution to strengthening the capacity of the EU to ensure effective and equal protection of the rule of law in all Member States. It thereby responds to requests from the European Parliament and the Council. While not excluding future developments of the Treaties in this area – which will have to be discussed as part of the broader reflections on the future of Europe –, it is based on Commission competences as provided for by existing Treaties. In addition to the action of the Commission, the role of the European Parliament and the Council will be crucial in reinforcing the EU's determination to uphold the rule of law.

[1] See the Preamble of the ECHR and Article 3 of the Statute of the Council of Europe (http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm).

[2] See Articles 3(2) TEU and 67 TFEU.

[3] See the speech of Vice-President Reding, EU Justice Commissioner, "The EU and the Rule of Law – What next?"(http://europa.eu/rapied/press-release_SPEECH-13-677_en.htm).

[4] See http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm and http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm

[5] In March 2013, the foreign ministers of Denmark, Finland, Germany and The Netherlands called for more European safeguards to ensure compliance with fundamental values of the Union in the Member States. On the discussion in the General Affairs Council see http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/136915.pdf. On the conclusions of the Justice and Home Affairs Council see http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf

[6] See the EP resolutions setting out various recommendations to the EU institutions on how to strengthen the protection of Article 2 TEU (the Rui Tavares Report of 2013, the Louis Michel and the Kinga Göncz Reports of 2014 - http://www.europarl.europa.eu/committees/en/libe/reports.html).

[7] At the Assises de la Justice, a high level conference on the future of justice in the EU in November 2013 which was attended by over 600 stakeholders and interested parties, one session was specifically dedicated to the topic "Towards a new rule of law mechanism". A call for input was organised before and after the conference that attracted numerous written contributions (see http://ec.europa.eu/justice/events/assises-justice-2013/contributions_en.htm).

[8] As President Barroso highlighted in his State of the Union address of September 2013, the framework "should be based on the principle of equality between Member States and activated only in situations where there is a serious and systemic risk to the rule of law, and triggered by predefined benchmarks" (see http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm).

[9] The Venice Commission, officially named the European Commission for Democracy through Law, is the Council of Europe's advisory body on constitutional matters (see http://www.venice.coe.int/WebForms/pages/?p=01_Presentation).

[10] For an overview of the relevant case law on the rule of law and the principles which the rule of law entails see Annex I.

[11] The Court of Justice does not refer to the rule of law as simply a formal and procedural requirement, but also highlights its substantive value by specifying that a "Union based on the rule of law" means that the EU institutions are subject to judicial review of the compatibility of their acts not only with the Treaty but "with the general principles of law which include fundamental rights" (see ex pluribus, Case C-50/00 P, Unión de Pequeños Agricultores [2002] ECR I-06677, para 38 and 39; Joined Cases C-402/05 P and C-415/05 P, Kadi, [2008], ECR I-06351, para 316).This has been also confirmed by the European Court of Human Rights which gives the rule of law a substantive nature by establishing that it is a concept inherent in all articles of the ECHR (see for example ECtHR Stafford v United Kingdom, 28 May 2001, para 63). It must be highlighted that in the French version the Court does not use only the terms "pre-eminence du droit" but also "Etat de droit".

[12] See Case C-168/13, Jeremy F v Premier Ministre, not yet published, para 35 and 36.

[13] See, for example, cases C-286/12 Commission v Hungary, not yet published (equal treatment as regards the compulsory retirement of judges and

public prosecutors); C-518/07 Commission v Germany [2010] ECR I-01885 and C-614/10 Commission v Austria, not yet published (independence of data protection authorities).

[14] The Commission's action to ensure compliance with the Charter of Fundamental Rights illustrates this legal limitation stemming from the Treaty itself. As explained in its Communication "Strategy for the effective implementation of the Charter of Fundamental rights" of 19 October 2010 (COM(2010) 573 final), the Commission is determined to use all the means at its disposal to ensure that the Charter is fully respected by the Member States. This concerns in particular Article 47 of the Charter which provides that everyone whose rights guaranteed by EU law are violated has the right to an effective remedy before an independent tribunal. However, this can be done by the Commission vis-à-vis Member States "only when they are implementing Union law", as set out explicitly in Article 51 of the Charter. See for example Case C-87/12, Kreshnik Ymeraga and Others v Ministre du Travail, de l'Emploi et de l'Immigration, not yet published, C-370/12 Thomas Pringle v Governement of Ireland, Ireland and The Attorney General, not yet published and C-617/10, Åklagaren v Hans Åkerberg Fransson, not yet published.

[15] Communication from the Commission of 15 October 2003: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final.

[16] In some cases, systemic deficiencies related to the rule of law may be tackled using the Cooperation and Verification Mechanisms (CVM) based on the Acts of Accession for Romania and Bulgaria. However, these mechanisms, which have their basis directly in primary EU law, address pre-accession-related and therefore transitional situations. They are therefore not suitable for addressing a threat to the rule of law in all EU Member States.

[17] Article 8 of the Statute of the Council of Europe provides that a Member State that has "seriously violated" the principles of the rule of law and human rights may be suspended from its rights of representation and even be expelled from the Council of Europe. Like the mechanisms set out in Article 7 TEU, this mechanism has never been activated.

[18] With regard to the notion of "systemic deficiencies" in complying with fundamental rights when acting within the scope of EU law, see, for example, Joined Cases C-411/10 and 493/10, N.S., not yet published, para 94 and 106; and Case C-4/11, Germany v Kaveh Puid, not yet published, para 36. With regard to the notion of "systemic" or "structural" in the context of the European Convention of Human Rights, see also the role of the European Court of Human rights in identifying underlying systemic problems, as defined in the Resolution Res(2004)3 of the Committee of Ministers of 12 May 2004, on Judgments Revealing an Underlying Systemic Problem, (https://wcd.coe.int/ViewDoc.jsp?id=743257&Lang=fr).

[19] See also the Commission Communication of 15 October 2003 (footnote 15).

[20] See in particular Article 4(1)(a) of Council Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights (OJ L 53, p.1).

[21] See also the Commission Communication of 15 October 2003 (footnote 15).

[22] The FRA can give advice within the scope of its tasks as defined by Council Regulation (EC) No 168/2007 (see footnote 20).

[23] Network of the Presidents of the Supreme Judicial Courts of the European Union (see http://www.networkpresidents.eu/).

[24] Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union(see http://www.aca-europe.eu/index.php/en/).

[25] European Network of Councils for the Judiciary (see http://www.encj.eu).

OPINION OF THE LEGAL SERVICE OF THE COUNCIL OF THE EUROPEAN UNION ON THE compatibility with the Treaties OF THE Commission's Communication on a new EU Framework to strengthen the Rule of Law[1]

INTRODUCTION

1. The above communication was presented at the Council (General Affairs) on 18 March 2014. The support of the Council Legal Service was sought to clarify the institutional and procedural issues of relevance concerning the new mechanism suggested in the communication, before further consideration of the matter by the Council.

II. THE NEW FRAMEWORK FOR THE RULE OF LAW

2. The Communication sets out a new EU Framework for the rule of law to strengthen the capacity of the Union to ensure effective and equal protection of the rule of law in all Member States.

a) The Rule of Law in the Treaties

3. The rule of law is referred to in Article 2 TEU as one of the values on which the Union is founded, along with respect for human dignity, freedom, democracy, equality and respect for human rights, including the rights of persons belonging to minorities. The rule of law is also mentioned in the preambles to the TEU and to the Charter of Fundamental Rights of the European Union.

4. Indirectly, the rule of law is referred to in Article 7 TEU, which lays down a procedure to ensure respect by the Member States of the values referred to in Article 2 TEU.

5. Article 7 TEU lays down a procedure which may lead to a Member State being suspended of certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. The procedure has three stages. At the first one, the Council, acting by a majority of at least four fifths of its members,[2] and on the basis of a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, may determine that there is "a clear risk of a serious breach by a Member State of the values referred to in Article 2". The Council may address recommendations to the Member State in question, acting in accordance with the same procedure.

6. At the second stage, which does not require the completion of the first stage, the European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine "the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 (TEU), after inviting the Member State in question to submit its observations".

7. After this determination, the Council, acting by a qualified majority, may decide to suspend certain of the rights of the Member State in question.

b) The debate prior to the Commission's communication

8. In March 2013, the Foreign Ministers of Denmark, Finland, Germany and the Netherlands sent a letter to the President of the Commission arguing that fundamental values of the EU - democracy, the rule of law and human rights - must be vigorously protected. In their view, a new mechanism was called for to safeguard fundamental values in the Member States. The Council examined these ideas on its meeting of 18 March 2014, where several legal questions, to which this opinion aims at answering, were raised by the members of the Council.

9. In his State of the Union address in 2012, the President of the European Commission expressed the view that the Union needed

[1] This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

[2] Pursuant to Article 354 TFEU, the member of the European Council or of the Council representing the Member State in question shall not take part in the vote and the Member State in question shall not be counted in the evaluation of the four fifths of the Member States.

a better developed set of instruments as concerns the rule of law, not just the alternative between the "soft power" of political persuasion and the "nuclear option" of Article 7 TEU.

10. In March 2013, the Commission presented the EU Justice Scoreboard, which includes statistics on the justice systems in all the Member States and refers to the relevance of the functioning of the rule of law to the internal market.

11. In June 2013, the Council (Justice and Home Affairs) stated that "respecting the rule of law is a prerequisite for the protection of fundamental rights" and called on the Commission "to take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle issues.

c) The Commission's communication

12. The Commission aims at setting out a new EU Framework to strengthen the rule of law. The new mechanism is intended "to enable the Commission to find a solution with the Member State concerned in order to prevent the emerging of a systemic threat to the rule of law in that Member State that could develop into a "clear risk of a serious breach" within the meaning of Article 7 TEU". The new mechanism would be additional to existing procedures, such as infringement procedures and Article 7 TEU.

13. The new EU Framework lays down a procedure which begins if the Commission assesses that there is "a situation of systemic threat to the rule of law". Such an assessment, which will be made public by the Commission , will prompt a dialogue with the Member State concerned to try to resolve the matter satisfactorily. If there is objective evidence of a systemic threat and the situation is not resolved, the Commission will issue a "rule of law recommendation" addressed to the Member State concerned setting a fixed time limit to solve the problems identified.

14. The sending of the recommendation and its main content will be made public by the Commission. If there is no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set, "the Commission will assess the possibility of activating one of the mechanisms set out in Article 7 TEU".

III. LEGAL ANALYSIS

15. According to Article 5 TEU, "the limits of Union competences are governed by the principle of conferral". Its consequence is that "competences not conferred upon the Union in the Treaties remain within the Member States".

16. Article 2 TEU does not confer any material competence upon the Union but, similarly to the Charter provisions,[3] it lists certain values that ought to be respected by the institutions of the Union and by its Member States when they act within the limits of the powers conferred on the Union in the treaties, and without affecting their limits. Therefore, a violation of the values of the Union, including the rule of law, may be invoked against a Member State only when it acts in a subject matter for which the Union has competence based on specific competence-setting Treaty provisions.

17. Respect of the rule of law by the Member States cannot be, under the Treaties, the subject matter of an action by the institutions of the Union irrespective of the existence of a specific material competence to frame this action, with the sole exception of the procedure described at Article 7 TEU. Only this legal basis provides for a Union competence to supervise the application of the rule of law, as a value of the Union, in a context that is not related to a specific material competence or that exceeds its scope.

18. Article 7 TEU deliberately establishes a precise supervision framework with different phases, a high notional threshold to start the procedures, reinforced majorities within the Council and the European Council and a set of procedural guarantees for the Member State concerned, including the possibility of access to the Court of justice. However, that Article does not set a basis to further develop or amend that procedure.

19. Having recourse to recommendations as a form of action does not make it possible to disregard the limitation just described. Two important qualifications must be made. The first one is that the non-binding nature of a recommendation does not allow the institutions to act by issuing such type of acts in matters or subjects on which the Treaties have not vested powers on them.[4] The

[3] Article 51 of the Charter specifies that its provisions do "not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union […]".
[4] See Case C-233/02, France v. Commission, ECR [2004] p. I-2781, paragraph 40.

second is that even if recommendations are not intended to produce binding effects and are not capable of creating rights that individuals can rely on before a national court, they are not without any legal effect.[5] As a consequence the legality and interpretation of recommendations may be the object of proceedings before the Court of Justice, via preliminary rulings or actions for damages.

20. Article 70 TFEU could be mentioned as a relevant reference. This provision allows the Council to lay down arrangements to conduct objective and impartial evaluation of the implementation of the Union policies referred to in Title V of part three of the TFEU by the Member States' authorities. However, such arrangements could not cover the examination of Member States' actions or omissions in matters not covered by the provisions of Title V or by the acts of the institutions adopted pursuant to these provisions.

21. Article 241 TFEU empowers the Council to request the Commission to undertake studies and to submit proposals. Of course, such studies and proposals cannot exceed the scope of Union competences. Therefore, any request by the Council for a rule of law study and proposal by the Commission in the meaning of Article 241 TFEU could only be grounded in Article 7 TEU - which means that it could only lead to a reasoned proposal by the Commission, leaving the determination of a clear risk of a serious breach of the values to the Council, having obtained the consent of the European Parliament. It is not to be excluded that the Council may wish to make use of this possibility in specific circumstances. But to build a permanent mechanism for a rule of law study and proposal facility operated by the Commission on the combined bases of Article 7 TEU and Article 241 TFEU would undermine the specific character of the procedure of Article 7(1) - particularly concerning the way it can be initiated.

22. Article 337 empowers the Commission to collect information and carry out checks required for the performance of the tasks entrusted to it (of which issuing reasoned opinions as foreseen by Article 7(1) TEU forms part) but this does not offer a legal basis for a new framework independent from Article 7.

23. The same difficulty applies to Article 352 TFEU, which grants powers of action when no other basis is available to attain objectives of the Treaties, but which may only be invoked within the framework of the policies defined in the Treaties. It is apparent that respect of the values of the Union, including the rule of law, does not as such constitute a Union policy as foreseen by the Treaties.

24. It follows that there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article. Were the Council to act along such lines, it would run the risk of being found to have abased its powers by deciding without a legal basis.

25. A solution compatible with the Treaties aimed at reinforcing the supervision of the respect of the rule of law, as such, by the Member States, however exists in the opinion of the Council Legal Service.

26. This solution is that Member States - and not the Council - agree on a review system of the functioning of the rule of law in the Member States, which may allow for the participation of the Commission[6] and of other institutions if necessary, and on the consequences that Member States might engage to draw from such review. The possibility for the Union to use the powers provided for in Article 7 TEU and Articles 258, 259 and 260 TFEU must be unaffected by such agreement among the Member States.

27. Such a peer review approach, with a possible involvement of the institutions if so decided, could find its legal basis in an intergovernmental agreement designed to supplement the law of the Union and to ensure effective respect of the values on which the Member States have founded the Union, without by doing so conferring on the Union competences whose transfer the Treaties have not foreseen.

[5] See Case C-207/01, Altair, ECR [2003] p. I-8894, paragraph 41.

[6] "It is apparent from the case-law of the Court that the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States", Case C-370/12, Pringle, ECR [2012] not yet published, paragraph 158.

REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 27 April 2016

on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee (1),

Having regard to the opinion of the Committee of the Regions (2),

Acting in accordance with the ordinary legislative procedure (3),

Whereas:

(1) The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union (the 'Charter') and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) provide that everyone has the right to the protection of personal data concerning him or her.

(2) The principles of, and rules on the protection of natural persons with regard to the processing of their personal data should, whatever their nationality or residence, respect their fundamental rights and freedoms, in particular their right to the protection of personal data. This Regulation is intended to contribute to the accomplishment of an area of freedom, security and justice and of an economic union, to economic and social progress, to the strengthening and the convergence of the economies within the internal market, and to the well-being of natural persons.

(3) Directive 95/46/EC of the European Parliament and of the Council (4) seeks to harmonise the protection of fundamental rights and freedoms of natural persons in respect of processing activities and to ensure the free flow of personal data between Member States.

(4) The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity.

(5) The economic and social integration resulting from the functioning of the internal market has led to a substantial increase in cross-border flows of personal data. The exchange of personal data between public and private actors, including natural persons, associations and undertakings across the Union has increased. National authorities in the Member States are being called upon by Union law to cooperate and exchange personal data so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State.

(6) Rapid technological developments and globalisation have brought new challenges for the protection of personal data. The scale of the collection and sharing of personal data has increased significantly. Technology allows both private companies and public authorities to make use of personal data on an unprecedented scale in order to pursue their activities. Natural persons increasingly make personal information available publicly and globally. Technology has transformed both the economy and social life, and should further facilitate the free flow of personal data within the Union and the transfer to third countries and international organisations, while ensuring a high level of the protection of personal data.

(7) Those developments require a strong and more coherent data protection framework in the Union, backed by strong enforcement, given the importance of creating the trust that will allow the digital economy to develop across the internal market. Natural persons

should have control of their own personal data. Legal and practical certainty for natural persons, economic operators and public authorities should be enhanced.

(8)Where this Regulation provides for specifications or restrictions of its rules by Member State law, Member States may, as far as necessary for coherence and for making the national provisions comprehensible to the persons to whom they apply, incorporate elements of this Regulation into their national law.

(9)The objectives and principles of Directive 95/46/EC remain sound, but it has not prevented fragmentation in the implementation of data protection across the Union, legal uncertainty or a widespread public perception that there are significant risks to the protection of natural persons, in particular with regard to online activity. Differences in the level of protection of the rights and freedoms of natural persons, in particular the right to the protection of personal data, with regard to the processing of personal data in the Member States may prevent the free flow of personal data throughout the Union. Those differences may therefore constitute an obstacle to the pursuit of economic activities at the level of the Union, distort competition and impede authorities in the discharge of their responsibilities under Union law. Such a difference in levels of protection is due to the existence of differences in the implementation and application of Directive 95/46/EC.

(10)In order to ensure a consistent and high level of protection of natural persons and to remove the obstacles to flows of personal data within the Union, the level of protection of the rights and freedoms of natural persons with regard to the processing of such data should be equivalent in all Member States. Consistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data should be ensured throughout the Union. Regarding the processing of personal data for compliance with a legal obligation, for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, Member States should be allowed to maintain or introduce national provisions to further specify the application of the rules of this Regulation. In conjunction with the general and horizontal law on data protection implementing Directive 95/46/EC, Member States have several sector-specific laws in areas that need more specific provisions. This Regulation also provides a margin of manoeuvre for Member States to specify its rules, including for the processing of special categories of personal data ('sensitive data'). To that extent, this Regulation does not exclude Member State law that sets out the circumstances for specific processing situations, including determining more precisely the conditions under which the processing of personal data is lawful.

(11)Effective protection of personal data throughout the Union requires the strengthening and setting out in detail of the rights of data subjects and the obligations of those who process and determine the processing of personal data, as well as equivalent powers for monitoring and ensuring compliance with the rules for the protection of personal data and equivalent sanctions for infringements in the Member States.

(12)Article 16(2) TFEU mandates the European Parliament and the Council to lay down the rules relating to the protection of natural persons with regard to the processing of personal data and the rules relating to the free movement of personal data.

(13)In order to ensure a consistent level of protection for natural persons throughout the Union and to prevent divergences hampering the free movement of personal data within the internal market, a Regulation is necessary to provide legal certainty and transparency for economic operators, including micro, small and medium-sized enterprises, and to provide natural persons in all Member States with the same level of legally enforceable rights and obligations and responsibilities for controllers and processors, to ensure consistent monitoring of the processing of personal data, and equivalent sanctions in all Member States as well as effective cooperation between the supervisory authorities of different Member States. The proper functioning of the internal market requires that the free movement of personal data within the Union is not restricted or prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data. To take account of the specific situation of micro, small and medium-sized enterprises, this Regulation includes a derogation for organisations with fewer than 250 employees with regard to record-keeping. In addition, the Union institutions and bodies, and Member States and their supervisory authorities, are encouraged to take account of the specific needs of micro, small and medium-sized enterprises in the application of this Regulation. The notion of micro, small and medium-sized enterprises should draw from Article 2 of the Annex to Commission Recommendation 2003/361/EC [(5)].

(14)The protection afforded by this Regulation should apply to natural persons, whatever their nationality or place of residence, in relation to the processing of their personal data. This Regulation does not cover the processing of personal data which concerns legal persons and in particular undertakings established as legal persons, including the name and the form of the legal person and the contact details of the legal person.

(15)In order to prevent creating a serious risk of circumvention, the protection of natural persons should be technologically neutral and should not depend on the techniques used. The protection of natural persons should apply to the processing of personal data by automated means, as well as to manual processing, if the personal data are contained or are intended to be contained in a filing system. Files or sets of files, as well as their cover pages, which are not structured according to specific criteria should

not fall within the scope of this Regulation.

(16) This Regulation does not apply to issues of protection of fundamental rights and freedoms or the free flow of personal data related to activities which fall outside the scope of Union law, such as activities concerning national security. This Regulation does not apply to the processing of personal data by the Member States when carrying out activities in relation to the common foreign and security policy of the Union.

(17) Regulation (EC) No 45/2001 of the European Parliament and of the Council [(6)] applies to the processing of personal data by the Union institutions, bodies, offices and agencies. Regulation (EC) No 45/2001 and other Union legal acts applicable to such processing of personal data should be adapted to the principles and rules established in this Regulation and applied in the light of this Regulation. In order to provide a strong and coherent data protection framework in the Union, the necessary adaptations of Regulation (EC) No 45/2001 should follow after the adoption of this Regulation, in order to allow application at the same time as this Regulation.

(18) This Regulation does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity and thus with no connection to a professional or commercial activity. Personal or household activities could include correspondence and the holding of addresses, or social networking and online activity undertaken within the context of such activities. However, this Regulation applies to controllers or processors which provide the means for processing personal data for such personal or household activities.

(19) The protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security and the free movement of such data, is the subject of a specific Union legal act. This Regulation should not, therefore, apply to processing activities for those purposes. However, personal data processed by public authorities under this Regulation should, when used for those purposes, be governed by a more specific Union legal act, namely Directive (EU) 2016/680 of the European Parliament and of the Council [(7)]. Member States may entrust competent authorities within the meaning of Directive (EU) 2016/680 with tasks which are not necessarily carried out for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and prevention of threats to public security, so that the processing of personal data for those other purposes, in so far as it is within the scope of Union law, falls within the scope of this Regulation.

With regard to the processing of personal data by those competent authorities for purposes falling within scope of this Regulation, Member States should be able to maintain or introduce more specific provisions to adapt the application of the rules of this Regulation. Such provisions may determine more precisely specific requirements for the processing of personal data by those competent authorities for those other purposes, taking into account the constitutional, organisational and administrative structure of the respective Member State. When the processing of personal data by private bodies falls within the scope of this Regulation, this Regulation should provide for the possibility for Member States under specific conditions to restrict by law certain obligations and rights when such a restriction constitutes a necessary and proportionate measure in a democratic society to safeguard specific important interests including public security and the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security. This is relevant for instance in the framework of anti-money laundering or the activities of forensic laboratories.

(20) While this Regulation applies, inter alia, to the activities of courts and other judicial authorities, Union or Member State law could specify the processing operations and processing procedures in relation to the processing of personal data by courts and other judicial authorities. The competence of the supervisory authorities should not cover the processing of personal data when courts are acting in their judicial capacity, in order to safeguard the independence of the judiciary in the performance of its judicial tasks, including decision-making. It should be possible to entrust supervision of such data processing operations to specific bodies within the judicial system of the Member State, which should, in particular ensure compliance with the rules of this Regulation, enhance awareness among members of the judiciary of their obligations under this Regulation and handle complaints in relation to such data processing operations.

(21) This Regulation is without prejudice to the application of Directive 2000/31/EC of the European Parliament and of the Council [(8)], in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive. That Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between Member States.

(22) Any processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union should be carried out in accordance with this Regulation, regardless of whether the processing itself takes place within the Union. Establishment implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in that respect.

(23) In order to ensure that natural persons are not deprived of the protection to which they are entitled under this Regulation, the processing of personal data of data subjects who are in the Union by a controller or a processor not established in the Union should be subject to this Regulation where the processing activities are related to offering goods or services to such data subjects irrespective of whether connected to a payment. In order to determine whether such a controller or processor is offering goods or services to data subjects who are in the Union, it should be ascertained whether it is apparent that the controller or processor envisages offering services to data subjects in one or more Member States in the Union. Whereas the mere accessibility of the controller's, processor's or an intermediary's website in the Union, of an email address or of other contact details, or the use of a language generally used in the third country where the controller is established, is insufficient to ascertain such intention, factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, or the mentioning of customers or users who are in the Union, may make it apparent that the controller envisages offering goods or services to data subjects in the Union.

(24) The processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union should also be subject to this Regulation when it is related to the monitoring of the behaviour of such data subjects in so far as their behaviour takes place within the Union. In order to determine whether a processing activity can be considered to monitor the behaviour of data subjects, it should be ascertained whether natural persons are tracked on the internet including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes.

(25) Where Member State law applies by virtue of public international law, this Regulation should also apply to a controller not established in the Union, such as in a Member State's diplomatic mission or consular post.

(26) The principles of data protection should apply to any information concerning an identified or identifiable natural person. Personal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments. The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes.

(27) This Regulation does not apply to the personal data of deceased persons. Member States may provide for rules regarding the processing of personal data of deceased persons.

(28) The application of pseudonymisation to personal data can reduce the risks to the data subjects concerned and help controllers and processors to meet their data-protection obligations. The explicit introduction of ‘pseudonymisation’ in this Regulation is not intended to preclude any other measures of data protection.

(29) In order to create incentives to apply pseudonymisation when processing personal data, measures of pseudonymisation should, whilst allowing general analysis, be possible within the same controller when that controller has taken technical and organisational measures necessary to ensure, for the processing concerned, that this Regulation is implemented, and that additional information for attributing the personal data to a specific data subject is kept separately. The controller processing the personal data should indicate the authorised persons within the same controller.

(30) Natural persons may be associated with online identifiers provided by their devices, applications, tools and protocols, such as internet protocol addresses, cookie identifiers or other identifiers such as radio frequency identification tags. This may leave traces which, in particular when combined with unique identifiers and other information received by the servers, may be used to create profiles of the natural persons and identify them.

(31) Public authorities to which personal data are disclosed in accordance with a legal obligation for the exercise of their official mission, such as tax and customs authorities, financial investigation units, independent administrative authorities, or financial market authorities responsible for the regulation and supervision of securities markets should not be regarded as recipients if they receive personal data which are necessary to carry out a particular inquiry in the general interest, in accordance with Union or Member State law. The requests for disclosure sent by the public authorities should always be in writing, reasoned and occasional and should not concern the entirety of a filing system or lead to the interconnection of filing systems. The processing of personal data by those public authorities should comply with the applicable data-protection rules according to the purposes of

the processing.

(32)Consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her, such as by a written statement, including by electronic means, or an oral statement. This could include ticking a box when visiting an internet website, choosing technical settings for information society services or another statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of his or her personal data. Silence, pre-ticked boxes or inactivity should not therefore constitute consent. Consent should cover all processing activities carried out for the same purpose or purposes. When the processing has multiple purposes, consent should be given for all of them. If the data subject's consent is to be given following a request by electronic means, the request must be clear, concise and not unnecessarily disruptive to the use of the service for which it is provided.

(33)It is often not possible to fully identify the purpose of personal data processing for scientific research purposes at the time of data collection. Therefore, data subjects should be allowed to give their consent to certain areas of scientific research when in keeping with recognised ethical standards for scientific research. Data subjects should have the opportunity to give their consent only to certain areas of research or parts of research projects to the extent allowed by the intended purpose.

(34)Genetic data should be defined as personal data relating to the inherited or acquired genetic characteristics of a natural person which result from the analysis of a biological sample from the natural person in question, in particular chromosomal, deoxyribonucleic acid (DNA) or ribonucleic acid (RNA) analysis, or from the analysis of another element enabling equivalent information to be obtained.

(35)Personal data concerning health should include all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject. This includes information about the natural person collected in the course of the registration for, or the provision of, health care services as referred to in Directive 2011/24/EU of the European Parliament and of the Council [(9)] to that natural person; a number, symbol or particular assigned to a natural person to uniquely identify the natural person for health purposes; information derived from the testing or examination of a body part or bodily substance, including from genetic data and biological samples; and any information on, for example, a disease, disability, disease risk, medical history, clinical treatment or the physiological or biomedical state of the data subject independent of its source, for example from a physician or other health professional, a hospital, a medical device or an in vitro diagnostic test.

(36)The main establishment of a controller in the Union should be the place of its central administration in the Union, unless the decisions on the purposes and means of the processing of personal data are taken in another establishment of the controller in the Union, in which case that other establishment should be considered to be the main establishment. The main establishment of a controller in the Union should be determined according to objective criteria and should imply the effective and real exercise of management activities determining the main decisions as to the purposes and means of processing through stable arrangements. That criterion should not depend on whether the processing of personal data is carried out at that location. The presence and use of technical means and technologies for processing personal data or processing activities do not, in themselves, constitute a main establishment and are therefore not determining criteria for a main establishment. The main establishment of the processor should be the place of its central administration in the Union or, if it has no central administration in the Union, the place where the main processing activities take place in the Union. In cases involving both the controller and the processor, the competent lead supervisory authority should remain the supervisory authority of the Member State where the controller has its main establishment, but the supervisory authority of the processor should be considered to be a supervisory authority concerned and that supervisory authority should participate in the cooperation procedure provided for by this Regulation. In any case, the supervisory authorities of the Member State or Member States where the processor has one or more establishments should not be considered to be supervisory authorities concerned where the draft decision concerns only the controller. Where the processing is carried out by a group of undertakings, the main establishment of the controlling undertaking should be considered to be the main establishment of the group of undertakings, except where the purposes and means of processing are determined by another undertaking.

(37)A group of undertakings should cover a controlling undertaking and its controlled undertakings, whereby the controlling undertaking should be the undertaking which can exert a dominant influence over the other undertakings by virtue, for example, of ownership, financial participation or the rules which govern it or the power to have personal data protection rules implemented. An undertaking which controls the processing of personal data in undertakings affiliated to it should be regarded, together with those undertakings, as a group of undertakings.

(38)Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular,

apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child. The consent of the holder of parental responsibility should not be necessary in the context of preventive or counselling services offered directly to a child.

(39) Any processing of personal data should be lawful and fair. It should be transparent to natural persons that personal data concerning them are collected, used, consulted or otherwise processed and to what extent the personal data are or will be processed. The principle of transparency requires that any information and communication relating to the processing of those personal data be easily accessible and easy to understand, and that clear and plain language be used. That principle concerns, in particular, information to the data subjects on the identity of the controller and the purposes of the processing and further information to ensure fair and transparent processing in respect of the natural persons concerned and their right to obtain confirmation and communication of personal data concerning them which are being processed. Natural persons should be made aware of risks, rules, safeguards and rights in relation to the processing of personal data and how to exercise their rights in relation to such processing. In particular, the specific purposes for which personal data are processed should be explicit and legitimate and determined at the time of the collection of the personal data. The personal data should be adequate, relevant and limited to what is necessary for the purposes for which they are processed. This requires, in particular, ensuring that the period for which the personal data are stored is limited to a strict minimum. Personal data should be processed only if the purpose of the processing could not reasonably be fulfilled by other means. In order to ensure that the personal data are not kept longer than necessary, time limits should be established by the controller for erasure or for a periodic review. Every reasonable step should be taken to ensure that personal data which are inaccurate are rectified or deleted. Personal data should be processed in a manner that ensures appropriate security and confidentiality of the personal data, including for preventing unauthorised access to or use of personal data and the equipment used for the processing.

(40) In order for processing to be lawful, personal data should be processed on the basis of the consent of the data subject concerned or some other legitimate basis, laid down by law, either in this Regulation or in other Union or Member State law as referred to in this Regulation, including the necessity for compliance with the legal obligation to which the controller is subject or the necessity for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract.

(41) Where this Regulation refers to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament, without prejudice to requirements pursuant to the constitutional order of the Member State concerned. However, such a legal basis or legislative measure should be clear and precise and its application should be foreseeable to persons subject to it, in accordance with the case-law of the Court of Justice of the European Union (the 'Court of Justice') and the European Court of Human Rights.

(42) Where processing is based on the data subject's consent, the controller should be able to demonstrate that the data subject has given consent to the processing operation. In particular in the context of a written declaration on another matter, safeguards should ensure that the data subject is aware of the fact that and the extent to which consent is given. In accordance with Council Directive 93/13/EEC [(10)] a declaration of consent pre-formulated by the controller should be provided in an intelligible and easily accessible form, using clear and plain language and it should not contain unfair terms. For consent to be informed, the data subject should be aware at least of the identity of the controller and the purposes of the processing for which the personal data are intended. Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.

(43) In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller, in particular where the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation. Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case, or if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance.

(44) Processing should be lawful where it is necessary in the context of a contract or the intention to enter into a contract.

(45) Where processing is carried out in accordance with a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority, the processing should have a basis in Union or Member State law. This Regulation does not require a specific law for each individual processing. A law as a basis for several processing operations based on a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of an official authority may be sufficient. It should also be for Union or Member State law to determine the purpose of processing. Furthermore, that law could specify the general conditions of this Regulation governing the lawfulness of personal data processing, establish

specifications for determining the controller, the type of personal data which are subject to the processing, the data subjects concerned, the entities to which the personal data may be disclosed, the purpose limitations, the storage period and other measures to ensure lawful and fair processing. It should also be for Union or Member State law to determine whether the controller performing a task carried out in the public interest or in the exercise of official authority should be a public authority or another natural or legal person governed by public law, or, where it is in the public interest to do so, including for health purposes such as public health and social protection and the management of health care services, by private law, such as a professional association.

(46) The processing of personal data should also be regarded to be lawful where it is necessary to protect an interest which is essential for the life of the data subject or that of another natural person. Processing of personal data based on the vital interest of another natural person should in principle take place only where the processing cannot be manifestly based on another legal basis. Some types of processing may serve both important grounds of public interest and the vital interests of the data subject as for instance when processing is necessary for humanitarian purposes, including for monitoring epidemics and their spread or in situations of humanitarian emergencies, in particular in situations of natural and man-made disasters.

(47) The legitimate interests of a controller, including those of a controller to which the personal data may be disclosed, or of a third party, may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding, taking into consideration the reasonable expectations of data subjects based on their relationship with the controller. Such legitimate interest could exist for example where there is a relevant and appropriate relationship between the data subject and the controller in situations such as where the data subject is a client or in the service of the controller. At any rate the existence of a legitimate interest would need careful assessment including whether a data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place. The interests and fundamental rights of the data subject could in particular override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect further processing. Given that it is for the legislator to provide by law for the legal basis for public authorities to process personal data, that legal basis should not apply to the processing by public authorities in the performance of their tasks. The processing of personal data strictly necessary for the purposes of preventing fraud also constitutes a legitimate interest of the data controller concerned. The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.

(48) Controllers that are part of a group of undertakings or institutions affiliated to a central body may have a legitimate interest in transmitting personal data within the group of undertakings for internal administrative purposes, including the processing of clients' or employees' personal data. The general principles for the transfer of personal data, within a group of undertakings, to an undertaking located in a third country remain unaffected.

(49) The processing of personal data to the extent strictly necessary and proportionate for the purposes of ensuring network and information security, i.e. the ability of a network or an information system to resist, at a given level of confidence, accidental events or unlawful or malicious actions that compromise the availability, authenticity, integrity and confidentiality of stored or transmitted personal data, and the security of the related services offered by, or accessible via, those networks and systems, by public authorities, by computer emergency response teams (CERTs), computer security incident response teams (CSIRTs), by providers of electronic communications networks and services and by providers of security technologies and services, constitutes a legitimate interest of the data controller concerned. This could, for example, include preventing unauthorised access to electronic communications networks and malicious code distribution and stopping ‘denial of service’ attacks and damage to computer and electronic communication systems.

(50) The processing of personal data for purposes other than those for which the personal data were initially collected should be allowed only where the processing is compatible with the purposes for which the personal data were initially collected. In such a case, no legal basis separate from that which allowed the collection of the personal data is required. If the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, Union or Member State law may determine and specify the tasks and purposes for which the further processing should be regarded as compatible and lawful. Further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes should be considered to be compatible lawful processing operations. The legal basis provided by Union or Member State law for the processing of personal data may also provide a legal basis for further processing. In order to ascertain whether a purpose of further processing is compatible with the purpose for which the personal data are initially collected, the controller, after having met all the requirements for the lawfulness of the original processing, should take into account, inter alia: any link between those purposes and the purposes of the intended further processing; the context in which the personal data have been collected, in particular the reasonable expectations of data subjects based on their relationship with the controller as to their further use; the nature of the personal data; the consequences of the intended further processing for data subjects; and the existence of appropriate safeguards in both the original and intended further processing operations.

Where the data subject has given consent or the processing is based on Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard, in particular, important objectives of general public interest, the controller should be allowed to further process the personal data irrespective of the compatibility of the purposes. In any case, the application of the principles set out in this Regulation and in particular the information of the data subject on those other purposes and on his or her rights including the right to object, should be ensured. Indicating possible criminal acts or threats to public security by the controller and transmitting the relevant personal data in individual cases or in several cases relating to the same criminal act or threats to public security to a competent authority should be regarded as being in the legitimate interest pursued by the controller. However, such transmission in the legitimate interest of the controller or further processing of personal data should be prohibited if the processing is not compatible with a legal, professional or other binding obligation of secrecy.

(51) Personal data which are, by their nature, particularly sensitive in relation to fundamental rights and freedoms merit specific protection as the context of their processing could create significant risks to the fundamental rights and freedoms. Those personal data should include personal data revealing racial or ethnic origin, whereby the use of the term 'racial origin' in this Regulation does not imply an acceptance by the Union of theories which attempt to determine the existence of separate human races. The processing of photographs should not systematically be considered to be processing of special categories of personal data as they are covered by the definition of biometric data only when processed through a specific technical means allowing the unique identification or authentication of a natural person. Such personal data should not be processed, unless processing is allowed in specific cases set out in this Regulation, taking into account that Member States law may lay down specific provisions on data protection in order to adapt the application of the rules of this Regulation for compliance with a legal obligation or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. In addition to the specific requirements for such processing, the general principles and other rules of this Regulation should apply, in particular as regards the conditions for lawful processing. Derogations from the general prohibition for processing such special categories of personal data should be explicitly provided, inter alia, where the data subject gives his or her explicit consent or in respect of specific needs in particular where the processing is carried out in the course of legitimate activities by certain associations or foundations the purpose of which is to permit the exercise of fundamental freedoms.

(52) Derogating from the prohibition on processing special categories of personal data should also be allowed when provided for in Union or Member State law and subject to suitable safeguards, so as to protect personal data and other fundamental rights, where it is in the public interest to do so, in particular processing personal data in the field of employment law, social protection law including pensions and for health security, monitoring and alert purposes, the prevention or control of communicable diseases and other serious threats to health. Such a derogation may be made for health purposes, including public health and the management of health-care services, especially in order to ensure the quality and cost-effectiveness of the procedures used for settling claims for benefits and services in the health insurance system, or for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes. A derogation should also allow the processing of such personal data where necessary for the establishment, exercise or defence of legal claims, whether in court proceedings or in an administrative or out-of-court procedure.

(53) Special categories of personal data which merit higher protection should be processed for health-related purposes only where necessary to achieve those purposes for the benefit of natural persons and society as a whole, in particular in the context of the management of health or social care services and systems, including processing by the management and central national health authorities of such data for the purpose of quality control, management information and the general national and local supervision of the health or social care system, and ensuring continuity of health or social care and cross-border healthcare or health security, monitoring and alert purposes, or for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, based on Union or Member State law which has to meet an objective of public interest, as well as for studies conducted in the public interest in the area of public health. Therefore, this Regulation should provide for harmonised conditions for the processing of special categories of personal data concerning health, in respect of specific needs, in particular where the processing of such data is carried out for certain health-related purposes by persons subject to a legal obligation of professional secrecy. Union or Member State law should provide for specific and suitable measures so as to protect the fundamental rights and the personal data of natural persons. Member States should be allowed to maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health. However, this should not hamper the free flow of personal data within the Union when those conditions apply to cross-border processing of such data.

(54) The processing of special categories of personal data may be necessary for reasons of public interest in the areas of public health without consent of the data subject. Such processing should be subject to suitable and specific measures so as to protect the rights and freedoms of natural persons. In that context, 'public health' should be interpreted as defined in Regulation (EC) No 1338/2008 of the European Parliament and of the Council [(11)], namely all elements related to health, namely health status, including morbidity and disability, the determinants having an effect on that health status, health care needs, resources allocated

to health care, the provision of, and universal access to, health care as well as health care expenditure and financing, and the causes of mortality. Such processing of data concerning health for reasons of public interest should not result in personal data being processed for other purposes by third parties such as employers or insurance and banking companies.

(55)Moreover, the processing of personal data by official authorities for the purpose of achieving the aims, laid down by constitutional law or by international public law, of officially recognised religious associations, is carried out on grounds of public interest.

(56)Where in the course of electoral activities, the operation of the democratic system in a Member State requires that political parties compile personal data on people's political opinions, the processing of such data may be permitted for reasons of public interest, provided that appropriate safeguards are established.

(57)If the personal data processed by a controller do not permit the controller to identify a natural person, the data controller should not be obliged to acquire additional information in order to identify the data subject for the sole purpose of complying with any provision of this Regulation. However, the controller should not refuse to take additional information provided by the data subject in order to support the exercise of his or her rights. Identification should include the digital identification of a data subject, for example through authentication mechanism such as the same credentials, used by the data subject to log-in to the on-line service offered by the data controller.

(58)The principle of transparency requires that any information addressed to the public or to the data subject be concise, easily accessible and easy to understand, and that clear and plain language and, additionally, where appropriate, visualisation be used. Such information could be provided in electronic form, for example, when addressed to the public, through a website. This is of particular relevance in situations where the proliferation of actors and the technological complexity of practice make it difficult for the data subject to know and understand whether, by whom and for what purpose personal data relating to him or her are being collected, such as in the case of online advertising. Given that children merit specific protection, any information and communication, where processing is addressed to a child, should be in such a clear and plain language that the child can easily understand.

(59)Modalities should be provided for facilitating the exercise of the data subject's rights under this Regulation, including mechanisms to request and, if applicable, obtain, free of charge, in particular, access to and rectification or erasure of personal data and the exercise of the right to object. The controller should also provide means for requests to be made electronically, especially where personal data are processed by electronic means. The controller should be obliged to respond to requests from the data subject without undue delay and at the latest within one month and to give reasons where the controller does not intend to comply with any such requests.

(60)The principles of fair and transparent processing require that the data subject be informed of the existence of the processing operation and its purposes. The controller should provide the data subject with any further information necessary to ensure fair and transparent processing taking into account the specific circumstances and context in which the personal data are processed. Furthermore, the data subject should be informed of the existence of profiling and the consequences of such profiling. Where the personal data are collected from the data subject, the data subject should also be informed whether he or she is obliged to provide the personal data and of the consequences, where he or she does not provide such data. That information may be provided in combination with standardised icons in order to give in an easily visible, intelligible and clearly legible manner, a meaningful overview of the intended processing. Where the icons are presented electronically, they should be machine-readable.

(61)The information in relation to the processing of personal data relating to the data subject should be given to him or her at the time of collection from the data subject, or, where the personal data are obtained from another source, within a reasonable period, depending on the circumstances of the case. Where personal data can be legitimately disclosed to another recipient, the data subject should be informed when the personal data are first disclosed to the recipient. Where the controller intends to process the personal data for a purpose other than that for which they were collected, the controller should provide the data subject prior to that further processing with information on that other purpose and other necessary information. Where the origin of the personal data cannot be provided to the data subject because various sources have been used, general information should be provided.

(62)However, it is not necessary to impose the obligation to provide information where the data subject already possesses the information, where the recording or disclosure of the personal data is expressly laid down by law or where the provision of information to the data subject proves to be impossible or would involve a disproportionate effort. The latter could in particular be the case where processing is carried out for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes. In that regard, the number of data subjects, the age of the data and any appropriate safeguards adopted should be taken into consideration.

(63)A data subject should have the right of access to personal data which have been collected concerning him or her, and to exercise that right easily and at reasonable intervals, in order to be aware of, and verify, the lawfulness of the processing. This includes

the right for data subjects to have access to data concerning their health, for example the data in their medical records containing information such as diagnoses, examination results, assessments by treating physicians and any treatment or interventions provided. Every data subject should therefore have the right to know and obtain communication in particular with regard to the purposes for which the personal data are processed, where possible the period for which the personal data are processed, the recipients of the personal data, the logic involved in any automatic personal data processing and, at least when based on profiling, the consequences of such processing. Where possible, the controller should be able to provide remote access to a secure system which would provide the data subject with direct access to his or her personal data. That right should not adversely affect the rights or freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software. However, the result of those considerations should not be a refusal to provide all information to the data subject. Where the controller processes a large quantity of information concerning the data subject, the controller should be able to request that, before the information is delivered, the data subject specify the information or processing activities to which the request relates.

(64) The controller should use all reasonable measures to verify the identity of a data subject who requests access, in particular in the context of online services and online identifiers. A controller should not retain personal data for the sole purpose of being able to react to potential requests.

(65) A data subject should have the right to have personal data concerning him or her rectified and a 'right to be forgotten' where the retention of such data infringes this Regulation or Union or Member State law to which the controller is subject. In particular, a data subject should have the right to have his or her personal data erased and no longer processed where the personal data are no longer necessary in relation to the purposes for which they are collected or otherwise processed, where a data subject has withdrawn his or her consent or objects to the processing of personal data concerning him or her, or where the processing of his or her personal data does not otherwise comply with this Regulation. That right is relevant in particular where the data subject has given his or her consent as a child and is not fully aware of the risks involved by the processing, and later wants to remove such personal data, especially on the internet. The data subject should be able to exercise that right notwithstanding the fact that he or she is no longer a child. However, the further retention of the personal data should be lawful where it is necessary, for exercising the right of freedom of expression and information, for compliance with a legal obligation, for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims.

(66) To strengthen the right to be forgotten in the online environment, the right to erasure should also be extended in such a way that a controller who has made the personal data public should be obliged to inform the controllers which are processing such personal data to erase any links to, or copies or replications of those personal data. In doing so, that controller should take reasonable steps, taking into account available technology and the means available to the controller, including technical measures, to inform the controllers which are processing the personal data of the data subject's request.

(67) Methods by which to restrict the processing of personal data could include, inter alia, temporarily moving the selected data to another processing system, making the selected personal data unavailable to users, or temporarily removing published data from a website. In automated filing systems, the restriction of processing should in principle be ensured by technical means in such a manner that the personal data are not subject to further processing operations and cannot be changed. The fact that the processing of personal data is restricted should be clearly indicated in the system.

(68) To further strengthen the control over his or her own data, where the processing of personal data is carried out by automated means, the data subject should also be allowed to receive personal data concerning him or her which he or she has provided to a controller in a structured, commonly used, machine-readable and interoperable format, and to transmit it to another controller. Data controllers should be encouraged to develop interoperable formats that enable data portability. That right should apply where the data subject provided the personal data on the basis of his or her consent or the processing is necessary for the performance of a contract. It should not apply where processing is based on a legal ground other than consent or contract. By its very nature, that right should not be exercised against controllers processing personal data in the exercise of their public duties. It should therefore not apply where the processing of the personal data is necessary for compliance with a legal obligation to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of an official authority vested in the controller. The data subject's right to transmit or receive personal data concerning him or her should not create an obligation for the controllers to adopt or maintain processing systems which are technically compatible. Where, in a certain set of personal data, more than one data subject is concerned, the right to receive the personal data should be without prejudice to the rights and freedoms of other data subjects in accordance with this Regulation. Furthermore, that right should not prejudice the right of the data subject to obtain the erasure of personal data and the limitations of that right as set out in this Regulation and should, in particular, not imply the erasure of personal data concerning the data subject which have been provided by him or her for the performance of a contract to the extent that and for as long as the personal data are necessary for the

performance of that contract. Where technically feasible, the data subject should have the right to have the personal data transmitted directly from one controller to another.

(69) Where personal data might lawfully be processed because processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, or on grounds of the legitimate interests of a controller or a third party, a data subject should, nevertheless, be entitled to object to the processing of any personal data relating to his or her particular situation. It should be for the controller to demonstrate that its compelling legitimate interest overrides the interests or the fundamental rights and freedoms of the data subject.

(70) Where personal data are processed for the purposes of direct marketing, the data subject should have the right to object to such processing, including profiling to the extent that it is related to such direct marketing, whether with regard to initial or further processing, at any time and free of charge. That right should be explicitly brought to the attention of the data subject and presented clearly and separately from any other information.

(71) The data subject should have the right not to be subject to a decision, which may include a measure, evaluating personal aspects relating to him or her which is based solely on automated processing and which produces legal effects concerning him or her or similarly significantly affects him or her, such as automatic refusal of an online credit application or e-recruiting practices without any human intervention. Such processing includes 'profiling' that consists of any form of automated processing of personal data evaluating the personal aspects relating to a natural person, in particular to analyse or predict aspects concerning the data subject's performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, where it produces legal effects concerning him or her or similarly significantly affects him or her. However, decision-making based on such processing, including profiling, should be allowed where expressly authorised by Union or Member State law to which the controller is subject, including for fraud and tax-evasion monitoring and prevention purposes conducted in accordance with the regulations, standards and recommendations of Union institutions or national oversight bodies and to ensure the security and reliability of a service provided by the controller, or necessary for the entering or performance of a contract between the data subject and a controller, or when the data subject has given his or her explicit consent. In any case, such processing should be subject to suitable safeguards, which should include specific information to the data subject and the right to obtain human intervention, to express his or her point of view, to obtain an explanation of the decision reached after such assessment and to challenge the decision. Such measure should not concern a child.

In order to ensure fair and transparent processing in respect of the data subject, taking into account the specific circumstances and context in which the personal data are processed, the controller should use appropriate mathematical or statistical procedures for the profiling, implement technical and organisational measures appropriate to ensure, in particular, that factors which result in inaccuracies in personal data are corrected and the risk of errors is minimised, secure personal data in a manner that takes account of the potential risks involved for the interests and rights of the data subject and that prevents, inter alia, discriminatory effects on natural persons on the basis of racial or ethnic origin, political opinion, religion or beliefs, trade union membership, genetic or health status or sexual orientation, or that result in measures having such an effect. Automated decision-making and profiling based on special categories of personal data should be allowed only under specific conditions.

(72) Profiling is subject to the rules of this Regulation governing the processing of personal data, such as the legal grounds for processing or data protection principles. The European Data Protection Board established by this Regulation (the 'Board') should be able to issue guidance in that context.

(73) Restrictions concerning specific principles and the rights of information, access to and rectification or erasure of personal data, the right to data portability, the right to object, decisions based on profiling, as well as the communication of a personal data breach to a data subject and certain related obligations of the controllers may be imposed by Union or Member State law, as far as necessary and proportionate in a democratic society to safeguard public security, including the protection of human life especially in response to natural or manmade disasters, the prevention, investigation and prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, or of breaches of ethics for regulated professions, other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, the keeping of public registers kept for reasons of general public interest, further processing of archived personal data to provide specific information related to the political behaviour under former totalitarian state regimes or the protection of the data subject or the rights and freedoms of others, including social protection, public health and humanitarian purposes. Those restrictions should be in accordance with the requirements set out in the Charter and in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(74) The responsibility and liability of the controller for any processing of personal data carried out by the controller or on the controller's behalf should be established. In particular, the controller should be obliged to implement appropriate and effective measures and

be able to demonstrate the compliance of processing activities with this Regulation, including the effectiveness of the measures. Those measures should take into account the nature, scope, context and purposes of the processing and the risk to the rights and freedoms of natural persons.

(75) The risk to the rights and freedoms of natural persons, of varying likelihood and severity, may result from personal data processing which could lead to physical, material or non-material damage, in particular: where the processing may give rise to discrimination, identity theft or fraud, financial loss, damage to the reputation, loss of confidentiality of personal data protected by professional secrecy, unauthorised reversal of pseudonymisation, or any other significant economic or social disadvantage; where data subjects might be deprived of their rights and freedoms or prevented from exercising control over their personal data; where personal data are processed which reveal racial or ethnic origin, political opinions, religion or philosophical beliefs, trade union membership, and the processing of genetic data, data concerning health or data concerning sex life or criminal convictions and offences or related security measures; where personal aspects are evaluated, in particular analysing or predicting aspects concerning performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, in order to create or use personal profiles; where personal data of vulnerable natural persons, in particular of children, are processed; or where processing involves a large amount of personal data and affects a large number of data subjects.

(76) The likelihood and severity of the risk to the rights and freedoms of the data subject should be determined by reference to the nature, scope, context and purposes of the processing. Risk should be evaluated on the basis of an objective assessment, by which it is established whether data processing operations involve a risk or a high risk.

(77) Guidance on the implementation of appropriate measures and on the demonstration of compliance by the controller or the processor, especially as regards the identification of the risk related to the processing, their assessment in terms of origin, nature, likelihood and severity, and the identification of best practices to mitigate the risk, could be provided in particular by means of approved codes of conduct, approved certifications, guidelines provided by the Board or indications provided by a data protection officer. The Board may also issue guidelines on processing operations that are considered to be unlikely to result in a high risk to the rights and freedoms of natural persons and indicate what measures may be sufficient in such cases to address such risk.

(78) The protection of the rights and freedoms of natural persons with regard to the processing of personal data require that appropriate technical and organisational measures be taken to ensure that the requirements of this Regulation are met. In order to be able to demonstrate compliance with this Regulation, the controller should adopt internal policies and implement measures which meet in particular the principles of data protection by design and data protection by default. Such measures could consist, inter alia, of minimising the processing of personal data, pseudonymising personal data as soon as possible, transparency with regard to the functions and processing of personal data, enabling the data subject to monitor the data processing, enabling the controller to create and improve security features. When developing, designing, selecting and using applications, services and products that are based on the processing of personal data or process personal data to fulfil their task, producers of the products, services and applications should be encouraged to take into account the right to data protection when developing and designing such products, services and applications and, with due regard to the state of the art, to make sure that controllers and processors are able to fulfil their data protection obligations. The principles of data protection by design and by default should also be taken into consideration in the context of public tenders.

(79) The protection of the rights and freedoms of data subjects as well as the responsibility and liability of controllers and processors, also in relation to the monitoring by and measures of supervisory authorities, requires a clear allocation of the responsibilities under this Regulation, including where a controller determines the purposes and means of the processing jointly with other controllers or where a processing operation is carried out on behalf of a controller.

(80) Where a controller or a processor not established in the Union is processing personal data of data subjects who are in the Union whose processing activities are related to the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union, or to the monitoring of their behaviour as far as their behaviour takes place within the Union, the controller or the processor should designate a representative, unless the processing is occasional, does not include processing, on a large scale, of special categories of personal data or the processing of personal data relating to criminal convictions and offences, and is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing or if the controller is a public authority or body. The representative should act on behalf of the controller or the processor and may be addressed by any supervisory authority. The representative should be explicitly designated by a written mandate of the controller or of the processor to act on its behalf with regard to its obligations under this Regulation. The designation of such a representative does not affect the responsibility or liability of the controller or of the processor under this Regulation. Such a representative should perform its tasks according to the mandate received from the controller or processor, including cooperating with the competent supervisory authorities with regard to any action taken to ensure compliance with this Regulation. The designated representative should be subject to enforcement proceedings in the event of

non-compliance by the controller or processor.

(81) To ensure compliance with the requirements of this Regulation in respect of the processing to be carried out by the processor on behalf of the controller, when entrusting a processor with processing activities, the controller should use only processors providing sufficient guarantees, in particular in terms of expert knowledge, reliability and resources, to implement technical and organisational measures which will meet the requirements of this Regulation, including for the security of processing. The adherence of the processor to an approved code of conduct or an approved certification mechanism may be used as an element to demonstrate compliance with the obligations of the controller. The carrying-out of processing by a processor should be governed by a contract or other legal act under Union or Member State law, binding the processor to the controller, setting out the subject-matter and duration of the processing, the nature and purposes of the processing, the type of personal data and categories of data subjects, taking into account the specific tasks and responsibilities of the processor in the context of the processing to be carried out and the risk to the rights and freedoms of the data subject. The controller and processor may choose to use an individual contract or standard contractual clauses which are adopted either directly by the Commission or by a supervisory authority in accordance with the consistency mechanism and then adopted by the Commission. After the completion of the processing on behalf of the controller, the processor should, at the choice of the controller, return or delete the personal data, unless there is a requirement to store the personal data under Union or Member State law to which the processor is subject.

(82) In order to demonstrate compliance with this Regulation, the controller or processor should maintain records of processing activities under its responsibility. Each controller and processor should be obliged to cooperate with the supervisory authority and make those records, on request, available to it, so that it might serve for monitoring those processing operations.

(83) In order to maintain security and to prevent processing in infringement of this Regulation, the controller or processor should evaluate the risks inherent in the processing and implement measures to mitigate those risks, such as encryption. Those measures should ensure an appropriate level of security, including confidentiality, taking into account the state of the art and the costs of implementation in relation to the risks and the nature of the personal data to be protected. In assessing data security risk, consideration should be given to the risks that are presented by personal data processing, such as accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed which may in particular lead to physical, material or non-material damage.

(84) In order to enhance compliance with this Regulation where processing operations are likely to result in a high risk to the rights and freedoms of natural persons, the controller should be responsible for the carrying-out of a data protection impact assessment to evaluate, in particular, the origin, nature, particularity and severity of that risk. The outcome of the assessment should be taken into account when determining the appropriate measures to be taken in order to demonstrate that the processing of personal data complies with this Regulation. Where a data-protection impact assessment indicates that processing operations involve a high risk which the controller cannot mitigate by appropriate measures in terms of available technology and costs of implementation, a consultation of the supervisory authority should take place prior to the processing.

(85) A personal data breach may, if not addressed in an appropriate and timely manner, result in physical, material or non-material damage to natural persons such as loss of control over their personal data or limitation of their rights, discrimination, identity theft or fraud, financial loss, unauthorised reversal of pseudonymisation, damage to reputation, loss of confidentiality of personal data protected by professional secrecy or any other significant economic or social disadvantage to the natural person concerned. Therefore, as soon as the controller becomes aware that a personal data breach has occurred, the controller should notify the personal data breach to the supervisory authority without undue delay and, where feasible, not later than 72 hours after having become aware of it, unless the controller is able to demonstrate, in accordance with the accountability principle, that the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons. Where such notification cannot be achieved within 72 hours, the reasons for the delay should accompany the notification and information may be provided in phases without undue further delay.

(86) The controller should communicate to the data subject a personal data breach, without undue delay, where that personal data breach is likely to result in a high risk to the rights and freedoms of the natural person in order to allow him or her to take the necessary precautions. The communication should describe the nature of the personal data breach as well as recommendations for the natural person concerned to mitigate potential adverse effects. Such communications to data subjects should be made as soon as reasonably feasible and in close cooperation with the supervisory authority, respecting guidance provided by it or by other relevant authorities such as law-enforcement authorities. For example, the need to mitigate an immediate risk of damage would call for prompt communication with data subjects whereas the need to implement appropriate measures against continuing or similar personal data breaches may justify more time for communication.

(87) It should be ascertained whether all appropriate technological protection and organisational measures have been implemented to establish immediately whether a personal data breach has taken place and to inform promptly the supervisory authority and

the data subject. The fact that the notification was made without undue delay should be established taking into account in particular the nature and gravity of the personal data breach and its consequences and adverse effects for the data subject. Such notification may result in an intervention of the supervisory authority in accordance with its tasks and powers laid down in this Regulation.

(88) In setting detailed rules concerning the format and procedures applicable to the notification of personal data breaches, due consideration should be given to the circumstances of that breach, including whether or not personal data had been protected by appropriate technical protection measures, effectively limiting the likelihood of identity fraud or other forms of misuse. Moreover, such rules and procedures should take into account the legitimate interests of law-enforcement authorities where early disclosure could unnecessarily hamper the investigation of the circumstances of a personal data breach.

(89) Directive 95/46/EC provided for a general obligation to notify the processing of personal data to the supervisory authorities. While that obligation produces administrative and financial burdens, it did not in all cases contribute to improving the protection of personal data. Such indiscriminate general notification obligations should therefore be abolished, and replaced by effective procedures and mechanisms which focus instead on those types of processing operations which are likely to result in a high risk to the rights and freedoms of natural persons by virtue of their nature, scope, context and purposes. Such types of processing operations may be those which in, particular, involve using new technologies, or are of a new kind and where no data protection impact assessment has been carried out before by the controller, or where they become necessary in the light of the time that has elapsed since the initial processing.

(90) In such cases, a data protection impact assessment should be carried out by the controller prior to the processing in order to assess the particular likelihood and severity of the high risk, taking into account the nature, scope, context and purposes of the processing and the sources of the risk. That impact assessment should include, in particular, the measures, safeguards and mechanisms envisaged for mitigating that risk, ensuring the protection of personal data and demonstrating compliance with this Regulation.

(91) This should in particular apply to large-scale processing operations which aim to process a considerable amount of personal data at regional, national or supranational level and which could affect a large number of data subjects and which are likely to result in a high risk, for example, on account of their sensitivity, where in accordance with the achieved state of technological knowledge a new technology is used on a large scale as well as to other processing operations which result in a high risk to the rights and freedoms of data subjects, in particular where those operations render it more difficult for data subjects to exercise their rights. A data protection impact assessment should also be made where personal data are processed for taking decisions regarding specific natural persons following any systematic and extensive evaluation of personal aspects relating to natural persons based on profiling those data or following the processing of special categories of personal data, biometric data, or data on criminal convictions and offences or related security measures. A data protection impact assessment is equally required for monitoring publicly accessible areas on a large scale, especially when using optic-electronic devices or for any other operations where the competent supervisory authority considers that the processing is likely to result in a high risk to the rights and freedoms of data subjects, in particular because they prevent data subjects from exercising a right or using a service or a contract, or because they are carried out systematically on a large scale. The processing of personal data should not be considered to be on a large scale if the processing concerns personal data from patients or clients by an individual physician, other health care professional or lawyer. In such cases, a data protection impact assessment should not be mandatory.

(92) There are circumstances under which it may be reasonable and economical for the subject of a data protection impact assessment to be broader than a single project, for example where public authorities or bodies intend to establish a common application or processing platform or where several controllers plan to introduce a common application or processing environment across an industry sector or segment or for a widely used horizontal activity.

(93) In the context of the adoption of the Member State law on which the performance of the tasks of the public authority or public body is based and which regulates the specific processing operation or set of operations in question, Member States may deem it necessary to carry out such assessment prior to the processing activities.

(94) Where a data protection impact assessment indicates that the processing would, in the absence of safeguards, security measures and mechanisms to mitigate the risk, result in a high risk to the rights and freedoms of natural persons and the controller is of the opinion that the risk cannot be mitigated by reasonable means in terms of available technologies and costs of implementation, the supervisory authority should be consulted prior to the start of processing activities. Such high risk is likely to result from certain types of processing and the extent and frequency of processing, which may result also in a realisation of damage or interference with the rights and freedoms of the natural person. The supervisory authority should respond to the request for consultation within a specified period. However, the absence of a reaction of the supervisory authority within that period should be without prejudice to any intervention of the supervisory authority in accordance with its tasks and powers laid down in this Regulation, including

the power to prohibit processing operations. As part of that consultation process, the outcome of a data protection impact assessment carried out with regard to the processing at issue may be submitted to the supervisory authority, in particular the measures envisaged to mitigate the risk to the rights and freedoms of natural persons.

(95)The processor should assist the controller, where necessary and upon request, in ensuring compliance with the obligations deriving from the carrying out of data protection impact assessments and from prior consultation of the supervisory authority.

(96)A consultation of the supervisory authority should also take place in the course of the preparation of a legislative or regulatory measure which provides for the processing of personal data, in order to ensure compliance of the intended processing with this Regulation and in particular to mitigate the risk involved for the data subject.

(97)Where the processing is carried out by a public authority, except for courts or independent judicial authorities when acting in their judicial capacity, where, in the private sector, processing is carried out by a controller whose core activities consist of processing operations that require regular and systematic monitoring of the data subjects on a large scale, or where the core activities of the controller or the processor consist of processing on a large scale of special categories of personal data and data relating to criminal convictions and offences, a person with expert knowledge of data protection law and practices should assist the controller or processor to monitor internal compliance with this Regulation. In the private sector, the core activities of a controller relate to its primary activities and do not relate to the processing of personal data as ancillary activities. The necessary level of expert knowledge should be determined in particular according to the data processing operations carried out and the protection required for the personal data processed by the controller or the processor. Such data protection officers, whether or not they are an employee of the controller, should be in a position to perform their duties and tasks in an independent manner.

(98)Associations or other bodies representing categories of controllers or processors should be encouraged to draw up codes of conduct, within the limits of this Regulation, so as to facilitate the effective application of this Regulation, taking account of the specific characteristics of the processing carried out in certain sectors and the specific needs of micro, small and medium enterprises. In particular, such codes of conduct could calibrate the obligations of controllers and processors, taking into account the risk likely to result from the processing for the rights and freedoms of natural persons.

(99)When drawing up a code of conduct, or when amending or extending such a code, associations and other bodies representing categories of controllers or processors should consult relevant stakeholders, including data subjects where feasible, and have regard to submissions received and views expressed in response to such consultations.

(100)In order to enhance transparency and compliance with this Regulation, the establishment of certification mechanisms and data protection seals and marks should be encouraged, allowing data subjects to quickly assess the level of data protection of relevant products and services.

(101)Flows of personal data to and from countries outside the Union and international organisations are necessary for the expansion of international trade and international cooperation. The increase in such flows has raised new challenges and concerns with regard to the protection of personal data. However, when personal data are transferred from the Union to controllers, processors or other recipients in third countries or to international organisations, the level of protection of natural persons ensured in the Union by this Regulation should not be undermined, including in cases of onward transfers of personal data from the third country or international organisation to controllers, processors in the same or another third country or international organisation. In any event, transfers to third countries and international organisations may only be carried out in full compliance with this Regulation. A transfer could take place only if, subject to the other provisions of this Regulation, the conditions laid down in the provisions of this Regulation relating to the transfer of personal data to third countries or international organisations are complied with by the controller or processor.

(102)This Regulation is without prejudice to international agreements concluded between the Union and third countries regulating the transfer of personal data including appropriate safeguards for the data subjects. Member States may conclude international agreements which involve the transfer of personal data to third countries or international organisations, as far as such agreements do not affect this Regulation or any other provisions of Union law and include an appropriate level of protection for the fundamental rights of the data subjects.

(103)The Commission may decide with effect for the entire Union that a third country, a territory or specified sector within a third country, or an international organisation, offers an adequate level of data protection, thus providing legal certainty and uniformity throughout the Union as regards the third country or international organisation which is considered to provide such level of protection. In such cases, transfers of personal data to that third country or international organisation may take place without the need to obtain any further authorisation. The Commission may also decide, having given notice and a full statement setting out the reasons to the third country or international organisation, to revoke such a decision.

(104)In line with the fundamental values on which the Union is founded, in particular the protection of human rights, the Commission

should, in its assessment of the third country, or of a territory or specified sector within a third country, take into account how a particular third country respects the rule of law, access to justice as well as international human rights norms and standards and its general and sectoral law, including legislation concerning public security, defence and national security as well as public order and criminal law. The adoption of an adequacy decision with regard to a territory or a specified sector in a third country should take into account clear and objective criteria, such as specific processing activities and the scope of applicable legal standards and legislation in force in the third country. The third country should offer guarantees ensuring an adequate level of protection essentially equivalent to that ensured within the Union, in particular where personal data are processed in one or several specific sectors. In particular, the third country should ensure effective independent data protection supervision and should provide for cooperation mechanisms with the Member States' data protection authorities, and the data subjects should be provided with effective and enforceable rights and effective administrative and judicial redress.

(105) Apart from the international commitments the third country or international organisation has entered into, the Commission should take account of obligations arising from the third country's or international organisation's participation in multilateral or regional systems in particular in relation to the protection of personal data, as well as the implementation of such obligations. In particular, the third country's accession to the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to the Automatic Processing of Personal Data and its Additional Protocol should be taken into account. The Commission should consult the Board when assessing the level of protection in third countries or international organisations.

(106) The Commission should monitor the functioning of decisions on the level of protection in a third country, a territory or specified sector within a third country, or an international organisation, and monitor the functioning of decisions adopted on the basis of Article 25(6) or Article 26(4) of Directive 95/46/EC. In its adequacy decisions, the Commission should provide for a periodic review mechanism of their functioning. That periodic review should be conducted in consultation with the third country or international organisation in question and take into account all relevant developments in the third country or international organisation. For the purposes of monitoring and of carrying out the periodic reviews, the Commission should take into consideration the views and findings of the European Parliament and of the Council as well as of other relevant bodies and sources. The Commission should evaluate, within a reasonable time, the functioning of the latter decisions and report any relevant findings to the Committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council [(12)] as established under this Regulation, to the European Parliament and to the Council.

(107) The Commission may recognise that a third country, a territory or a specified sector within a third country, or an international organisation no longer ensures an adequate level of data protection. Consequently the transfer of personal data to that third country or international organisation should be prohibited, unless the requirements in this Regulation relating to transfers subject to appropriate safeguards, including binding corporate rules, and derogations for specific situations are fulfilled. In that case, provision should be made for consultations between the Commission and such third countries or international organisations. The Commission should, in a timely manner, inform the third country or international organisation of the reasons and enter into consultations with it in order to remedy the situation.

(108) In the absence of an adequacy decision, the controller or processor should take measures to compensate for the lack of data protection in a third country by way of appropriate safeguards for the data subject. Such appropriate safeguards may consist of making use of binding corporate rules, standard data protection clauses adopted by the Commission, standard data protection clauses adopted by a supervisory authority or contractual clauses authorised by a supervisory authority. Those safeguards should ensure compliance with data protection requirements and the rights of the data subjects appropriate to processing within the Union, including the availability of enforceable data subject rights and of effective legal remedies, including to obtain effective administrative or judicial redress and to claim compensation, in the Union or in a third country. They should relate in particular to compliance with the general principles relating to personal data processing, the principles of data protection by design and by default. Transfers may also be carried out by public authorities or bodies with public authorities or bodies in third countries or with international organisations with corresponding duties or functions, including on the basis of provisions to be inserted into administrative arrangements, such as a memorandum of understanding, providing for enforceable and effective rights for data subjects. Authorisation by the competent supervisory authority should be obtained when the safeguards are provided for in administrative arrangements that are not legally binding.

(109) The possibility for the controller or processor to use standard data-protection clauses adopted by the Commission or by a supervisory authority should prevent controllers or processors neither from including the standard data-protection clauses in a wider contract, such as a contract between the processor and another processor, nor from adding other clauses or additional safeguards provided that they do not contradict, directly or indirectly, the standard contractual clauses adopted by the Commission or by a supervisory authority or prejudice the fundamental rights or freedoms of the data subjects. Controllers and processors should be encouraged to provide additional safeguards via contractual commitments that supplement standard protection clauses.

(110)A group of undertakings, or a group of enterprises engaged in a joint economic activity, should be able to make use of approved binding corporate rules for its international transfers from the Union to organisations within the same group of undertakings, or group of enterprises engaged in a joint economic activity, provided that such corporate rules include all essential principles and enforceable rights to ensure appropriate safeguards for transfers or categories of transfers of personal data.

(111)Provisions should be made for the possibility for transfers in certain circumstances where the data subject has given his or her explicit consent, where the transfer is occasional and necessary in relation to a contract or a legal claim, regardless of whether in a judicial procedure or whether in an administrative or any out-of-court procedure, including procedures before regulatory bodies. Provision should also be made for the possibility for transfers where important grounds of public interest laid down by Union or Member State law so require or where the transfer is made from a register established by law and intended for consultation by the public or persons having a legitimate interest. In the latter case, such a transfer should not involve the entirety of the personal data or entire categories of the data contained in the register and, when the register is intended for consultation by persons having a legitimate interest, the transfer should be made only at the request of those persons or, if they are to be the recipients, taking into full account the interests and fundamental rights of the data subject.

(112)Those derogations should in particular apply to data transfers required and necessary for important reasons of public interest, for example in cases of international data exchange between competition authorities, tax or customs administrations, between financial supervisory authorities, between services competent for social security matters, or for public health, for example in the case of contact tracing for contagious diseases or in order to reduce and/or eliminate doping in sport. A transfer of personal data should also be regarded as lawful where it is necessary to protect an interest which is essential for the data subject's or another person's vital interests, including physical integrity or life, if the data subject is incapable of giving consent. In the absence of an adequacy decision, Union or Member State law may, for important reasons of public interest, expressly set limits to the transfer of specific categories of data to a third country or an international organisation. Member States should notify such provisions to the Commission. Any transfer to an international humanitarian organisation of personal data of a data subject who is physically or legally incapable of giving consent, with a view to accomplishing a task incumbent under the Geneva Conventions or to complying with international humanitarian law applicable in armed conflicts, could be considered to be necessary for an important reason of public interest or because it is in the vital interest of the data subject.

(113)Transfers which can be qualified as not repetitive and that only concern a limited number of data subjects, could also be possible for the purposes of the compelling legitimate interests pursued by the controller, when those interests are not overridden by the interests or rights and freedoms of the data subject and when the controller has assessed all the circumstances surrounding the data transfer. The controller should give particular consideration to the nature of the personal data, the purpose and duration of the proposed processing operation or operations, as well as the situation in the country of origin, the third country and the country of final destination, and should provide suitable safeguards to protect fundamental rights and freedoms of natural persons with regard to the processing of their personal data. Such transfers should be possible only in residual cases where none of the other grounds for transfer are applicable. For scientific or historical research purposes or statistical purposes, the legitimate expectations of society for an increase of knowledge should be taken into consideration. The controller should inform the supervisory authority and the data subject about the transfer.

(114)In any case, where the Commission has taken no decision on the adequate level of data protection in a third country, the controller or processor should make use of solutions that provide data subjects with enforceable and effective rights as regards the processing of their data in the Union once those data have been transferred so that that they will continue to benefit from fundamental rights and safeguards.

(115)Some third countries adopt laws, regulations and other legal acts which purport to directly regulate the processing activities of natural and legal persons under the jurisdiction of the Member States. This may include judgments of courts or tribunals or decisions of administrative authorities in third countries requiring a controller or processor to transfer or disclose personal data, and which are not based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State. The extraterritorial application of those laws, regulations and other legal acts may be in breach of international law and may impede the attainment of the protection of natural persons ensured in the Union by this Regulation. Transfers should only be allowed where the conditions of this Regulation for a transfer to third countries are met. This may be the case, inter alia, where disclosure is necessary for an important ground of public interest recognised in Union or Member State law to which the controller is subject.

(116)When personal data moves across borders outside the Union it may put at increased risk the ability of natural persons to exercise data protection rights in particular to protect themselves from the unlawful use or disclosure of that information. At the same time, supervisory authorities may find that they are unable to pursue complaints or conduct investigations relating to the activities outside their borders. Their efforts to work together in the cross-border context may also be hampered by insufficient

preventative or remedial powers, inconsistent legal regimes, and practical obstacles like resource constraints. Therefore, there is a need to promote closer cooperation among data protection supervisory authorities to help them exchange information and carry out investigations with their international counterparts. For the purposes of developing international cooperation mechanisms to facilitate and provide international mutual assistance for the enforcement of legislation for the protection of personal data, the Commission and the supervisory authorities should exchange information and cooperate in activities related to the exercise of their powers with competent authorities in third countries, based on reciprocity and in accordance with this Regulation.

(117) The establishment of supervisory authorities in Member States, empowered to perform their tasks and exercise their powers with complete independence, is an essential component of the protection of natural persons with regard to the processing of their personal data. Member States should be able to establish more than one supervisory authority, to reflect their constitutional, organisational and administrative structure.

(118) The independence of supervisory authorities should not mean that the supervisory authorities cannot be subject to control or monitoring mechanisms regarding their financial expenditure or to judicial review.

(119) Where a Member State establishes several supervisory authorities, it should establish by law mechanisms for ensuring the effective participation of those supervisory authorities in the consistency mechanism. That Member State should in particular designate the supervisory authority which functions as a single contact point for the effective participation of those authorities in the mechanism, to ensure swift and smooth cooperation with other supervisory authorities, the Board and the Commission.

(120) Each supervisory authority should be provided with the financial and human resources, premises and infrastructure necessary for the effective performance of their tasks, including those related to mutual assistance and cooperation with other supervisory authorities throughout the Union. Each supervisory authority should have a separate, public annual budget, which may be part of the overall state or national budget.

(121) The general conditions for the member or members of the supervisory authority should be laid down by law in each Member State and should in particular provide that those members are to be appointed, by means of a transparent procedure, either by the parliament, government or the head of State of the Member State on the basis of a proposal from the government, a member of the government, the parliament or a chamber of the parliament, or by an independent body entrusted under Member State law. In order to ensure the independence of the supervisory authority, the member or members should act with integrity, refrain from any action that is incompatible with their duties and should not, during their term of office, engage in any incompatible occupation, whether gainful or not. The supervisory authority should have its own staff, chosen by the supervisory authority or an independent body established by Member State law, which should be subject to the exclusive direction of the member or members of the supervisory authority.

(122) Each supervisory authority should be competent on the territory of its own Member State to exercise the powers and to perform the tasks conferred on it in accordance with this Regulation. This should cover in particular the processing in the context of the activities of an establishment of the controller or processor on the territory of its own Member State, the processing of personal data carried out by public authorities or private bodies acting in the public interest, processing affecting data subjects on its territory or processing carried out by a controller or processor not established in the Union when targeting data subjects residing on its territory. This should include handling complaints lodged by a data subject, conducting investigations on the application of this Regulation and promoting public awareness of the risks, rules, safeguards and rights in relation to the processing of personal data.

(123) The supervisory authorities should monitor the application of the provisions pursuant to this Regulation and contribute to its consistent application throughout the Union, in order to protect natural persons in relation to the processing of their personal data and to facilitate the free flow of personal data within the internal market. For that purpose, the supervisory authorities should cooperate with each other and with the Commission, without the need for any agreement between Member States on the provision of mutual assistance or on such cooperation.

(124) Where the processing of personal data takes place in the context of the activities of an establishment of a controller or a processor in the Union and the controller or processor is established in more than one Member State, or where processing taking place in the context of the activities of a single establishment of a controller or processor in the Union substantially affects or is likely to substantially affect data subjects in more than one Member State, the supervisory authority for the main establishment of the controller or processor or for the single establishment of the controller or processor should act as lead authority. It should cooperate with the other authorities concerned, because the controller or processor has an establishment on the territory of their Member State, because data subjects residing on their territory are substantially affected, or because a complaint has been lodged with them. Also where a data subject not residing in that Member State has lodged a complaint, the supervisory authority with which such complaint has been lodged should also be a supervisory authority concerned. Within its

tasks to issue guidelines on any question covering the application of this Regulation, the Board should be able to issue guidelines in particular on the criteria to be taken into account in order to ascertain whether the processing in question substantially affects data subjects in more than one Member State and on what constitutes a relevant and reasoned objection.

(125) The lead authority should be competent to adopt binding decisions regarding measures applying the powers conferred on it in accordance with this Regulation. In its capacity as lead authority, the supervisory authority should closely involve and coordinate the supervisory authorities concerned in the decision-making process. Where the decision is to reject the complaint by the data subject in whole or in part, that decision should be adopted by the supervisory authority with which the complaint has been lodged.

(126) The decision should be agreed jointly by the lead supervisory authority and the supervisory authorities concerned and should be directed towards the main or single establishment of the controller or processor and be binding on the controller and processor. The controller or processor should take the necessary measures to ensure compliance with this Regulation and the implementation of the decision notified by the lead supervisory authority to the main establishment of the controller or processor as regards the processing activities in the Union.

(127) Each supervisory authority not acting as the lead supervisory authority should be competent to handle local cases where the controller or processor is established in more than one Member State, but the subject matter of the specific processing concerns only processing carried out in a single Member State and involves only data subjects in that single Member State, for example, where the subject matter concerns the processing of employees' personal data in the specific employment context of a Member State. In such cases, the supervisory authority should inform the lead supervisory authority without delay about the matter. After being informed, the lead supervisory authority should decide, whether it will handle the case pursuant to the provision on cooperation between the lead supervisory authority and other supervisory authorities concerned ('one-stop-shop mechanism'), or whether the supervisory authority which informed it should handle the case at local level. When deciding whether it will handle the case, the lead supervisory authority should take into account whether there is an establishment of the controller or processor in the Member State of the supervisory authority which informed it in order to ensure effective enforcement of a decision *vis-à-vis* the controller or processor. Where the lead supervisory authority decides to handle the case, the supervisory authority which informed it should have the possibility to submit a draft for a decision, of which the lead supervisory authority should take utmost account when preparing its draft decision in that one-stop-shop mechanism.

(128) The rules on the lead supervisory authority and the one-stop-shop mechanism should not apply where the processing is carried out by public authorities or private bodies in the public interest. In such cases the only supervisory authority competent to exercise the powers conferred to it in accordance with this Regulation should be the supervisory authority of the Member State where the public authority or private body is established.

(129) In order to ensure consistent monitoring and enforcement of this Regulation throughout the Union, the supervisory authorities should have in each Member State the same tasks and effective powers, including powers of investigation, corrective powers and sanctions, and authorisation and advisory powers, in particular in cases of complaints from natural persons, and without prejudice to the powers of prosecutorial authorities under Member State law, to bring infringements of this Regulation to the attention of the judicial authorities and engage in legal proceedings. Such powers should also include the power to impose a temporary or definitive limitation, including a ban, on processing. Member States may specify other tasks related to the protection of personal data under this Regulation. The powers of supervisory authorities should be exercised in accordance with appropriate procedural safeguards set out in Union and Member State law, impartially, fairly and within a reasonable time. In particular each measure should be appropriate, necessary and proportionate in view of ensuring compliance with this Regulation, taking into account the circumstances of each individual case, respect the right of every person to be heard before any individual measure which would affect him or her adversely is taken and avoid superfluous costs and excessive inconveniences for the persons concerned. Investigatory powers as regards access to premises should be exercised in accordance with specific requirements in Member State procedural law, such as the requirement to obtain a prior judicial authorisation. Each legally binding measure of the supervisory authority should be in writing, be clear and unambiguous, indicate the supervisory authority which has issued the measure, the date of issue of the measure, bear the signature of the head, or a member of the supervisory authority authorised by him or her, give the reasons for the measure, and refer to the right of an effective remedy. This should not preclude additional requirements pursuant to Member State procedural law. The adoption of a legally binding decision implies that it may give rise to judicial review in the Member State of the supervisory authority that adopted the decision.

(130) Where the supervisory authority with which the complaint has been lodged is not the lead supervisory authority, the lead supervisory authority should closely cooperate with the supervisory authority with which the complaint has been lodged in accordance with the provisions on cooperation and consistency laid down in this Regulation. In such cases, the lead supervisory authority should, when taking measures intended to produce legal effects, including the imposition of administrative fines, take

utmost account of the view of the supervisory authority with which the complaint has been lodged and which should remain competent to carry out any investigation on the territory of its own Member State in liaison with the competent supervisory authority.

(131) Where another supervisory authority should act as a lead supervisory authority for the processing activities of the controller or processor but the concrete subject matter of a complaint or the possible infringement concerns only processing activities of the controller or processor in the Member State where the complaint has been lodged or the possible infringement detected and the matter does not substantially affect or is not likely to substantially affect data subjects in other Member States, the supervisory authority receiving a complaint or detecting or being informed otherwise of situations that entail possible infringements of this Regulation should seek an amicable settlement with the controller and, if this proves unsuccessful, exercise its full range of powers. This should include: specific processing carried out in the territory of the Member State of the supervisory authority or with regard to data subjects on the territory of that Member State; processing that is carried out in the context of an offer of goods or services specifically aimed at data subjects in the territory of the Member State of the supervisory authority; or processing that has to be assessed taking into account relevant legal obligations under Member State law.

(132) Awareness-raising activities by supervisory authorities addressed to the public should include specific measures directed at controllers and processors, including micro, small and medium-sized enterprises, as well as natural persons in particular in the educational context.

(133) The supervisory authorities should assist each other in performing their tasks and provide mutual assistance, so as to ensure the consistent application and enforcement of this Regulation in the internal market. A supervisory authority requesting mutual assistance may adopt a provisional measure if it receives no response to a request for mutual assistance within one month of the receipt of that request by the other supervisory authority.

(134) Each supervisory authority should, where appropriate, participate in joint operations with other supervisory authorities. The requested supervisory authority should be obliged to respond to the request within a specified time period.

(135) In order to ensure the consistent application of this Regulation throughout the Union, a consistency mechanism for cooperation between the supervisory authorities should be established. That mechanism should in particular apply where a supervisory authority intends to adopt a measure intended to produce legal effects as regards processing operations which substantially affect a significant number of data subjects in several Member States. It should also apply where any supervisory authority concerned or the Commission requests that such matter should be handled in the consistency mechanism. That mechanism should be without prejudice to any measures that the Commission may take in the exercise of its powers under the Treaties.

(136) In applying the consistency mechanism, the Board should, within a determined period of time, issue an opinion, if a majority of its members so decides or if so requested by any supervisory authority concerned or the Commission. The Board should also be empowered to adopt legally binding decisions where there are disputes between supervisory authorities. For that purpose, it should issue, in principle by a two-thirds majority of its members, legally binding decisions in clearly specified cases where there are conflicting views among supervisory authorities, in particular in the cooperation mechanism between the lead supervisory authority and supervisory authorities concerned on the merits of the case, in particular whether there is an infringement of this Regulation.

(137) There may be an urgent need to act in order to protect the rights and freedoms of data subjects, in particular when the danger exists that the enforcement of a right of a data subject could be considerably impeded. A supervisory authority should therefore be able to adopt duly justified provisional measures on its territory with a specified period of validity which should not exceed three months.

(138) The application of such mechanism should be a condition for the lawfulness of a measure intended to produce legal effects by a supervisory authority in those cases where its application is mandatory. In other cases of cross-border relevance, the cooperation mechanism between the lead supervisory authority and supervisory authorities concerned should be applied and mutual assistance and joint operations might be carried out between the supervisory authorities concerned on a bilateral or multilateral basis without triggering the consistency mechanism.

(139) In order to promote the consistent application of this Regulation, the Board should be set up as an independent body of the Union. To fulfil its objectives, the Board should have legal personality. The Board should be represented by its Chair. It should replace the Working Party on the Protection of Individuals with Regard to the Processing of Personal Data established by Directive 95/46/EC. It should consist of the head of a supervisory authority of each Member State and the European Data Protection Supervisor or their respective representatives. The Commission should participate in the Board's activities without voting rights and the European Data Protection Supervisor should have specific voting rights. The Board should contribute to the consistent application of this Regulation throughout the Union, including by advising the Commission, in particular on the

level of protection in third countries or international organisations, and promoting cooperation of the supervisory authorities throughout the Union. The Board should act independently when performing its tasks.

(140) The Board should be assisted by a secretariat provided by the European Data Protection Supervisor. The staff of the European Data Protection Supervisor involved in carrying out the tasks conferred on the Board by this Regulation should perform its tasks exclusively under the instructions of, and report to, the Chair of the Board.

(141) Every data subject should have the right to lodge a complaint with a single supervisory authority, in particular in the Member State of his or her habitual residence, and the right to an effective judicial remedy in accordance with Article 47 of the Charter if the data subject considers that his or her rights under this Regulation are infringed or where the supervisory authority does not act on a complaint, partially or wholly rejects or dismisses a complaint or does not act where such action is necessary to protect the rights of the data subject. The investigation following a complaint should be carried out, subject to judicial review, to the extent that is appropriate in the specific case. The supervisory authority should inform the data subject of the progress and the outcome of the complaint within a reasonable period. If the case requires further investigation or coordination with another supervisory authority, intermediate information should be given to the data subject. In order to facilitate the submission of complaints, each supervisory authority should take measures such as providing a complaint submission form which can also be completed electronically, without excluding other means of communication.

(142) Where a data subject considers that his or her rights under this Regulation are infringed, he or she should have the right to mandate a not-for-profit body, organisation or association which is constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest and is active in the field of the protection of personal data to lodge a complaint on his or her behalf with a supervisory authority, exercise the right to a judicial remedy on behalf of data subjects or, if provided for in Member State law, exercise the right to receive compensation on behalf of data subjects. A Member State may provide for such a body, organisation or association to have the right to lodge a complaint in that Member State, independently of a data subject's mandate, and the right to an effective judicial remedy where it has reasons to consider that the rights of a data subject have been infringed as a result of the processing of personal data which infringes this Regulation. That body, organisation or association may not be allowed to claim compensation on a data subject's behalf independently of the data subject's mandate.

(143) Any natural or legal person has the right to bring an action for annulment of decisions of the Board before the Court of Justice under the conditions provided for in Article 263 TFEU. As addressees of such decisions, the supervisory authorities concerned which wish to challenge them have to bring action within two months of being notified of them, in accordance with Article 263 TFEU. Where decisions of the Board are of direct and individual concern to a controller, processor or complainant, the latter may bring an action for annulment against those decisions within two months of their publication on the website of the Board, in accordance with Article 263 TFEU. Without prejudice to this right under Article 263 TFEU, each natural or legal person should have an effective judicial remedy before the competent national court against a decision of a supervisory authority which produces legal effects concerning that person. Such a decision concerns in particular the exercise of investigative, corrective and authorisation powers by the supervisory authority or the dismissal or rejection of complaints. However, the right to an effective judicial remedy does not encompass measures taken by supervisory authorities which are not legally binding, such as opinions issued by or advice provided by the supervisory authority. Proceedings against a supervisory authority should be brought before the courts of the Member State where the supervisory authority is established and should be conducted in accordance with that Member State's procedural law. Those courts should exercise full jurisdiction, which should include jurisdiction to examine all questions of fact and law relevant to the dispute before them.

Where a complaint has been rejected or dismissed by a supervisory authority, the complainant may bring proceedings before the courts in the same Member State. In the context of judicial remedies relating to the application of this Regulation, national courts which consider a decision on the question necessary to enable them to give judgment, may, or in the case provided for in Article 267 TFEU, must, request the Court of Justice to give a preliminary ruling on the interpretation of Union law, including this Regulation. Furthermore, where a decision of a supervisory authority implementing a decision of the Board is challenged before a national court and the validity of the decision of the Board is at issue, that national court does not have the power to declare the Board's decision invalid but must refer the question of validity to the Court of Justice in accordance with Article 267 TFEU as interpreted by the Court of Justice, where it considers the decision invalid. However, a national court may not refer a question on the validity of the decision of the Board at the request of a natural or legal person which had the opportunity to bring an action for annulment of that decision, in particular if it was directly and individually concerned by that decision, but had not done so within the period laid down in Article 263 TFEU.

(144) Where a court seized of proceedings against a decision by a supervisory authority has reason to believe that proceedings concerning the same processing, such as the same subject matter as regards processing by the same controller or processor, or the same cause of action, are brought before a competent court in another Member State, it should contact that court in order

to confirm the existence of such related proceedings. If related proceedings are pending before a court in another Member State, any court other than the court first seized may stay its proceedings or may, on request of one of the parties, decline jurisdiction in favour of the court first seized if that court has jurisdiction over the proceedings in question and its law permits the consolidation of such related proceedings. Proceedings are deemed to be related where they are so closely connected that it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.

(145) For proceedings against a controller or processor, the plaintiff should have the choice to bring the action before the courts of the Member States where the controller or processor has an establishment or where the data subject resides, unless the controller is a public authority of a Member State acting in the exercise of its public powers.

(146) The controller or processor should compensate any damage which a person may suffer as a result of processing that infringes this Regulation. The controller or processor should be exempt from liability if it proves that it is not in any way responsible for the damage. The concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation. This is without prejudice to any claims for damage deriving from the violation of other rules in Union or Member State law. Processing that infringes this Regulation also includes processing that infringes delegated and implementing acts adopted in accordance with this Regulation and Member State law specifying rules of this Regulation. Data subjects should receive full and effective compensation for the damage they have suffered. Where controllers or processors are involved in the same processing, each controller or processor should be held liable for the entire damage. However, where they are joined to the same judicial proceedings, in accordance with Member State law, compensation may be apportioned according to the responsibility of each controller or processor for the damage caused by the processing, provided that full and effective compensation of the data subject who suffered the damage is ensured. Any controller or processor which has paid full compensation may subsequently institute recourse proceedings against other controllers or processors involved in the same processing.

(147) Where specific rules on jurisdiction are contained in this Regulation, in particular as regards proceedings seeking a judicial remedy including compensation, against a controller or processor, general jurisdiction rules such as those of Regulation (EU) No 1215/2012 of the European Parliament and of the Council [(13)] should not prejudice the application of such specific rules.

(148) In order to strengthen the enforcement of the rules of this Regulation, penalties including administrative fines should be imposed for any infringement of this Regulation, in addition to, or instead of appropriate measures imposed by the supervisory authority pursuant to this Regulation. In a case of a minor infringement or if the fine likely to be imposed would constitute a disproportionate burden to a natural person, a reprimand may be issued instead of a fine. Due regard should however be given to the nature, gravity and duration of the infringement, the intentional character of the infringement, actions taken to mitigate the damage suffered, degree of responsibility or any relevant previous infringements, the manner in which the infringement became known to the supervisory authority, compliance with measures ordered against the controller or processor, adherence to a code of conduct and any other aggravating or mitigating factor. The imposition of penalties including administrative fines should be subject to appropriate procedural safeguards in accordance with the general principles of Union law and the Charter, including effective judicial protection and due process.

(149) Member States should be able to lay down the rules on criminal penalties for infringements of this Regulation, including for infringements of national rules adopted pursuant to and within the limits of this Regulation. Those criminal penalties may also allow for the deprivation of the profits obtained through infringements of this Regulation. However, the imposition of criminal penalties for infringements of such national rules and of administrative penalties should not lead to a breach of the principle of *ne bis in idem*, as interpreted by the Court of Justice.

(150) In order to strengthen and harmonise administrative penalties for infringements of this Regulation, each supervisory authority should have the power to impose administrative fines. This Regulation should indicate infringements and the upper limit and criteria for setting the related administrative fines, which should be determined by the competent supervisory authority in each individual case, taking into account all relevant circumstances of the specific situation, with due regard in particular to the nature, gravity and duration of the infringement and of its consequences and the measures taken to ensure compliance with the obligations under this Regulation and to prevent or mitigate the consequences of the infringement. Where administrative fines are imposed on an undertaking, an undertaking should be understood to be an undertaking in accordance with Articles 101 and 102 TFEU for those purposes. Where administrative fines are imposed on persons that are not an undertaking, the supervisory authority should take account of the general level of income in the Member State as well as the economic situation of the person in considering the appropriate amount of the fine. The consistency mechanism may also be used to promote a consistent application of administrative fines. It should be for the Member States to determine whether and to which extent public authorities should be subject to administrative fines. Imposing an administrative fine or giving a warning does not affect the application of other powers of the supervisory authorities or of other penalties under this Regulation.

(151)The legal systems of Denmark and Estonia do not allow for administrative fines as set out in this Regulation. The rules on administrative fines may be applied in such a manner that in Denmark the fine is imposed by competent national courts as a criminal penalty and in Estonia the fine is imposed by the supervisory authority in the framework of a misdemeanour procedure, provided that such an application of the rules in those Member States has an equivalent effect to administrative fines imposed by supervisory authorities. Therefore the competent national courts should take into account the recommendation by the supervisory authority initiating the fine. In any event, the fines imposed should be effective, proportionate and dissuasive.

(152)Where this Regulation does not harmonise administrative penalties or where necessary in other cases, for example in cases of serious infringements of this Regulation, Member States should implement a system which provides for effective, proportionate and dissuasive penalties. The nature of such penalties, criminal or administrative, should be determined by Member State law.

(153)Member States law should reconcile the rules governing freedom of expression and information, including journalistic, academic, artistic and or literary expression with the right to the protection of personal data pursuant to this Regulation. The processing of personal data solely for journalistic purposes, or for the purposes of academic, artistic or literary expression should be subject to derogations or exemptions from certain provisions of this Regulation if necessary to reconcile the right to the protection of personal data with the right to freedom of expression and information, as enshrined in Article 11 of the Charter. This should apply in particular to the processing of personal data in the audiovisual field and in news archives and press libraries. Therefore, Member States should adopt legislative measures which lay down the exemptions and derogations necessary for the purpose of balancing those fundamental rights. Member States should adopt such exemptions and derogations on general principles, the rights of the data subject, the controller and the processor, the transfer of personal data to third countries or international organisations, the independent supervisory authorities, cooperation and consistency, and specific data-processing situations. Where such exemptions or derogations differ from one Member State to another, the law of the Member State to which the controller is subject should apply. In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly.

(154)This Regulation allows the principle of public access to official documents to be taken into account when applying this Regulation. Public access to official documents may be considered to be in the public interest. Personal data in documents held by a public authority or a public body should be able to be publicly disclosed by that authority or body if the disclosure is provided for by Union or Member State law to which the public authority or public body is subject. Such laws should reconcile public access to official documents and the reuse of public sector information with the right to the protection of personal data and may therefore provide for the necessary reconciliation with the right to the protection of personal data pursuant to this Regulation. The reference to public authorities and bodies should in that context include all authorities or other bodies covered by Member State law on public access to documents. Directive 2003/98/EC of the European Parliament and of the Council [(14)] leaves intact and in no way affects the level of protection of natural persons with regard to the processing of personal data under the provisions of Union and Member State law, and in particular does not alter the obligations and rights set out in this Regulation. In particular, that Directive should not apply to documents to which access is excluded or restricted by virtue of the access regimes on the grounds of protection of personal data, and parts of documents accessible by virtue of those regimes which contain personal data the re-use of which has been provided for by law as being incompatible with the law concerning the protection of natural persons with regard to the processing of personal data.

(155)Member State law or collective agreements, including 'works agreements', may provide for specific rules on the processing of employees' personal data in the employment context, in particular for the conditions under which personal data in the employment context may be processed on the basis of the consent of the employee, the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective agreements, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.

(156)The processing of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes should be subject to appropriate safeguards for the rights and freedoms of the data subject pursuant to this Regulation. Those safeguards should ensure that technical and organisational measures are in place in order to ensure, in particular, the principle of data minimisation. The further processing of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes is to be carried out when the controller has assessed the feasibility to fulfil those purposes by processing data which do not permit or no longer permit the identification of data subjects, provided that appropriate safeguards exist (such as, for instance, pseudonymisation of the data). Member States should provide for appropriate safeguards for the processing of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes. Member States should be authorised to provide, under specific conditions and subject to appropriate safeguards for data subjects, specifications and derogations with regard to the information requirements and

rights to rectification, to erasure, to be forgotten, to restriction of processing, to data portability, and to object when processing personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes. The conditions and safeguards in question may entail specific procedures for data subjects to exercise those rights if this is appropriate in the light of the purposes sought by the specific processing along with technical and organisational measures aimed at minimising the processing of personal data in pursuance of the proportionality and necessity principles. The processing of personal data for scientific purposes should also comply with other relevant legislation such as on clinical trials.

(157) By coupling information from registries, researchers can obtain new knowledge of great value with regard to widespread medical conditions such as cardiovascular disease, cancer and depression. On the basis of registries, research results can be enhanced, as they draw on a larger population. Within social science, research on the basis of registries enables researchers to obtain essential knowledge about the long-term correlation of a number of social conditions such as unemployment and education with other life conditions. Research results obtained through registries provide solid, high-quality knowledge which can provide the basis for the formulation and implementation of knowledge-based policy, improve the quality of life for a number of people and improve the efficiency of social services. In order to facilitate scientific research, personal data can be processed for scientific research purposes, subject to appropriate conditions and safeguards set out in Union or Member State law.

(158) Where personal data are processed for archiving purposes, this Regulation should also apply to that processing, bearing in mind that this Regulation should not apply to deceased persons. Public authorities or public or private bodies that hold records of public interest should be services which, pursuant to Union or Member State law, have a legal obligation to acquire, preserve, appraise, arrange, describe, communicate, promote, disseminate and provide access to records of enduring value for general public interest. Member States should also be authorised to provide for the further processing of personal data for archiving purposes, for example with a view to providing specific information related to the political behaviour under former totalitarian state regimes, genocide, crimes against humanity, in particular the Holocaust, or war crimes.

(159) Where personal data are processed for scientific research purposes, this Regulation should also apply to that processing. For the purposes of this Regulation, the processing of personal data for scientific research purposes should be interpreted in a broad manner including for example technological development and demonstration, fundamental research, applied research and privately funded research. In addition, it should take into account the Union's objective under Article 179(1) TFEU of achieving a European Research Area. Scientific research purposes should also include studies conducted in the public interest in the area of public health. To meet the specificities of processing personal data for scientific research purposes, specific conditions should apply in particular as regards the publication or otherwise disclosure of personal data in the context of scientific research purposes. If the result of scientific research in particular in the health context gives reason for further measures in the interest of the data subject, the general rules of this Regulation should apply in view of those measures.

(160) Where personal data are processed for historical research purposes, this Regulation should also apply to that processing. This should also include historical research and research for genealogical purposes, bearing in mind that this Regulation should not apply to deceased persons.

(161) For the purpose of consenting to the participation in scientific research activities in clinical trials, the relevant provisions of Regulation (EU) No 536/2014 of the European Parliament and of the Council [(15)] should apply.

(162) Where personal data are processed for statistical purposes, this Regulation should apply to that processing. Union or Member State law should, within the limits of this Regulation, determine statistical content, control of access, specifications for the processing of personal data for statistical purposes and appropriate measures to safeguard the rights and freedoms of the data subject and for ensuring statistical confidentiality. Statistical purposes mean any operation of collection and the processing of personal data necessary for statistical surveys or for the production of statistical results. Those statistical results may further be used for different purposes, including a scientific research purpose. The statistical purpose implies that the result of processing for statistical purposes is not personal data, but aggregate data, and that this result or the personal data are not used in support of measures or decisions regarding any particular natural person.

(163) The confidential information which the Union and national statistical authorities collect for the production of official European and official national statistics should be protected. European statistics should be developed, produced and disseminated in accordance with the statistical principles as set out in Article 338(2) TFEU, while national statistics should also comply with Member State law. Regulation (EC) No 223/2009 of the European Parliament and of the Council [(16)] provides further specifications on statistical confidentiality for European statistics.

(164) As regards the powers of the supervisory authorities to obtain from the controller or processor access to personal data and access to their premises, Member States may adopt by law, within the limits of this Regulation, specific rules in order to safeguard the professional or other equivalent secrecy obligations, in so far as necessary to reconcile the right to the protection of personal data with an obligation of professional secrecy. This is without prejudice to existing Member State obligations to

adopt rules on professional secrecy where required by Union law.

(165) This Regulation respects and does not prejudice the status under existing constitutional law of churches and religious associations or communities in the Member States, as recognised in Article 17 TFEU.

(166) In order to fulfil the objectives of this Regulation, namely to protect the fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data and to ensure the free movement of personal data within the Union, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission. In particular, delegated acts should be adopted in respect of criteria and requirements for certification mechanisms, information to be presented by standardised icons and procedures for providing such icons. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing-up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

(167) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission when provided for by this Regulation. Those powers should be exercised in accordance with Regulation (EU) No 182/2011. In that context, the Commission should consider specific measures for micro, small and medium-sized enterprises.

(168) The examination procedure should be used for the adoption of implementing acts on standard contractual clauses between controllers and processors and between processors; codes of conduct; technical standards and mechanisms for certification; the adequate level of protection afforded by a third country, a territory or a specified sector within that third country, or an international organisation; standard protection clauses; formats and procedures for the exchange of information by electronic means between controllers, processors and supervisory authorities for binding corporate rules; mutual assistance; and arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the Board.

(169) The Commission should adopt immediately applicable implementing acts where available evidence reveals that a third country, a territory or a specified sector within that third country, or an international organisation does not ensure an adequate level of protection, and imperative grounds of urgency so require.

(170) Since the objective of this Regulation, namely to ensure an equivalent level of protection of natural persons and the free flow of personal data throughout the Union, cannot be sufficiently achieved by the Member States and can rather, by reason of the scale or effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

(171) Directive 95/46/EC should be repealed by this Regulation. Processing already under way on the date of application of this Regulation should be brought into conformity with this Regulation within the period of two years after which this Regulation enters into force. Where processing is based on consent pursuant to Directive 95/46/EC, it is not necessary for the data subject to give his or her consent again if the manner in which the consent has been given is in line with the conditions of this Regulation, so as to allow the controller to continue such processing after the date of application of this Regulation. Commission decisions adopted and authorisations by supervisory authorities based on Directive 95/46/EC remain in force until amended, replaced or repealed.

(172) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 and delivered an opinion on 7 March 2012 [(17)].

(173) This Regulation should apply to all matters concerning the protection of fundamental rights and freedoms *vis-à-vis* the processing of personal data which are not subject to specific obligations with the same objective set out in Directive 2002/58/EC of the European Parliament and of the Council [(18)], including the obligations on the controller and the rights of natural persons. In order to clarify the relationship between this Regulation and Directive 2002/58/EC, that Directive should be amended accordingly. Once this Regulation is adopted, Directive 2002/58/EC should be reviewed in particular in order to ensure consistency with this Regulation,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

General provisions

Article 1

Subject-matter and objectives

1. This Regulation lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data.

2. This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.

3. The free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data.

Article 2

Material scope

1. This Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.

2. This Regulation does not apply to the processing of personal data:

(a) in the course of an activity which falls outside the scope of Union law;

(b) by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the TEU;

(c) by a natural person in the course of a purely personal or household activity;

(d) by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.

3. For the processing of personal data by the Union institutions, bodies, offices and agencies, Regulation (EC) No 45/2001 applies. Regulation (EC) No 45/2001 and other Union legal acts applicable to such processing of personal data shall be adapted to the principles and rules of this Regulation in accordance with Article 98.

4. This Regulation shall be without prejudice to the application of Directive 2000/31/EC, in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive.

Article 3

Territorial scope

1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.

2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:

(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or

(b) the monitoring of their behaviour as far as their behaviour takes place within the Union.

3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.

Article 4

Definitions

For the purposes of this Regulation:

(1) ‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;

(2)‘processing’ means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;

(3)‘restriction of processing’ means the marking of stored personal data with the aim of limiting their processing in the future;

(4)‘profiling’ means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements;

(5)‘pseudonymisation’ means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person;

(6)‘filing system’ means any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;

(7)‘controller’ means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;

(8)‘processor’ means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller;

(9)‘recipient’ means a natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not. However, public authorities which may receive personal data in the framework of a particular inquiry in accordance with Union or Member State law shall not be regarded as recipients; the processing of those data by those public authorities shall be in compliance with the applicable data protection rules according to the purposes of the processing;

(10)‘third party’ means a natural or legal person, public authority, agency or body other than the data subject, controller, processor and persons who, under the direct authority of the controller or processor, are authorised to process personal data;

(11)‘consent’ of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her;

(12)‘personal data breach’ means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed;

(13)‘genetic data’ means personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question;

(14)‘biometric data’ means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data;

(15)‘data concerning health’ means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status;

(16)‘main establishment’ means:

(a)as regards a controller with establishments in more than one Member State, the place of its central administration in the Union, unless the decisions on the purposes and means of the processing of personal data are taken in another establishment of the controller in the Union and the latter establishment has the power to have such decisions implemented, in which case the establishment having taken such decisions is to be considered to be the main establishment;

(b)as regards a processor with establishments in more than one Member State, the place of its central administration in the Union, or, if the processor has no central administration in the Union, the establishment of the processor in the Union where the main processing activities in the context of the activities of an establishment of the processor take place to the extent that

the processor is subject to specific obligations under this Regulation;

(17)‘representative’ means a natural or legal person established in the Union who, designated by the controller or processor in writing pursuant to Article 27, represents the controller or processor with regard to their respective obligations under this Regulation;

(18)‘enterprise’ means a natural or legal person engaged in an economic activity, irrespective of its legal form, including partnerships or associations regularly engaged in an economic activity;

(19) ‘group of undertakings’ means a controlling undertaking and its controlled undertakings;

(20)‘binding corporate rules’ means personal data protection policies which are adhered to by a controller or processor established on the territory of a Member State for transfers or a set of transfers of personal data to a controller or processor in one or more third countries within a group of undertakings, or group of enterprises engaged in a joint economic activity;

(21)‘supervisory authority’ means an independent public authority which is established by a Member State pursuant to Article 51;

(22)‘supervisory authority concerned’ means a supervisory authority which is concerned by the processing of personal data because:

(a) the controller or processor is established on the territory of the Member State of that supervisory authority;

(b)data subjects residing in the Member State of that supervisory authority are substantially affected or likely to be substantially affected by the processing; or

(c) a complaint has been lodged with that supervisory authority;

(23)‘cross-border processing’ means either:

(a)processing of personal data which takes place in the context of the activities of establishments in more than one Member State of a controller or processor in the Union where the controller or processor is established in more than one Member State; or

(b)processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect data subjects in more than one Member State.

(24)‘relevant and reasoned objection’ means an objection to a draft decision as to whether there is an infringement of this Regulation, or whether envisaged action in relation to the controller or processor complies with this Regulation, which clearly demonstrates the significance of the risks posed by the draft decision as regards the fundamental rights and freedoms of data subjects and, where applicable, the free flow of personal data within the Union;

(25)‘information society service’ means a service as defined in point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council [(19)];

(26)‘international organisation’ means an organisation and its subordinate bodies governed by public international law, or any other body which is set up by, or on the basis of, an agreement between two or more countries.

CHAPTER II

Principles

Article 5

Principles relating to processing of personal data

1. Personal data shall be:

(a)processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’);

(b)collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes (‘purpose limitation’);

(c)adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (‘data minimisation’);

(d)accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay (‘accuracy’);

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');

(f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').

2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability').

Article 6

Lawfulness of processing

1. Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.

2. Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) of paragraph 1 by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX.

3. The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by:

(a) Union law; or

(b) Member State law to which the controller is subject.

The purpose of the processing shall be determined in that legal basis or, as regards the processing referred to in point (e) of paragraph 1, shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. That legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia: the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed; the purpose limitation; storage periods; and processing operations and processing procedures, including measures to ensure lawful and fair processing such as those for other specific processing situations as provided for in Chapter IX. The Union or the Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued.

4. Where the processing for a purpose other than that for which the personal data have been collected is not based on the data subject's consent or on a Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Article 23(1), the controller shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the personal data are initially collected, take into account, inter alia:

(a) any link between the purposes for which the personal data have been collected and the purposes of the intended further processing;

(b) the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the

controller;

(c) the nature of the personal data, in particular whether special categories of personal data are processed, pursuant to Article 9, or whether personal data related to criminal convictions and offences are processed, pursuant to Article 10;

(d) the possible consequences of the intended further processing for data subjects;

(e) the existence of appropriate safeguards, which may include encryption or pseudonymisation.

Article 7

Conditions for consent

1. Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.

2. If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding.

3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent.

4. When assessing whether consent is freely given, utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.

[…]

Article 9

Processing of special categories of personal data

1. Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.

2. Paragraph 1 shall not apply if one of the following applies:

(a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject;

(b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject;

(c) processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent;

(d) processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects;

(e) processing relates to personal data which are manifestly made public by the data subject;

(f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity;

(g) processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject;

(h) processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in paragraph 3;

(i) processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy;

(j) processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

3. Personal data referred to in paragraph 1 may be processed for the purposes referred to in point (h) of paragraph 2 when those data are processed by or under the responsibility of a professional subject to the obligation of professional secrecy under Union or Member State law or rules established by national competent bodies or by another person also subject to an obligation of secrecy under Union or Member State law or rules established by national competent bodies.

4. Member States may maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health.

Article 10

Processing of personal data relating to criminal convictions and offences

Processing of personal data relating to criminal convictions and offences or related security measures based on Article 6(1) shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects. Any comprehensive register of criminal convictions shall be kept only under the control of official authority.

Article 11

Processing which does not require identification

1. If the purposes for which a controller processes personal data do not or do no longer require the identification of a data subject by the controller, the controller shall not be obliged to maintain, acquire or process additional information in order to identify the data subject for the sole purpose of complying with this Regulation.

2. Where, in cases referred to in paragraph 1 of this Article, the controller is able to demonstrate that it is not in a position to identify the data subject, the controller shall inform the data subject accordingly, if possible. In such cases, Articles 15 to 20 shall not apply except where the data subject, for the purpose of exercising his or her rights under those articles, provides additional information enabling his or her identification.

CHAPTER III

Rights of the data subject

Section 1

Transparency and modalities

Article 12

Transparent information, communication and modalities for the exercise of the rights of the data subject

1. The controller shall take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible

form, using clear and plain language, in particular for any information addressed specifically to a child. The information shall be provided in writing, or by other means, including, where appropriate, by electronic means. When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means.

2. The controller shall facilitate the exercise of data subject rights under Articles 15 to 22. In the cases referred to in Article 11(2), the controller shall not refuse to act on the request of the data subject for exercising his or her rights under Articles 15 to 22, unless the controller demonstrates that it is not in a position to identify the data subject.

3. The controller shall provide information on action taken on a request under Articles 15 to 22 to the data subject without undue delay and in any event within one month of receipt of the request. That period may be extended by two further months where necessary, taking into account the complexity and number of the requests. The controller shall inform the data subject of any such extension within one month of receipt of the request, together with the reasons for the delay. Where the data subject makes the request by electronic form means, the information shall be provided by electronic means where possible, unless otherwise requested by the data subject.

4. If the controller does not take action on the request of the data subject, the controller shall inform the data subject without delay and at the latest within one month of receipt of the request of the reasons for not taking action and on the possibility of lodging a complaint with a supervisory authority and seeking a judicial remedy.

5. Information provided under Articles 13 and 14 and any communication and any actions taken under Articles 15 to 22 and 34 shall be provided free of charge. Where requests from a data subject are manifestly unfounded or excessive, in particular because of their repetitive character, the controller may either:

(a) charge a reasonable fee taking into account the administrative costs of providing the information or communication or taking the action requested; or

(b) refuse to act on the request.

The controller shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

6. Without prejudice to Article 11, where the controller has reasonable doubts concerning the identity of the natural person making the request referred to in Articles 15 to 21, the controller may request the provision of additional information necessary to confirm the identity of the data subject.

7. The information to be provided to data subjects pursuant to Articles 13 and 14 may be provided in combination with standardised icons in order to give in an easily visible, intelligible and clearly legible manner a meaningful overview of the intended processing. Where the icons are presented electronically they shall be machine-readable.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 92 for the purpose of determining the information to be presented by the icons and the procedures for providing standardised icons.

Section 2

Information and access to personal data

Article 13

Information to be provided where personal data are collected from the data subject

1. Where personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained, provide the data subject with all of the following information:

(a) the identity and the contact details of the controller and, where applicable, of the controller's representative;

(b) the contact details of the data protection officer, where applicable;

(c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;

(d) where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party;

(e) the recipients or categories of recipients of the personal data, if any;

(f) where applicable, the fact that the controller intends to transfer personal data to a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in the case of transfers referred to in Article 46 or 47, or

the second subparagraph of Article 49(1), reference to the appropriate or suitable safeguards and the means by which to obtain a copy of them or where they have been made available.

2. In addition to the information referred to in paragraph 1, the controller shall, at the time when personal data are obtained, provide the data subject with the following further information necessary to ensure fair and transparent processing:

(a) the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;

(b) the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability;

(c) where the processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;

(d) the right to lodge a complaint with a supervisory authority;

(e) whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data;

(f) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

3. Where the controller intends to further process the personal data for a purpose other than that for which the personal data were collected, the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information as referred to in paragraph 2.

4. Paragraphs 1, 2 and 3 shall not apply where and insofar as the data subject already has the information.

Article 14

Information to be provided where personal data have not been obtained from the data subject

1. Where personal data have not been obtained from the data subject, the controller shall provide the data subject with the following information:

(a) the identity and the contact details of the controller and, where applicable, of the controller's representative;

(b) the contact details of the data protection officer, where applicable;

(c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;

(d) the categories of personal data concerned;

(e) the recipients or categories of recipients of the personal data, if any;

(f) where applicable, that the controller intends to transfer personal data to a recipient in a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in the case of transfers referred to in Article 46 or 47, or the second subparagraph of Article 49(1), reference to the appropriate or suitable safeguards and the means to obtain a copy of them or where they have been made available.

2. In addition to the information referred to in paragraph 1, the controller shall provide the data subject with the following information necessary to ensure fair and transparent processing in respect of the data subject:

(a) the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;

(b) where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party;

(c) the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject and to object to processing as well as the right to data portability;

(d) where processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;

(e) the right to lodge a complaint with a supervisory authority;

(f) from which source the personal data originate, and if applicable, whether it came from publicly accessible sources;

(g)the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

3. The controller shall provide the information referred to in paragraphs 1 and 2:

(a)within a reasonable period after obtaining the personal data, but at the latest within one month, having regard to the specific circumstances in which the personal data are processed;

(b)if the personal data are to be used for communication with the data subject, at the latest at the time of the first communication to that data subject; or

(c) if a disclosure to another recipient is envisaged, at the latest when the personal data are first disclosed.

4. Where the controller intends to further process the personal data for a purpose other than that for which the personal data were obtained, the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information as referred to in paragraph 2.

5. Paragraphs 1 to 4 shall not apply where and insofar as:

(a) the data subject already has the information;

(b)the provision of such information proves impossible or would involve a disproportionate effort, in particular for processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, subject to the conditions and safeguards referred to in Article 89(1) or in so far as the obligation referred to in paragraph 1 of this Article is likely to render impossible or seriously impair the achievement of the objectives of that processing. In such cases the controller shall take appropriate measures to protect the data subject's rights and freedoms and legitimate interests, including making the information publicly available;

(c)obtaining or disclosure is expressly laid down by Union or Member State law to which the controller is subject and which provides appropriate measures to protect the data subject's legitimate interests; or

(d)where the personal data must remain confidential subject to an obligation of professional secrecy regulated by Union or Member State law, including a statutory obligation of secrecy.

Article 15

Right of access by the data subject

1. The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information:

(a) the purposes of the processing;

(b) the categories of personal data concerned;

(c)the recipients or categories of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organisations;

(d)where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period;

(e)the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing;

(f) the right to lodge a complaint with a supervisory authority;

(g) where the personal data are not collected from the data subject, any available information as to their source;

(h)the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

2. Where personal data are transferred to a third country or to an international organisation, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 46 relating to the transfer.

3. The controller shall provide a copy of the personal data undergoing processing. For any further copies requested by the data subject, the controller may charge a reasonable fee based on administrative costs. Where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form.

4. The right to obtain a copy referred to in paragraph 3 shall not adversely affect the rights and freedoms of others.

Section 3

Rectification and erasure

Article 16

Right to rectification

The data subject shall have the right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her. Taking into account the purposes of the processing, the data subject shall have the right to have incomplete personal data completed, including by means of providing a supplementary statement.

Article 17

Right to erasure ('right to be forgotten')

1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

(b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;

(c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);

(d) the personal data have been unlawfully processed;

(e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;

(f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).

2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.

3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:

(a) for exercising the right of freedom of expression and information;

(b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);

(d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or

(e) for the establishment, exercise or defence of legal claims.

Article 18

Right to restriction of processing

1. The data subject shall have the right to obtain from the controller restriction of processing where one of the following applies:

(a) the accuracy of the personal data is contested by the data subject, for a period enabling the controller to verify the accuracy of the personal data;

(b) the processing is unlawful and the data subject opposes the erasure of the personal data and requests the restriction of their use instead;

(c) the controller no longer needs the personal data for the purposes of the processing, but they are required by the data subject for the establishment, exercise or defence of legal claims;

(d) the data subject has objected to processing pursuant to Article 21(1) pending the verification whether the legitimate grounds of the controller override those of the data subject.

2. Where processing has been restricted under paragraph 1, such personal data shall, with the exception of storage, only be processed with the data subject's consent or for the establishment, exercise or defence of legal claims or for the protection of the rights of another natural or legal person or for reasons of important public interest of the Union or of a Member State.

3. A data subject who has obtained restriction of processing pursuant to paragraph 1 shall be informed by the controller before the restriction of processing is lifted.

Article 19

Notification obligation regarding rectification or erasure of personal data or restriction of processing

The controller shall communicate any rectification or erasure of personal data or restriction of processing carried out in accordance with Article 16, Article 17(1) and Article 18 to each recipient to whom the personal data have been disclosed, unless this proves impossible or involves disproportionate effort. The controller shall inform the data subject about those recipients if the data subject requests it.

Article 20

Right to data portability

1. The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided, where:

(a) the processing is based on consent pursuant to point (a) of Article 6(1) or point (a) of Article 9(2) or on a contract pursuant to point (b) of Article 6(1); and

(b) the processing is carried out by automated means.

2. In exercising his or her right to data portability pursuant to paragraph 1, the data subject shall have the right to have the personal data transmitted directly from one controller to another, where technically feasible.

3. The exercise of the right referred to in paragraph 1 of this Article shall be without prejudice to Article 17. That right shall not apply to processing necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

4. The right referred to in paragraph 1 shall not adversely affect the rights and freedoms of others.

Section 4

Right to object and automated individual decision-making

Article 21

Right to object

1. The data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of

personal data concerning him or her which is based on point (e) or (f) of Article 6(1), including profiling based on those provisions. The controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.

2. Where personal data are processed for direct marketing purposes, the data subject shall have the right to object at any time to processing of personal data concerning him or her for such marketing, which includes profiling to the extent that it is related to such direct marketing.

3. Where the data subject objects to processing for direct marketing purposes, the personal data shall no longer be processed for such purposes.

4. At the latest at the time of the first communication with the data subject, the right referred to in paragraphs 1 and 2 shall be explicitly brought to the attention of the data subject and shall be presented clearly and separately from any other information.

5. In the context of the use of information society services, and notwithstanding Directive 2002/58/EC, the data subject may exercise his or her right to object by automated means using technical specifications.

6. Where personal data are processed for scientific or historical research purposes or statistical purposes pursuant to Article 89(1), the data subject, on grounds relating to his or her particular situation, shall have the right to object to processing of personal data concerning him or her, unless the processing is necessary for the performance of a task carried out for reasons of public interest.

Article 22

Automated individual decision-making, including profiling

1. The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.

2. Paragraph 1 shall not apply if the decision:

(a) is necessary for entering into, or performance of, a contract between the data subject and a data controller;

(b)is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or

(c) is based on the data subject's explicit consent.

3. In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.

4. Decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place.

Section 5

Restrictions

Article 23

Restrictions

1. Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard:

(a) national security;

(b) defence;

(c) public security;

(d)the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;

(e)other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation a matters, public health and social security;

(f) the protection of judicial independence and judicial proceedings;

(g) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;

(h)a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority in the cases referred to in points (a) to (e) and (g);

(i) the protection of the data subject or the rights and freedoms of others;

(j) the enforcement of civil law claims.

2. In particular, any legislative measure referred to in paragraph 1 shall contain specific provisions at least, where relevant, as to:

(a) the purposes of the processing or categories of processing;

(b) the categories of personal data;

(c) the scope of the restrictions introduced;

(d) the safeguards to prevent abuse or unlawful access or transfer;

(e) the specification of the controller or categories of controllers;

(f)the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing;

(g) the risks to the rights and freedoms of data subjects; and

(h)the right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction.

CHAPTER IV

Controller and processor

Section 1

General obligations

Article 24

Responsibility of the controller

1. Taking into account the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons, the controller shall implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation. Those measures shall be reviewed and updated where necessary.

2. Where proportionate in relation to processing activities, the measures referred to in paragraph 1 shall include the implementation of appropriate data protection policies by the controller.

3. Adherence to approved codes of conduct as referred to in Article 40 or approved certification mechanisms as referred to in Article 42 may be used as an element by which to demonstrate compliance with the obligations of the controller.

Article 25

Data protection by design and by default

1. Taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as

well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, the controller shall, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation and protect the rights of data subjects.

2. The controller shall implement appropriate technical and organisational measures for ensuring that, by default, only personal data which are necessary for each specific purpose of the processing are processed. That obligation applies to the amount of personal data collected, the extent of their processing, the period of their storage and their accessibility. In particular, such measures shall ensure that by default personal data are not made accessible without the individual's intervention to an indefinite number of natural persons.

3. An approved certification mechanism pursuant to Article 42 may be used as an element to demonstrate compliance with the requirements set out in paragraphs 1 and 2 of this Article.

Article 26

Joint controllers

1. Where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers. They shall in a transparent manner determine their respective responsibilities for compliance with the obligations under this Regulation, in particular as regards the exercising of the rights of the data subject and their respective duties to provide the information referred to in Articles 13 and 14, by means of an arrangement between them unless, and in so far as, the respective responsibilities of the controllers are determined by Union or Member State law to which the controllers are subject. The arrangement may designate a contact point for data subjects.

2. The arrangement referred to in paragraph 1 shall duly reflect the respective roles and relationships of the joint controllers *vis-à-vis* the data subjects. The essence of the arrangement shall be made available to the data subject.

3. Irrespective of the terms of the arrangement referred to in paragraph 1, the data subject may exercise his or her rights under this Regulation in respect of and against each of the controllers.

Article 27

Representatives of controllers or processors not established in the Union

1. Where Article 3(2) applies, the controller or the processor shall designate in writing a representative in the Union.

2. The obligation laid down in paragraph 1 of this Article shall not apply to:

(a) processing which is occasional, does not include, on a large scale, processing of special categories of data as referred to in Article 9(1) or processing of personal data relating to criminal convictions and offences referred to in Article 10, and is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing; or

(b) a public authority or body.

3. The representative shall be established in one of the Member States where the data subjects, whose personal data are processed in relation to the offering of goods or services to them, or whose behaviour is monitored, are.

4. The representative shall be mandated by the controller or processor to be addressed in addition to or instead of the controller or the processor by, in particular, supervisory authorities and data subjects, on all issues related to processing, for the purposes of ensuring compliance with this Regulation.

5. The designation of a representative by the controller or processor shall be without prejudice to legal actions which could be initiated against the controller or the processor themselves.

Article 28

Processor

1. Where processing is to be carried out on behalf of a controller, the controller shall use only processors providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that processing will meet the

requirements of this Regulation and ensure the protection of the rights of the data subject.

2. The processor shall not engage another processor without prior specific or general written authorisation of the controller. In the case of general written authorisation, the processor shall inform the controller of any intended changes concerning the addition or replacement of other processors, thereby giving the controller the opportunity to object to such changes.

3. Processing by a processor shall be governed by a contract or other legal act under Union or Member State law, that is binding on the processor with regard to the controller and that sets out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller. That contract or other legal act shall stipulate, in particular, that the processor:

(a) processes the personal data only on documented instructions from the controller, including with regard to transfers of personal data to a third country or an international organisation, unless required to do so by Union or Member State law to which the processor is subject; in such a case, the processor shall inform the controller of that legal requirement before processing, unless that law prohibits such information on important grounds of public interest;

(b) ensures that persons authorised to process the personal data have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality;

(c) takes all measures required pursuant to Article 32;

(d) respects the conditions referred to in paragraphs 2 and 4 for engaging another processor;

(e) taking into account the nature of the processing, assists the controller by appropriate technical and organisational measures, insofar as this is possible, for the fulfilment of the controller's obligation to respond to requests for exercising the data subject's rights laid down in Chapter III;

(f) assists the controller in ensuring compliance with the obligations pursuant to Articles 32 to 36 taking into account the nature of processing and the information available to the processor;

(g) at the choice of the controller, deletes or returns all the personal data to the controller after the end of the provision of services relating to processing, and deletes existing copies unless Union or Member State law requires storage of the personal data;

(h) makes available to the controller all information necessary to demonstrate compliance with the obligations laid down in this Article and allow for and contribute to audits, including inspections, conducted by the controller or another auditor mandated by the controller.

With regard to point (h) of the first subparagraph, the processor shall immediately inform the controller if, in its opinion, an instruction infringes this Regulation or other Union or Member State data protection provisions.

4. Where a processor engages another processor for carrying out specific processing activities on behalf of the controller, the same data protection obligations as set out in the contract or other legal act between the controller and the processor as referred to in paragraph 3 shall be imposed on that other processor by way of a contract or other legal act under Union or Member State law, in particular providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that the processing will meet the requirements of this Regulation. Where that other processor fails to fulfil its data protection obligations, the initial processor shall remain fully liable to the controller for the performance of that other processor's obligations.

5. Adherence of a processor to an approved code of conduct as referred to in Article 40 or an approved certification mechanism as referred to in Article 42 may be used as an element by which to demonstrate sufficient guarantees as referred to in paragraphs 1 and 4 of this Article.

6. Without prejudice to an individual contract between the controller and the processor, the contract or the other legal act referred to in paragraphs 3 and 4 of this Article may be based, in whole or in part, on standard contractual clauses referred to in paragraphs 7 and 8 of this Article, including when they are part of a certification granted to the controller or processor pursuant to Articles 42 and 43.

7. The Commission may lay down standard contractual clauses for the matters referred to in paragraph 3 and 4 of this Article and in accordance with the examination procedure referred to in Article 93(2).

8. A supervisory authority may adopt standard contractual clauses for the matters referred to in paragraph 3 and 4 of this Article and in accordance with the consistency mechanism referred to in Article 63.

9. The contract or the other legal act referred to in paragraphs 3 and 4 shall be in writing, including in electronic form.

10. Without prejudice to Articles 82, 83 and 84, if a processor infringes this Regulation by determining the purposes and means of

processing, the processor shall be considered to be a controller in respect of that processing.

Article 29

Processing under the authority of the controller or processor

The processor and any person acting under the authority of the controller or of the processor, who has access to personal data, shall not process those data except on instructions from the controller, unless required to do so by Union or Member State law.

Article 30

Records of processing activities

1. Each controller and, where applicable, the controller's representative, shall maintain a record of processing activities under its responsibility. That record shall contain all of the following information:

(a) the name and contact details of the controller and, where applicable, the joint controller, the controller's representative and the data protection officer;

(b) the purposes of the processing;

(c) a description of the categories of data subjects and of the categories of personal data;

(d) the categories of recipients to whom the personal data have been or will be disclosed including recipients in third countries or international organisations;

(e) where applicable, transfers of personal data to a third country or an international organisation, including the identification of that third country or international organisation and, in the case of transfers referred to in the second subparagraph of Article 49(1), the documentation of suitable safeguards;

(f) where possible, the envisaged time limits for erasure of the different categories of data;

(g) where possible, a general description of the technical and organisational security measures referred to in Article 32(1).

2. Each processor and, where applicable, the processor's representative shall maintain a record of all categories of processing activities carried out on behalf of a controller, containing:

(a) the name and contact details of the processor or processors and of each controller on behalf of which the processor is acting, and, where applicable, of the controller's or the processor's representative, and the data protection officer;

(b) the categories of processing carried out on behalf of each controller;

(c) where applicable, transfers of personal data to a third country or an international organisation, including the identification of that third country or international organisation and, in the case of transfers referred to in the second subparagraph of Article 49(1), the documentation of suitable safeguards;

(d) where possible, a general description of the technical and organisational security measures referred to in Article 32(1).

3. The records referred to in paragraphs 1 and 2 shall be in writing, including in electronic form.

4. The controller or the processor and, where applicable, the controller's or the processor's representative, shall make the record available to the supervisory authority on request.

5. The obligations referred to in paragraphs 1 and 2 shall not apply to an enterprise or an organisation employing fewer than 250 persons unless the processing it carries out is likely to result in a risk to the rights and freedoms of data subjects, the processing is not occasional, or the processing includes special categories of data as referred to in Article 9(1) or personal data relating to criminal convictions and offences referred to in Article 10.

Article 31

Cooperation with the supervisory authority

The controller and the processor and, where applicable, their representatives, shall cooperate, on request, with the supervisory authority in the performance of its tasks.

Section 2

Security of personal data

Article 32

Security of processing

1. Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, including inter alia as appropriate:

(a) the pseudonymisation and encryption of personal data;

(b) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;

(c) the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident;

(d) a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.

2. In assessing the appropriate level of security account shall be taken in particular of the risks that are presented by processing, in particular from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to personal data transmitted, stored or otherwise processed.

3. Adherence to an approved code of conduct as referred to in Article 40 or an approved certification mechanism as referred to in Article 42 may be used as an element by which to demonstrate compliance with the requirements set out in paragraph 1 of this Article.

4. The controller and processor shall take steps to ensure that any natural person acting under the authority of the controller or the processor who has access to personal data does not process them except on instructions from the controller, unless he or she is required to do so by Union or Member State law.

Article 33

Notification of a personal data breach to the supervisory authority

1. In the case of a personal data breach, the controller shall without undue delay and, where feasible, not later than 72 hours after having become aware of it, notify the personal data breach to the supervisory authority competent in accordance with Article 55, unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons. Where the notification to the supervisory authority is not made within 72 hours, it shall be accompanied by reasons for the delay.

2. The processor shall notify the controller without undue delay after becoming aware of a personal data breach.

3. The notification referred to in paragraph 1 shall at least:

(a) describe the nature of the personal data breach including where possible, the categories and approximate number of data subjects concerned and the categories and approximate number of personal data records concerned;

(b) communicate the name and contact details of the data protection officer or other contact point where more information can be obtained;

(c) describe the likely consequences of the personal data breach;

(d) describe the measures taken or proposed to be taken by the controller to address the personal data breach, including, where appropriate, measures to mitigate its possible adverse effects.

4. Where, and in so far as, it is not possible to provide the information at the same time, the information may be provided in phases without undue further delay.

5. The controller shall document any personal data breaches, comprising the facts relating to the personal data breach, its effects and the remedial action taken. That documentation shall enable the supervisory authority to verify compliance with this Article.

Article 34

Communication of a personal data breach to the data subject

1. When the personal data breach is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall communicate the personal data breach to the data subject without undue delay.

2. The communication to the data subject referred to in paragraph 1 of this Article shall describe in clear and plain language the nature of the personal data breach and contain at least the information and measures referred to in points (b), (c) and (d) of Article 33(3).

3. The communication to the data subject referred to in paragraph 1 shall not be required if any of the following conditions are met:

(a) the controller has implemented appropriate technical and organisational protection measures, and those measures were applied to the personal data affected by the personal data breach, in particular those that render the personal data unintelligible to any person who is not authorised to access it, such as encryption;

(b) the controller has taken subsequent measures which ensure that the high risk to the rights and freedoms of data subjects referred to in paragraph 1 is no longer likely to materialise;

(c) it would involve disproportionate effort. In such a case, there shall instead be a public communication or similar measure whereby the data subjects are informed in an equally effective manner.

4. If the controller has not already communicated the personal data breach to the data subject, the supervisory authority, having considered the likelihood of the personal data breach resulting in a high risk, may require it to do so or may decide that any of the conditions referred to in paragraph 3 are met.

Section 3

Data protection impact assessment and prior consultation

Article 35

Data protection impact assessment

1. Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. A single assessment may address a set of similar processing operations that present similar high risks.

2. The controller shall seek the advice of the data protection officer, where designated, when carrying out a data protection impact assessment.

3. A data protection impact assessment referred to in paragraph 1 shall in particular be required in the case of:

(a) a systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling, and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect the natural person;

(b) processing on a large scale of special categories of data referred to in Article 9(1), or of personal data relating to criminal convictions and offences referred to in Article 10; or

(c) a systematic monitoring of a publicly accessible area on a large scale.

4. The supervisory authority shall establish and make public a list of the kind of processing operations which are subject to the requirement for a data protection impact assessment pursuant to paragraph 1. The supervisory authority shall communicate those lists to the Board referred to in Article 68.

5. The supervisory authority may also establish and make public a list of the kind of processing operations for which no data protection impact assessment is required. The supervisory authority shall communicate those lists to the Board.

6. Prior to the adoption of the lists referred to in paragraphs 4 and 5, the competent supervisory authority shall apply the consistency mechanism referred to in Article 63 where such lists involve processing activities which are related to the offering of goods or services to data subjects or to the monitoring of their behaviour in several Member States, or may substantially affect the free movement of personal data within the Union.

7. The assessment shall contain at least:

(a) a systematic description of the envisaged processing operations and the purposes of the processing, including, where applicable, the legitimate interest pursued by the controller;

(b) an assessment of the necessity and proportionality of the processing operations in relation to the purposes;

(c) an assessment of the risks to the rights and freedoms of data subjects referred to in paragraph 1; and

(d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with this Regulation taking into account the rights and legitimate interests of data subjects and other persons concerned.

8. Compliance with approved codes of conduct referred to in Article 40 by the relevant controllers or processors shall be taken into due account in assessing the impact of the processing operations performed by such controllers or processors, in particular for the purposes of a data protection impact assessment.

9. Where appropriate, the controller shall seek the views of data subjects or their representatives on the intended processing, without prejudice to the protection of commercial or public interests or the security of processing operations.

10. Where processing pursuant to point (c) or (e) of Article 6(1) has a legal basis in Union law or in the law of the Member State to which the controller is subject, that law regulates the specific processing operation or set of operations in question, and a data protection impact assessment has already been carried out as part of a general impact assessment in the context of the adoption of that legal basis, paragraphs 1 to 7 shall not apply unless Member States deem it to be necessary to carry out such an assessment prior to processing activities.

11. Where necessary, the controller shall carry out a review to assess if processing is performed in accordance with the data protection impact assessment at least when there is a change of the risk represented by processing operations.

Article 36

Prior consultation

1. The controller shall consult the supervisory authority prior to processing where a data protection impact assessment under Article 35 indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk.

2. Where the supervisory authority is of the opinion that the intended processing referred to in paragraph 1 would infringe this Regulation, in particular where the controller has insufficiently identified or mitigated the risk, the supervisory authority shall, within period of up to eight weeks of receipt of the request for consultation, provide written advice to the controller and, where applicable to the processor, and may use any of its powers referred to in Article 58. That period may be extended by six weeks, taking into account the complexity of the intended processing. The supervisory authority shall inform the controller and, where applicable, the processor, of any such extension within one month of receipt of the request for consultation together with the reasons for the delay. Those periods may be suspended until the supervisory authority has obtained information it has requested for the purposes of the consultation.

3. When consulting the supervisory authority pursuant to paragraph 1, the controller shall provide the supervisory authority with:

(a) where applicable, the respective responsibilities of the controller, joint controllers and processors involved in the processing, in particular for processing within a group of undertakings;

(b) the purposes and means of the intended processing;

(c) the measures and safeguards provided to protect the rights and freedoms of data subjects pursuant to this Regulation;

(d) where applicable, the contact details of the data protection officer;

(e) the data protection impact assessment provided for in Article 35; and

(f) any other information requested by the supervisory authority.

4. Member States shall consult the supervisory authority during the preparation of a proposal for a legislative measure to be adopted by a national parliament, or of a regulatory measure based on such a legislative measure, which relates to processing.

5. Notwithstanding paragraph 1, Member State law may require controllers to consult with, and obtain prior authorisation from, the supervisory authority in relation to processing by a controller for the performance of a task carried out by the controller in the public interest, including processing in relation to social protection and public health.

Section 4

Data protection officer

Article 37

Designation of the data protection officer

1. The controller and the processor shall designate a data protection officer in any case where:

(a) the processing is carried out by a public authority or body, except for courts acting in their judicial capacity;

(b) the core activities of the controller or the processor consist of processing operations which, by virtue of their nature, their scope and/or their purposes, require regular and systematic monitoring of data subjects on a large scale; or

(c) the core activities of the controller or the processor consist of processing on a large scale of special categories of data pursuant to Article 9 and personal data relating to criminal convictions and offences referred to in Article 10.

2. A group of undertakings may appoint a single data protection officer provided that a data protection officer is easily accessible from each establishment.

3. Where the controller or the processor is a public authority or body, a single data protection officer may be designated for several such authorities or bodies, taking account of their organisational structure and size.

4. In cases other than those referred to in paragraph 1, the controller or processor or associations and other bodies representing categories of controllers or processors may or, where required by Union or Member State law shall, designate a data protection officer. The data protection officer may act for such associations and other bodies representing controllers or processors.

5. The data protection officer shall be designated on the basis of professional qualities and, in particular, expert knowledge of data protection law and practices and the ability to fulfil the tasks referred to in Article 39.

6. The data protection officer may be a staff member of the controller or processor, or fulfil the tasks on the basis of a service contract.

7. The controller or the processor shall publish the contact details of the data protection officer and communicate them to the supervisory authority.

Article 38

Position of the data protection officer

1. The controller and the processor shall ensure that the data protection officer is involved, properly and in a timely manner, in all issues which relate to the protection of personal data.

2. The controller and processor shall support the data protection officer in performing the tasks referred to in Article 39 by providing resources necessary to carry out those tasks and access to personal data and processing operations, and to maintain his or her expert knowledge.

3. The controller and processor shall ensure that the data protection officer does not receive any instructions regarding the exercise of those tasks. He or she shall not be dismissed or penalised by the controller or the processor for performing his tasks. The data protection officer shall directly report to the highest management level of the controller or the processor.

4. Data subjects may contact the data protection officer with regard to all issues related to processing of their personal data and to the exercise of their rights under this Regulation.

5. The data protection officer shall be bound by secrecy or confidentiality concerning the performance of his or her tasks, in accordance with Union or Member State law.

6. The data protection officer may fulfil other tasks and duties. The controller or processor shall ensure that any such tasks and duties do not result in a conflict of interests.

Article 39

Tasks of the data protection officer

1. The data protection officer shall have at least the following tasks:

(a) to inform and advise the controller or the processor and the employees who carry out processing of their obligations pursuant to this Regulation and to other Union or Member State data protection provisions;

(b) to monitor compliance with this Regulation, with other Union or Member State data protection provisions and with the policies of the controller or processor in relation to the protection of personal data, including the assignment of responsibilities, awareness-raising and training of staff involved in processing operations, and the related audits;

(c) to provide advice where requested as regards the data protection impact assessment and monitor its performance pursuant to Article 35;

(d) to cooperate with the supervisory authority;

(e) to act as the contact point for the supervisory authority on issues relating to processing, including the prior consultation referred to in Article 36, and to consult, where appropriate, with regard to any other matter.

2. The data protection officer shall in the performance of his or her tasks have due regard to the risk associated with processing operations, taking into account the nature, scope, context and purposes of processing.

Section 5
Codes of conduct and certification

Article 40

Codes of conduct

1. The Member States, the supervisory authorities, the Board and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper application of this Regulation, taking account of the specific features of the various processing sectors and the specific needs of micro, small and medium-sized enterprises.

2. Associations and other bodies representing categories of controllers or processors may prepare codes of conduct, or amend or extend such codes, for the purpose of specifying the application of this Regulation, such as with regard to:

(a) fair and transparent processing;

(b) the legitimate interests pursued by controllers in specific contexts;

(c) the collection of personal data;

(d) the pseudonymisation of personal data;

(e) the information provided to the public and to data subjects;

(f) the exercise of the rights of data subjects;

(g) the information provided to, and the protection of, children, and the manner in which the consent of the holders of parental responsibility over children is to be obtained;

(h) the measures and procedures referred to in Articles 24 and 25 and the measures to ensure security of processing referred to in Article 32;

(i) the notification of personal data breaches to supervisory authorities and the communication of such personal data breaches to data subjects;

(j) the transfer of personal data to third countries or international organisations; or

(k) out-of-court proceedings and other dispute resolution procedures for resolving disputes between controllers and data subjects with regard to processing, without prejudice to the rights of data subjects pursuant to Articles 77 and 79.

3. In addition to adherence by controllers or processors subject to this Regulation, codes of conduct approved pursuant to paragraph 5 of this Article and having general validity pursuant to paragraph 9 of this Article may also be adhered to by controllers or processors that are not subject to this Regulation pursuant to Article 3 in order to provide appropriate safeguards within the framework of personal data transfers to third countries or international organisations under the terms referred to in point (e) of Article 46(2). Such controllers or processors shall make binding and enforceable commitments, via contractual or other legally binding instruments, to apply those

appropriate safeguards including with regard to the rights of data subjects.

4. A code of conduct referred to in paragraph 2 of this Article shall contain mechanisms which enable the body referred to in Article 41(1) to carry out the mandatory monitoring of compliance with its provisions by the controllers or processors which undertake to apply it, without prejudice to the tasks and powers of supervisory authorities competent pursuant to Article 55 or 56.

5. Associations and other bodies referred to in paragraph 2 of this Article which intend to prepare a code of conduct or to amend or extend an existing code shall submit the draft code, amendment or extension to the supervisory authority which is competent pursuant to Article 55. The supervisory authority shall provide an opinion on whether the draft code, amendment or extension complies with this Regulation and shall approve that draft code, amendment or extension if it finds that it provides sufficient appropriate safeguards.

6. Where the draft code, or amendment or extension is approved in accordance with paragraph 5, and where the code of conduct concerned does not relate to processing activities in several Member States, the supervisory authority shall register and publish the code.

7. Where a draft code of conduct relates to processing activities in several Member States, the supervisory authority which is competent pursuant to Article 55 shall, before approving the draft code, amendment or extension, submit it in the procedure referred to in Article 63 to the Board which shall provide an opinion on whether the draft code, amendment or extension complies with this Regulation or, in the situation referred to in paragraph 3 of this Article, provides appropriate safeguards.

8. Where the opinion referred to in paragraph 7 confirms that the draft code, amendment or extension complies with this Regulation, or, in the situation referred to in paragraph 3, provides appropriate safeguards, the Board shall submit its opinion to the Commission.

9. The Commission may, by way of implementing acts, decide that the approved code of conduct, amendment or extension submitted to it pursuant to paragraph 8 of this Article have general validity within the Union. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 93(2).

10. The Commission shall ensure appropriate publicity for the approved codes which have been decided as having general validity in accordance with paragraph 9.

11. The Board shall collate all approved codes of conduct, amendments and extensions in a register and shall make them publicly available by way of appropriate means.

Article 41

Monitoring of approved codes of conduct

1. Without prejudice to the tasks and powers of the competent supervisory authority under Articles 57 and 58, the monitoring of compliance with a code of conduct pursuant to Article 40 may be carried out by a body which has an appropriate level of expertise in relation to the subject-matter of the code and is accredited for that purpose by the competent supervisory authority.

2. A body as referred to in paragraph 1 may be accredited to monitor compliance with a code of conduct where that body has:

(a) demonstrated its independence and expertise in relation to the subject-matter of the code to the satisfaction of the competent supervisory authority;

(b) established procedures which allow it to assess the eligibility of controllers and processors concerned to apply the code, to monitor their compliance with its provisions and to periodically review its operation;

(c) established procedures and structures to handle complaints about infringements of the code or the manner in which the code has been, or is being, implemented by a controller or processor, and to make those procedures and structures transparent to data subjects and the public; and

(d) demonstrated to the satisfaction of the competent supervisory authority that its tasks and duties do not result in a conflict of interests.

3. The competent supervisory authority shall submit the draft criteria for accreditation of a body as referred to in paragraph 1 of this Article to the Board pursuant to the consistency mechanism referred to in Article 63.

4. Without prejudice to the tasks and powers of the competent supervisory authority and the provisions of Chapter VIII, a body as referred to in paragraph 1 of this Article shall, subject to appropriate safeguards, take appropriate action in cases of infringement of the code by a controller or processor, including suspension or exclusion of the controller or processor concerned from the code. It shall inform the competent supervisory authority of such actions and the reasons for taking them.

5. The competent supervisory authority shall revoke the accreditation of a body as referred to in paragraph 1 if the conditions for

accreditation are not, or are no longer, met or where actions taken by the body infringe this Regulation.

6. This Article shall not apply to processing carried out by public authorities and bodies.

Article 42

Certification

1. The Member States, the supervisory authorities, the Board and the Commission shall encourage, in particular at Union level, the establishment of data protection certification mechanisms and of data protection seals and marks, for the purpose of demonstrating compliance with this Regulation of processing operations by controllers and processors. The specific needs of micro, small and medium-sized enterprises shall be taken into account.

2. In addition to adherence by controllers or processors subject to this Regulation, data protection certification mechanisms, seals or marks approved pursuant to paragraph 5 of this Article may be established for the purpose of demonstrating the existence of appropriate safeguards provided by controllers or processors that are not subject to this Regulation pursuant to Article 3 within the framework of personal data transfers to third countries or international organisations under the terms referred to in point (f) of Article 46(2). Such controllers or processors shall make binding and enforceable commitments, via contractual or other legally binding instruments, to apply those appropriate safeguards, including with regard to the rights of data subjects.

3. The certification shall be voluntary and available via a process that is transparent.

4. A certification pursuant to this Article does not reduce the responsibility of the controller or the processor for compliance with this Regulation and is without prejudice to the tasks and powers of the supervisory authorities which are competent pursuant to Article 55 or 56.

5. A certification pursuant to this Article shall be issued by the certification bodies referred to in Article 43 or by the competent supervisory authority, on the basis of criteria approved by that competent supervisory authority pursuant to Article 58(3) or by the Board pursuant to Article 63. Where the criteria are approved by the Board, this may result in a common certification, the European Data Protection Seal.

6. The controller or processor which submits its processing to the certification mechanism shall provide the certification body referred to in Article 43, or where applicable, the competent supervisory authority, with all information and access to its processing activities which are necessary to conduct the certification procedure.

7. Certification shall be issued to a controller or processor for a maximum period of three years and may be renewed, under the same conditions, provided that the relevant requirements continue to be met. Certification shall be withdrawn, as applicable, by the certification bodies referred to in Article 43 or by the competent supervisory authority where the requirements for the certification are not or are no longer met.

8. The Board shall collate all certification mechanisms and data protection seals and marks in a register and shall make them publicly available by any appropriate means.

Article 43

Certification bodies

1. Without prejudice to the tasks and powers of the competent supervisory authority under Articles 57 and 58, certification bodies which have an appropriate level of expertise in relation to data protection shall, after informing the supervisory authority in order to allow it to exercise its powers pursuant to point (h) of Article 58(2) where necessary, issue and renew certification. Member States shall ensure that those certification bodies are accredited by one or both of the following:

(a) the supervisory authority which is competent pursuant to Article 55 or 56;

(b) the national accreditation body named in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council [(20)] in accordance with EN-ISO/IEC 17065/2012 and with the additional requirements established by the supervisory authority which is competent pursuant to Article 55 or 56.

2. Certification bodies referred to in paragraph 1 shall be accredited in accordance with that paragraph only where they have:

(a) demonstrated their independence and expertise in relation to the subject-matter of the certification to the satisfaction of the competent supervisory authority;

(b) undertaken to respect the criteria referred to in Article 42(5) and approved by the supervisory authority which is competent pursuant

to Article 55 or 56 or by the Board pursuant to Article 63;

(c) established procedures for the issuing, periodic review and withdrawal of data protection certification, seals and marks;

(d) established procedures and structures to handle complaints about infringements of the certification or the manner in which the certification has been, or is being, implemented by the controller or processor, and to make those procedures and structures transparent to data subjects and the public; and

(e) demonstrated, to the satisfaction of the competent supervisory authority, that their tasks and duties do not result in a conflict of interests.

3. The accreditation of certification bodies as referred to in paragraphs 1 and 2 of this Article shall take place on the basis of criteria approved by the supervisory authority which is competent pursuant to Article 55 or 56 or by the Board pursuant to Article 63. In the case of accreditation pursuant to point (b) of paragraph 1 of this Article, those requirements shall complement those envisaged in Regulation (EC) No 765/2008 and the technical rules that describe the methods and procedures of the certification bodies.

4. The certification bodies referred to in paragraph 1 shall be responsible for the proper assessment leading to the certification or the withdrawal of such certification without prejudice to the responsibility of the controller or processor for compliance with this Regulation. The accreditation shall be issued for a maximum period of five years and may be renewed on the same conditions provided that the certification body meets the requirements set out in this Article.

5. The certification bodies referred to in paragraph 1 shall provide the competent supervisory authorities with the reasons for granting or withdrawing the requested certification.

6. The requirements referred to in paragraph 3 of this Article and the criteria referred to in Article 42(5) shall be made public by the supervisory authority in an easily accessible form. The supervisory authorities shall also transmit those requirements and criteria to the Board. The Board shall collate all certification mechanisms and data protection seals in a register and shall make them publicly available by any appropriate means.

7. Without prejudice to Chapter VIII, the competent supervisory authority or the national accreditation body shall revoke an accreditation of a certification body pursuant to paragraph 1 of this Article where the conditions for the accreditation are not, or are no longer, met or where actions taken by a certification body infringe this Regulation.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 92 for the purpose of specifying the requirements to be taken into account for the data protection certification mechanisms referred to in Article 42(1).

9. The Commission may adopt implementing acts laying down technical standards for certification mechanisms and data protection seals and marks, and mechanisms to promote and recognise those certification mechanisms, seals and marks. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 93(2).

CHAPTER V

Transfers of personal data to third countries or international organisations

Article 44

General principle for transfers

Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions of this Regulation, the conditions laid down in this Chapter are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation. All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined.

Article 45

Transfers on the basis of an adequacy decision

1. A transfer of personal data to a third country or an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. Such a transfer shall not require any specific authorisation.

2. When assessing the adequacy of the level of protection, the Commission shall, in particular, take account of the following elements:

(a) the rule of law, respect for human rights and fundamental freedoms, relevant legislation, both general and sectoral, including concerning public security, defence, national security and criminal law and the access of public authorities to personal data, as well as the implementation of such legislation, data protection rules, professional rules and security measures, including rules for the onward transfer of personal data to another third country or international organisation which are complied with in that country or international organisation, case-law, as well as effective and enforceable data subject rights and effective administrative and judicial redress for the data subjects whose personal data are being transferred;

(b) the existence and effective functioning of one or more independent supervisory authorities in the third country or to which an international organisation is subject, with responsibility for ensuring and enforcing compliance with the data protection rules, including adequate enforcement powers, for assisting and advising the data subjects in exercising their rights and for cooperation with the supervisory authorities of the Member States; and

(c) the international commitments the third country or international organisation concerned has entered into, or other obligations arising from legally binding conventions or instruments as well as from its participation in multilateral or regional systems, in particular in relation to the protection of personal data.

3. The Commission, after assessing the adequacy of the level of protection, may decide, by means of implementing act, that a third country, a territory or one or more specified sectors within a third country, or an international organisation ensures an adequate level of protection within the meaning of paragraph 2 of this Article. The implementing act shall provide for a mechanism for a periodic review, at least every four years, which shall take into account all relevant developments in the third country or international organisation. The implementing act shall specify its territorial and sectoral application and, where applicable, identify the supervisory authority or authorities referred to in point (b) of paragraph 2 of this Article. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 93(2).

4. The Commission shall, on an ongoing basis, monitor developments in third countries and international organisations that could affect the functioning of decisions adopted pursuant to paragraph 3 of this Article and decisions adopted on the basis of Article 25(6) of Directive 95/46/EC.

5. The Commission shall, where available information reveals, in particular following the review referred to in paragraph 3 of this Article, that a third country, a territory or one or more specified sectors within a third country, or an international organisation no longer ensures an adequate level of protection within the meaning of paragraph 2 of this Article, to the extent necessary, repeal, amend or suspend the decision referred to in paragraph 3 of this Article by means of implementing acts without retro-active effect. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 93(2).

On duly justified imperative grounds of urgency, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 93(3).

6. The Commission shall enter into consultations with the third country or international organisation with a view to remedying the situation giving rise to the decision made pursuant to paragraph 5.

7. A decision pursuant to paragraph 5 of this Article is without prejudice to transfers of personal data to the third country, a territory or one or more specified sectors within that third country, or the international organisation in question pursuant to Articles 46 to 49.

8. The Commission shall publish in the *Official Journal of the European Union* and on its website a list of the third countries, territories and specified sectors within a third country and international organisations for which it has decided that an adequate level of protection is or is no longer ensured.

9. Decisions adopted by the Commission on the basis of Article 25(6) of Directive 95/46/EC shall remain in force until amended, replaced or repealed by a Commission Decision adopted in accordance with paragraph 3 or 5 of this Article.

Article 46

Transfers subject to appropriate safeguards

1. In the absence of a decision pursuant to Article 45(3), a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.

2. The appropriate safeguards referred to in paragraph 1 may be provided for, without requiring any specific authorisation from a

supervisory authority, by:

(a) a legally binding and enforceable instrument between public authorities or bodies;

(b) binding corporate rules in accordance with Article 47;

(c) standard data protection clauses adopted by the Commission in accordance with the examination procedure referred to in Article 93(2);

(d) standard data protection clauses adopted by a supervisory authority and approved by the Commission pursuant to the examination procedure referred to in Article 93(2);

(e) an approved code of conduct pursuant to Article 40 together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards, including as regards data subjects' rights; or

(f) an approved certification mechanism pursuant to Article 42 together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards, including as regards data subjects' rights.

3. Subject to the authorisation from the competent supervisory authority, the appropriate safeguards referred to in paragraph 1 may also be provided for, in particular, by:

(a) contractual clauses between the controller or processor and the controller, processor or the recipient of the personal data in the third country or international organisation; or

(b) provisions to be inserted into administrative arrangements between public authorities or bodies which include enforceable and effective data subject rights.

4. The supervisory authority shall apply the consistency mechanism referred to in Article 63 in the cases referred to in paragraph 3 of this Article.

5. Authorisations by a Member State or supervisory authority on the basis of Article 26(2) of Directive 95/46/EC shall remain valid until amended, replaced or repealed, if necessary, by that supervisory authority. Decisions adopted by the Commission on the basis of Article 26(4) of Directive 95/46/EC shall remain in force until amended, replaced or repealed, if necessary, by a Commission Decision adopted in accordance with paragraph 2 of this Article.

Article 47

Binding corporate rules

1. The competent supervisory authority shall approve binding corporate rules in accordance with the consistency mechanism set out in Article 63, provided that they:

(a) are legally binding and apply to and are enforced by every member concerned of the group of undertakings, or group of enterprises engaged in a joint economic activity, including their employees;

(b) expressly confer enforceable rights on data subjects with regard to the processing of their personal data; and

(c) fulfil the requirements laid down in paragraph 2.

2. The binding corporate rules referred to in paragraph 1 shall specify at least:

(a) the structure and contact details of the group of undertakings, or group of enterprises engaged in a joint economic activity and of each of its members;

(b) the data transfers or set of transfers, including the categories of personal data, the type of processing and its purposes, the type of data subjects affected and the identification of the third country or countries in question;

(c) their legally binding nature, both internally and externally;

(d) the application of the general data protection principles, in particular purpose limitation, data minimisation, limited storage periods, data quality, data protection by design and by default, legal basis for processing, processing of special categories of personal data, measures to ensure data security, and the requirements in respect of onward transfers to bodies not bound by the binding corporate rules;

(e) the rights of data subjects in regard to processing and the means to exercise those rights, including the right not to be subject to decisions based solely on automated processing, including profiling in accordance with Article 22, the right to lodge a complaint with the competent supervisory authority and before the competent courts of the Member States in accordance with Article 79,

and to obtain redress and, where appropriate, compensation for a breach of the binding corporate rules;

(f) the acceptance by the controller or processor established on the territory of a Member State of liability for any breaches of the binding corporate rules by any member concerned not established in the Union; the controller or the processor shall be exempt from that liability, in whole or in part, only if it proves that that member is not responsible for the event giving rise to the damage;

(g) how the information on the binding corporate rules, in particular on the provisions referred to in points (d), (e) and (f) of this paragraph is provided to the data subjects in addition to Articles 13 and 14;

(h) the tasks of any data protection officer designated in accordance with Article 37 or any other person or entity in charge of the monitoring compliance with the binding corporate rules within the group of undertakings, or group of enterprises engaged in a joint economic activity, as well as monitoring training and complaint-handling;

(i) the complaint procedures;

(j) the mechanisms within the group of undertakings, or group of enterprises engaged in a joint economic activity for ensuring the verification of compliance with the binding corporate rules. Such mechanisms shall include data protection audits and methods for ensuring corrective actions to protect the rights of the data subject. Results of such verification should be communicated to the person or entity referred to in point (h) and to the board of the controlling undertaking of a group of undertakings, or of the group of enterprises engaged in a joint economic activity, and should be available upon request to the competent supervisory authority;

(k) the mechanisms for reporting and recording changes to the rules and reporting those changes to the supervisory authority;

(l) the cooperation mechanism with the supervisory authority to ensure compliance by any member of the group of undertakings, or group of enterprises engaged in a joint economic activity, in particular by making available to the supervisory authority the results of verifications of the measures referred to in point (j);

(m) the mechanisms for reporting to the competent supervisory authority any legal requirements to which a member of the group of undertakings, or group of enterprises engaged in a joint economic activity is subject in a third country which are likely to have a substantial adverse effect on the guarantees provided by the binding corporate rules; and

(n) the appropriate data protection training to personnel having permanent or regular access to personal data.

3. The Commission may specify the format and procedures for the exchange of information between controllers, processors and supervisory authorities for binding corporate rules within the meaning of this Article. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 93(2).

Article 48

Transfers or disclosures not authorised by Union law

Any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognised or enforceable in any manner if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State, without prejudice to other grounds for transfer pursuant to this Chapter.

Article 49

Derogations for specific situations

1. In the absence of an adequacy decision pursuant to Article 45(3), or of appropriate safeguards pursuant to Article 46, including binding corporate rules, a transfer or a set of transfers of personal data to a third country or an international organisation shall take place only on one of the following conditions:

(a) the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards;

(b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request;

(c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person;

(d) the transfer is necessary for important reasons of public interest;

(e) the transfer is necessary for the establishment, exercise or defence of legal claims;

(f) the transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent;

(g) the transfer is made from a register which according to Union or Member State law is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate a legitimate interest, but only to the extent that the conditions laid down by Union or Member State law for consultation are fulfilled in the particular case.

Where a transfer could not be based on a provision in Article 45 or 46, including the provisions on binding corporate rules, and none of the derogations for a specific situation referred to in the first subparagraph of this paragraph is applicable, a transfer to a third country or an international organisation may take place only if the transfer is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject, and the controller has assessed all the circumstances surrounding the data transfer and has on the basis of that assessment provided suitable safeguards with regard to the protection of personal data. The controller shall inform the supervisory authority of the transfer. The controller shall, in addition to providing the information referred to in Articles 13 and 14, inform the data subject of the transfer and on the compelling legitimate interests pursued.

2. A transfer pursuant to point (g) of the first subparagraph of paragraph 1 shall not involve the entirety of the personal data or entire categories of the personal data contained in the register. Where the register is intended for consultation by persons having a legitimate interest, the transfer shall be made only at the request of those persons or if they are to be the recipients.

3. Points (a), (b) and (c) of the first subparagraph of paragraph 1 and the second subparagraph thereof shall not apply to activities carried out by public authorities in the exercise of their public powers.

4. The public interest referred to in point (d) of the first subparagraph of paragraph 1 shall be recognised in Union law or in the law of the Member State to which the controller is subject.

5. In the absence of an adequacy decision, Union or Member State law may, for important reasons of public interest, expressly set limits to the transfer of specific categories of personal data to a third country or an international organisation. Member States shall notify such provisions to the Commission.

6. The controller or processor shall document the assessment as well as the suitable safeguards referred to in the second subparagraph of paragraph 1 of this Article in the records referred to in Article 30.

Article 50

International cooperation for the protection of personal data

In relation to third countries and international organisations, the Commission and supervisory authorities shall take appropriate steps to:

(a) develop international cooperation mechanisms to facilitate the effective enforcement of legislation for the protection of personal data;

(b) provide international mutual assistance in the enforcement of legislation for the protection of personal data, including through notification, complaint referral, investigative assistance and information exchange, subject to appropriate safeguards for the protection of personal data and other fundamental rights and freedoms;

(c) engage relevant stakeholders in discussion and activities aimed at furthering international cooperation in the enforcement of legislation for the protection of personal data;

(d) promote the exchange and documentation of personal data protection legislation and practice, including on jurisdictional conflicts with third countries.

CHAPTER VI

Independent supervisory authorities

Section 1

Independent status

Article 51

Supervisory authority

1. Each Member State shall provide for one or more independent public authorities to be responsible for monitoring the application of this Regulation, in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union ('supervisory authority').

2. Each supervisory authority shall contribute to the consistent application of this Regulation throughout the Union. For that purpose, the supervisory authorities shall cooperate with each other and the Commission in accordance with Chapter VII.

3. Where more than one supervisory authority is established in a Member State, that Member State shall designate the supervisory authority which is to represent those authorities in the Board and shall set out the mechanism to ensure compliance by the other authorities with the rules relating to the consistency mechanism referred to in Article 63.

4. Each Member State shall notify to the Commission the provisions of its law which it adopts pursuant to this Chapter, by 25 May 2018 and, without delay, any subsequent amendment affecting them.

Article 52

Independence

1. Each supervisory authority shall act with complete independence in performing its tasks and exercising its powers in accordance with this Regulation.

2. The member or members of each supervisory authority shall, in the performance of their tasks and exercise of their powers in accordance with this Regulation, remain free from external influence, whether direct or indirect, and shall neither seek nor take instructions from anybody.

3. Member or members of each supervisory authority shall refrain from any action incompatible with their duties and shall not, during their term of office, engage in any incompatible occupation, whether gainful or not.

4. Each Member State shall ensure that each supervisory authority is provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers, including those to be carried out in the context of mutual assistance, cooperation and participation in the Board.

5. Each Member State shall ensure that each supervisory authority chooses and has its own staff which shall be subject to the exclusive direction of the member or members of the supervisory authority concerned.

6. Each Member State shall ensure that each supervisory authority is subject to financial control which does not affect its independence and that it has separate, public annual budgets, which may be part of the overall state or national budget.

Article 53

General conditions for the members of the supervisory authority

1. Member States shall provide for each member of their supervisory authorities to be appointed by means of a transparent procedure by:

— their parliament;

— their government;

— their head of State; or

— an independent body entrusted with the appointment under Member State law.

2. Each member shall have the qualifications, experience and skills, in particular in the area of the protection of personal data, required to perform its duties and exercise its powers.

3. The duties of a member shall end in the event of the expiry of the term of office, resignation or compulsory retirement, in accordance with the law of the Member State concerned.

4. A member shall be dismissed only in cases of serious misconduct or if the member no longer fulfils the conditions required for the performance of the duties.

Article 54

Rules on the establishment of the supervisory authority

1. Each Member State shall provide by law for all of the following:

(a) the establishment of each supervisory authority;

(b) the qualifications and eligibility conditions required to be appointed as member of each supervisory authority;

(c) the rules and procedures for the appointment of the member or members of each supervisory authority;

(d) the duration of the term of the member or members of each supervisory authority of no less than four years, except for the first appointment after 24 May 2016, part of which may take place for a shorter period where that is necessary to protect the independence of the supervisory authority by means of a staggered appointment procedure;

(e) whether and, if so, for how many terms the member or members of each supervisory authority is eligible for reappointment;

(f) the conditions governing the obligations of the member or members and staff of each supervisory authority, prohibitions on actions, occupations and benefits incompatible therewith during and after the term of office and rules governing the cessation of employment.

2. The member or members and the staff of each supervisory authority shall, in accordance with Union or Member State law, be subject to a duty of professional secrecy both during and after their term of office, with regard to any confidential information which has come to their knowledge in the course of the performance of their tasks or exercise of their powers. During their term of office, that duty of professional secrecy shall in particular apply to reporting by natural persons of infringements of this Regulation.

Section 2

Competence, tasks and powers

Article 55

Competence

1. Each supervisory authority shall be competent for the performance of the tasks assigned to and the exercise of the powers conferred on it in accordance with this Regulation on the territory of its own Member State.

2. Where processing is carried out by public authorities or private bodies acting on the basis of point (c) or (e) of Article 6(1), the supervisory authority of the Member State concerned shall be competent. In such cases Article 56 does not apply.

3. Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity.

Article 56

Competence of the lead supervisory authority

1. Without prejudice to Article 55, the supervisory authority of the main establishment or of the single establishment of the controller or processor shall be competent to act as lead supervisory authority for the cross-border processing carried out by that controller or processor in accordance with the procedure provided in Article 60.

2. By derogation from paragraph 1, each supervisory authority shall be competent to handle a complaint lodged with it or a possible infringement of this Regulation, if the subject matter relates only to an establishment in its Member State or substantially affects data subjects only in its Member State.

3. In the cases referred to in paragraph 2 of this Article, the supervisory authority shall inform the lead supervisory authority without delay on that matter. Within a period of three weeks after being informed the lead supervisory authority shall decide whether or not it will handle the case in accordance with the procedure provided in Article 60, taking into account whether or not there is an establishment of the controller or processor in the Member State of which the supervisory authority informed it.

4. Where the lead supervisory authority decides to handle the case, the procedure provided in Article 60 shall apply. The supervisory authority which informed the lead supervisory authority may submit to the lead supervisory authority a draft for a decision. The lead supervisory authority shall take utmost account of that draft when preparing the draft decision referred to in Article 60(3).

5. Where the lead supervisory authority decides not to handle the case, the supervisory authority which informed the lead supervisory authority shall handle it according to Articles 61 and 62.

6. The lead supervisory authority shall be the sole interlocutor of the controller or processor for the cross-border processing carried out by that controller or processor.

Article 57

Tasks

1. Without prejudice to other tasks set out under this Regulation, each supervisory authority shall on its territory:

(a) monitor and enforce the application of this Regulation;

(b) promote public awareness and understanding of the risks, rules, safeguards and rights in relation to processing. Activities addressed specifically to children shall receive specific attention;

(c) advise, in accordance with Member State law, the national parliament, the government, and other institutions and bodies on legislative and administrative measures relating to the protection of natural persons' rights and freedoms with regard to processing;

(d) promote the awareness of controllers and processors of their obligations under this Regulation;

(e) upon request, provide information to any data subject concerning the exercise of their rights under this Regulation and, if appropriate, cooperate with the supervisory authorities in other Member States to that end;

(f) handle complaints lodged by a data subject, or by a body, organisation or association in accordance with Article 80, and investigate, to the extent appropriate, the subject matter of the complaint and inform the complainant of the progress and the outcome of the investigation within a reasonable period, in particular if further investigation or coordination with another supervisory authority is necessary;

(g) cooperate with, including sharing information and provide mutual assistance to, other supervisory authorities with a view to ensuring the consistency of application and enforcement of this Regulation;

(h) conduct investigations on the application of this Regulation, including on the basis of information received from another supervisory authority or other public authority;

(i) monitor relevant developments, insofar as they have an impact on the protection of personal data, in particular the development of information and communication technologies and commercial practices;

(j) adopt standard contractual clauses referred to in Article 28(8) and in point (d) of Article 46(2);

(k) establish and maintain a list in relation to the requirement for data protection impact assessment pursuant to Article 35(4);

(l) give advice on the processing operations referred to in Article 36(2);

(m) encourage the drawing up of codes of conduct pursuant to Article 40(1) and provide an opinion and approve such codes of conduct which provide sufficient safeguards, pursuant to Article 40(5);

(n) encourage the establishment of data protection certification mechanisms and of data protection seals and marks pursuant to Article 42(1), and approve the criteria of certification pursuant to Article 42(5);

(o) where applicable, carry out a periodic review of certifications issued in accordance with Article 42(7);

(p) draft and publish the criteria for accreditation of a body for monitoring codes of conduct pursuant to Article 41 and of a certification body pursuant to Article 43;

(q) conduct the accreditation of a body for monitoring codes of conduct pursuant to Article 41 and of a certification body pursuant to Article 43;

(r) authorise contractual clauses and provisions referred to in Article 46(3);

(s) approve binding corporate rules pursuant to Article 47;

(t) contribute to the activities of the Board;

(u) keep internal records of infringements of this Regulation and of measures taken in accordance with Article 58(2); and

(v) fulfil any other tasks related to the protection of personal data.

2. Each supervisory authority shall facilitate the submission of complaints referred to in point (f) of paragraph 1 by measures such as a complaint submission form which can also be completed electronically, without excluding other means of communication.

3. The performance of the tasks of each supervisory authority shall be free of charge for the data subject and, where applicable, for the data protection officer.

4. Where requests are manifestly unfounded or excessive, in particular because of their repetitive character, the supervisory authority may charge a reasonable fee based on administrative costs, or refuse to act on the request. The supervisory authority shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

Article 58

Powers

1. Each supervisory authority shall have all of the following investigative powers:

(a) to order the controller and the processor, and, where applicable, the controller's or the processor's representative to provide any information it requires for the performance of its tasks;

(b) to carry out investigations in the form of data protection audits;

(c) to carry out a review on certifications issued pursuant to Article 42(7);

(d) to notify the controller or the processor of an alleged infringement of this Regulation;

(e) to obtain, from the controller and the processor, access to all personal data and to all information necessary for the performance of its tasks;

(f) to obtain access to any premises of the controller and the processor, including to any data processing equipment and means, in accordance with Union or Member State procedural law.

2. Each supervisory authority shall have all of the following corrective powers:

(a) to issue warnings to a controller or processor that intended processing operations are likely to infringe provisions of this Regulation;

(b) to issue reprimands to a controller or a processor where processing operations have infringed provisions of this Regulation;

(c) to order the controller or the processor to comply with the data subject's requests to exercise his or her rights pursuant to this Regulation;

(d) to order the controller or processor to bring processing operations into compliance with the provisions of this Regulation, where appropriate, in a specified manner and within a specified period;

(e) to order the controller to communicate a personal data breach to the data subject;

(f) to impose a temporary or definitive limitation including a ban on processing;

(g) to order the rectification or erasure of personal data or restriction of processing pursuant to Articles 16, 17 and 18 and the notification of such actions to recipients to whom the personal data have been disclosed pursuant to Article 17(2) and Article 19;

(h) to withdraw a certification or to order the certification body to withdraw a certification issued pursuant to Articles 42 and 43, or to order the certification body not to issue certification if the requirements for the certification are not or are no longer met;

(i) to impose an administrative fine pursuant to Article 83, in addition to, or instead of measures referred to in this paragraph, depending on the circumstances of each individual case;

(j) to order the suspension of data flows to a recipient in a third country or to an international organisation.

3. Each supervisory authority shall have all of the following authorisation and advisory powers:

(a) to advise the controller in accordance with the prior consultation procedure referred to in Article 36;

(b) to issue, on its own initiative or on request, opinions to the national parliament, the Member State government or, in accordance with Member State law, to other institutions and bodies as well as to the public on any issue related to the protection of personal data;

(c) to authorise processing referred to in Article 36(5), if the law of the Member State requires such prior authorisation;

(d) to issue an opinion and approve draft codes of conduct pursuant to Article 40(5);

(e) to accredit certification bodies pursuant to Article 43;

(f) to issue certifications and approve criteria of certification in accordance with Article 42(5);

(g) to adopt standard data protection clauses referred to in Article 28(8) and in point (d) of Article 46(2);

(h) to authorise contractual clauses referred to in point (a) of Article 46(3);

(i) to authorise administrative arrangements referred to in point (b) of Article 46(3);

(j) to approve binding corporate rules pursuant to Article 47.

4. The exercise of the powers conferred on the supervisory authority pursuant to this Article shall be subject to appropriate safeguards, including effective judicial remedy and due process, set out in Union and Member State law in accordance with the Charter.

5. Each Member State shall provide by law that its supervisory authority shall have the power to bring infringements of this Regulation to the attention of the judicial authorities and where appropriate, to commence or engage otherwise in legal proceedings, in order to enforce the provisions of this Regulation.

6. Each Member State may provide by law that its supervisory authority shall have additional powers to those referred to in paragraphs 1, 2 and 3. The exercise of those powers shall not impair the effective operation of Chapter VII.

Article 59

Activity reports

Each supervisory authority shall draw up an annual report on its activities, which may include a list of types of infringement notified and types of measures taken in accordance with Article 58(2). Those reports shall be transmitted to the national parliament, the government and other authorities as designated by Member State law. They shall be made available to the public, to the Commission and to the Board.

CHAPTER VII

Cooperation and consistency

Section 1

Cooperation

Article 60

Cooperation between the lead supervisory authority and the other supervisory authorities concerned

1. The lead supervisory authority shall cooperate with the other supervisory authorities concerned in accordance with this Article in an endeavour to reach consensus. The lead supervisory authority and the supervisory authorities concerned shall exchange all relevant information with each other.

2. The lead supervisory authority may request at any time other supervisory authorities concerned to provide mutual assistance pursuant to Article 61 and may conduct joint operations pursuant to Article 62, in particular for carrying out investigations or for monitoring the implementation of a measure concerning a controller or processor established in another Member State.

3. The lead supervisory authority shall, without delay, communicate the relevant information on the matter to the other supervisory authorities concerned. It shall without delay submit a draft decision to the other supervisory authorities concerned for their opinion and take due account of their views.

4. Where any of the other supervisory authorities concerned within a period of four weeks after having been consulted in accordance with paragraph 3 of this Article, expresses a relevant and reasoned objection to the draft decision, the lead supervisory authority shall, if it does not follow the relevant and reasoned objection or is of the opinion that the objection is not relevant or reasoned, submit the matter to the consistency mechanism referred to in Article 63.

5. Where the lead supervisory authority intends to follow the relevant and reasoned objection made, it shall submit to the other

supervisory authorities concerned a revised draft decision for their opinion. That revised draft decision shall be subject to the procedure referred to in paragraph 4 within a period of two weeks.

6. Where none of the other supervisory authorities concerned has objected to the draft decision submitted by the lead supervisory authority within the period referred to in paragraphs 4 and 5, the lead supervisory authority and the supervisory authorities concerned shall be deemed to be in agreement with that draft decision and shall be bound by it.

7. The lead supervisory authority shall adopt and notify the decision to the main establishment or single establishment of the controller or processor, as the case may be and inform the other supervisory authorities concerned and the Board of the decision in question, including a summary of the relevant facts and grounds. The supervisory authority with which a complaint has been lodged shall inform the complainant on the decision.

8. By derogation from paragraph 7, where a complaint is dismissed or rejected, the supervisory authority with which the complaint was lodged shall adopt the decision and notify it to the complainant and shall inform the controller thereof.

9. Where the lead supervisory authority and the supervisory authorities concerned agree to dismiss or reject parts of a complaint and to act on other parts of that complaint, a separate decision shall be adopted for each of those parts of the matter. The lead supervisory authority shall adopt the decision for the part concerning actions in relation to the controller, shall notify it to the main establishment or single establishment of the controller or processor on the territory of its Member State and shall inform the complainant thereof, while the supervisory authority of the complainant shall adopt the decision for the part concerning dismissal or rejection of that complaint, and shall notify it to that complainant and shall inform the controller or processor thereof.

10. After being notified of the decision of the lead supervisory authority pursuant to paragraphs 7 and 9, the controller or processor shall take the necessary measures to ensure compliance with the decision as regards processing activities in the context of all its establishments in the Union. The controller or processor shall notify the measures taken for complying with the decision to the lead supervisory authority, which shall inform the other supervisory authorities concerned.

11. Where, in exceptional circumstances, a supervisory authority concerned has reasons to consider that there is an urgent need to act in order to protect the interests of data subjects, the urgency procedure referred to in Article 66 shall apply.

12. The lead supervisory authority and the other supervisory authorities concerned shall supply the information required under this Article to each other by electronic means, using a standardised format.

Article 61

Mutual assistance

1. Supervisory authorities shall provide each other with relevant information and mutual assistance in order to implement and apply this Regulation in a consistent manner, and shall put in place measures for effective cooperation with one another. Mutual assistance shall cover, in particular, information requests and supervisory measures, such as requests to carry out prior authorisations and consultations, inspections and investigations.

2. Each supervisory authority shall take all appropriate measures required to reply to a request of another supervisory authority without undue delay and no later than one month after receiving the request. Such measures may include, in particular, the transmission of relevant information on the conduct of an investigation.

3. Requests for assistance shall contain all the necessary information, including the purpose of and reasons for the request. Information exchanged shall be used only for the purpose for which it was requested.

4. The requested supervisory authority shall not refuse to comply with the request unless:

(a) it is not competent for the subject-matter of the request or for the measures it is requested to execute; or

(b) compliance with the request would infringe this Regulation or Union or Member State law to which the supervisory authority receiving the request is subject.

5. The requested supervisory authority shall inform the requesting supervisory authority of the results or, as the case may be, of the progress of the measures taken in order to respond to the request. The requested supervisory authority shall provide reasons for any refusal to comply with a request pursuant to paragraph 4.

6. Requested supervisory authorities shall, as a rule, supply the information requested by other supervisory authorities by electronic means, using a standardised format.

7. Requested supervisory authorities shall not charge a fee for any action taken by them pursuant to a request for mutual assistance.

Supervisory authorities may agree on rules to indemnify each other for specific expenditure arising from the provision of mutual assistance in exceptional circumstances.

8. Where a supervisory authority does not provide the information referred to in paragraph 5 of this Article within one month of receiving the request of another supervisory authority, the requesting supervisory authority may adopt a provisional measure on the territory of its Member State in accordance with Article 55(1). In that case, the urgent need to act under Article 66(1) shall be presumed to be met and require an urgent binding decision from the Board pursuant to Article 66(2).

9. The Commission may, by means of implementing acts, specify the format and procedures for mutual assistance referred to in this Article and the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the Board, in particular the standardised format referred to in paragraph 6 of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 93(2).

Article 62

Joint operations of supervisory authorities

1. The supervisory authorities shall, where appropriate, conduct joint operations including joint investigations and joint enforcement measures in which members or staff of the supervisory authorities of other Member States are involved.

2. Where the controller or processor has establishments in several Member States or where a significant number of data subjects in more than one Member State are likely to be substantially affected by processing operations, a supervisory authority of each of those Member States shall have the right to participate in joint operations. The supervisory authority which is competent pursuant to Article 56(1) or (4) shall invite the supervisory authority of each of those Member States to take part in the joint operations and shall respond without delay to the request of a supervisory authority to participate.

3. A supervisory authority may, in accordance with Member State law, and with the seconding supervisory authority's authorisation, confer powers, including investigative powers on the seconding supervisory authority's members or staff involved in joint operations or, in so far as the law of the Member State of the host supervisory authority permits, allow the seconding supervisory authority's members or staff to exercise their investigative powers in accordance with the law of the Member State of the seconding supervisory authority. Such investigative powers may be exercised only under the guidance and in the presence of members or staff of the host supervisory authority. The seconding supervisory authority's members or staff shall be subject to the Member State law of the host supervisory authority.

4. Where, in accordance with paragraph 1, staff of a seconding supervisory authority operate in another Member State, the Member State of the host supervisory authority shall assume responsibility for their actions, including liability, for any damage caused by them during their operations, in accordance with the law of the Member State in whose territory they are operating.

5. The Member State in whose territory the damage was caused shall make good such damage under the conditions applicable to damage caused by its own staff. The Member State of the seconding supervisory authority whose staff has caused damage to any person in the territory of another Member State shall reimburse that other Member State in full any sums it has paid to the persons entitled on their behalf.

6. Without prejudice to the exercise of its rights *vis-à-vis* third parties and with the exception of paragraph 5, each Member State shall refrain, in the case provided for in paragraph 1, from requesting reimbursement from another Member State in relation to damage referred to in paragraph 4.

7. Where a joint operation is intended and a supervisory authority does not, within one month, comply with the obligation laid down in the second sentence of paragraph 2 of this Article, the other supervisory authorities may adopt a provisional measure on the territory of its Member State in accordance with Article 55. In that case, the urgent need to act under Article 66(1) shall be presumed to be met and require an opinion or an urgent binding decision from the Board pursuant to Article 66(2).

Section 2

Consistency

Article 63

Consistency mechanism

In order to contribute to the consistent application of this Regulation throughout the Union, the supervisory authorities shall cooperate

with each other and, where relevant, with the Commission, through the consistency mechanism as set out in this Section.

Article 64

Opinion of the Board

1. The Board shall issue an opinion where a competent supervisory authority intends to adopt any of the measures below. To that end, the competent supervisory authority shall communicate the draft decision to the Board, when it:

(a)aims to adopt a list of the processing operations subject to the requirement for a data protection impact assessment pursuant to Article 35(4);

(b)concerns a matter pursuant to Article 40(7) whether a draft code of conduct or an amendment or extension to a code of conduct complies with this Regulation;

(c)aims to approve the criteria for accreditation of a body pursuant to Article 41(3) or a certification body pursuant to Article 43(3);

(d) aims to determine standard data protection clauses referred to in point (d) of Article 46(2) and in Article 28(8);

(e) aims to authorise contractual clauses referred to in point (a) of Article 46(3); or

(f) aims to approve binding corporate rules within the meaning of Article 47.

2. Any supervisory authority, the Chair of the Board or the Commission may request that any matter of general application or producing effects in more than one Member State be examined by the Board with a view to obtaining an opinion, in particular where a competent supervisory authority does not comply with the obligations for mutual assistance in accordance with Article 61 or for joint operations in accordance with Article 62.

3. In the cases referred to in paragraphs 1 and 2, the Board shall issue an opinion on the matter submitted to it provided that it has not already issued an opinion on the same matter. That opinion shall be adopted within eight weeks by simple majority of the members of the Board. That period may be extended by a further six weeks, taking into account the complexity of the subject matter. Regarding the draft decision referred to in paragraph 1 circulated to the members of the Board in accordance with paragraph 5, a member which has not objected within a reasonable period indicated by the Chair, shall be deemed to be in agreement with the draft decision.

4. Supervisory authorities and the Commission shall, without undue delay, communicate by electronic means to the Board, using a standardised format any relevant information, including as the case may be a summary of the facts, the draft decision, the grounds which make the enactment of such measure necessary, and the views of other supervisory authorities concerned.

5. The Chair of the Board shall, without undue, delay inform by electronic means:

(a)the members of the Board and the Commission of any relevant information which has been communicated to it using a standardised format. The secretariat of the Board shall, where necessary, provide translations of relevant information; and

(b)the supervisory authority referred to, as the case may be, in paragraphs 1 and 2, and the Commission of the opinion and make it public.

6. The competent supervisory authority shall not adopt its draft decision referred to in paragraph 1 within the period referred to in paragraph 3.

7. The supervisory authority referred to in paragraph 1 shall take utmost account of the opinion of the Board and shall, within two weeks after receiving the opinion, communicate to the Chair of the Board by electronic means whether it will maintain or amend its draft decision and, if any, the amended draft decision, using a standardised format.

8. Where the supervisory authority concerned informs the Chair of the Board within the period referred to in paragraph 7 of this Article that it does not intend to follow the opinion of the Board, in whole or in part, providing the relevant grounds, Article 65(1) shall apply.

Article 65

Dispute resolution by the Board

1. In order to ensure the correct and consistent application of this Regulation in individual cases, the Board shall adopt a binding decision in the following cases:

(a)where, in a case referred to in Article 60(4), a supervisory authority concerned has raised a relevant and reasoned objection to a

draft decision of the lead authority or the lead authority has rejected such an objection as being not relevant or reasoned. The binding decision shall concern all the matters which are the subject of the relevant and reasoned objection, in particular whether there is an infringement of this Regulation;

(b) where there are conflicting views on which of the supervisory authorities concerned is competent for the main establishment;

(c) where a competent supervisory authority does not request the opinion of the Board in the cases referred to in Article 64(1), or does not follow the opinion of the Board issued under Article 64. In that case, any supervisory authority concerned or the Commission may communicate the matter to the Board.

2. The decision referred to in paragraph 1 shall be adopted within one month from the referral of the subject-matter by a two-thirds majority of the members of the Board. That period may be extended by a further month on account of the complexity of the subject-matter. The decision referred to in paragraph 1 shall be reasoned and addressed to the lead supervisory authority and all the supervisory authorities concerned and binding on them.

3. Where the Board has been unable to adopt a decision within the periods referred to in paragraph 2, it shall adopt its decision within two weeks following the expiration of the second month referred to in paragraph 2 by a simple majority of the members of the Board. Where the members of the Board are split, the decision shall by adopted by the vote of its Chair.

4. The supervisory authorities concerned shall not adopt a decision on the subject matter submitted to the Board under paragraph 1 during the periods referred to in paragraphs 2 and 3.

5. The Chair of the Board shall notify, without undue delay, the decision referred to in paragraph 1 to the supervisory authorities concerned. It shall inform the Commission thereof. The decision shall be published on the website of the Board without delay after the supervisory authority has notified the final decision referred to in paragraph 6.

6. The lead supervisory authority or, as the case may be, the supervisory authority with which the complaint has been lodged shall adopt its final decision on the basis of the decision referred to in paragraph 1 of this Article, without undue delay and at the latest by one month after the Board has notified its decision. The lead supervisory authority or, as the case may be, the supervisory authority with which the complaint has been lodged, shall inform the Board of the date when its final decision is notified respectively to the controller or the processor and to the data subject. The final decision of the supervisory authorities concerned shall be adopted under the terms of Article 60(7), (8) and (9). The final decision shall refer to the decision referred to in paragraph 1 of this Article and shall specify that the decision referred to in that paragraph will be published on the website of the Board in accordance with paragraph 5 of this Article. The final decision shall attach the decision referred to in paragraph 1 of this Article.

Article 66

Urgency procedure

1. In exceptional circumstances, where a supervisory authority concerned considers that there is an urgent need to act in order to protect the rights and freedoms of data subjects, it may, by way of derogation from the consistency mechanism referred to in Articles 63, 64 and 65 or the procedure referred to in Article 60, immediately adopt provisional measures intended to produce legal effects on its own territory with a specified period of validity which shall not exceed three months. The supervisory authority shall, without delay, communicate those measures and the reasons for adopting them to the other supervisory authorities concerned, to the Board and to the Commission.

2. Where a supervisory authority has taken a measure pursuant to paragraph 1 and considers that final measures need urgently be adopted, it may request an urgent opinion or an urgent binding decision from the Board, giving reasons for requesting such opinion or decision.

3. Any supervisory authority may request an urgent opinion or an urgent binding decision, as the case may be, from the Board where a competent supervisory authority has not taken an appropriate measure in a situation where there is an urgent need to act, in order to protect the rights and freedoms of data subjects, giving reasons for requesting such opinion or decision, including for the urgent need to act.

4. By derogation from Article 64(3) and Article 65(2), an urgent opinion or an urgent binding decision referred to in paragraphs 2 and 3 of this Article shall be adopted within two weeks by simple majority of the members of the Board.

Article 67

Exchange of information

The Commission may adopt implementing acts of general scope in order to specify the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the Board, in particular the standardised format referred to in Article 64.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 93(2).

Section 3

European data protection board

Article 68

European Data Protection Board

1. The European Data Protection Board (the 'Board') is hereby established as a body of the Union and shall have legal personality.

2. The Board shall be represented by its Chair.

3. The Board shall be composed of the head of one supervisory authority of each Member State and of the European Data Protection Supervisor, or their respective representatives.

4. Where in a Member State more than one supervisory authority is responsible for monitoring the application of the provisions pursuant to this Regulation, a joint representative shall be appointed in accordance with that Member State's law.

5. The Commission shall have the right to participate in the activities and meetings of the Board without voting right. The Commission shall designate a representative. The Chair of the Board shall communicate to the Commission the activities of the Board.

6. In the cases referred to in Article 65, the European Data Protection Supervisor shall have voting rights only on decisions which concern principles and rules applicable to the Union institutions, bodies, offices and agencies which correspond in substance to those of this Regulation.

Article 69

Independence

1. The Board shall act independently when performing its tasks or exercising its powers pursuant to Articles 70 and 71.

2. Without prejudice to requests by the Commission referred to in point (b) of Article 70(1) and in Article 70(2), the Board shall, in the performance of its tasks or the exercise of its powers, neither seek nor take instructions from anybody.

Article 70

Tasks of the Board

1. The Board shall ensure the consistent application of this Regulation. To that end, the Board shall, on its own initiative or, where relevant, at the request of the Commission, in particular:

(a) monitor and ensure the correct application of this Regulation in the cases provided for in Articles 64 and 65 without prejudice to the tasks of national supervisory authorities;

(b) advise the Commission on any issue related to the protection of personal data in the Union, including on any proposed amendment of this Regulation;

(c) advise the Commission on the format and procedures for the exchange of information between controllers, processors and supervisory authorities for binding corporate rules;

(d) issue guidelines, recommendations, and best practices on procedures for erasing links, copies or replications of personal data from publicly available communication services as referred to in Article 17(2);

(e) examine, on its own initiative, on request of one of its members or on request of the Commission, any question covering the application of this Regulation and issue guidelines, recommendations and best practices in order to encourage consistent application of this Regulation;

(f) issue guidelines, recommendations and best practices in accordance with point (e) of this paragraph for further specifying the

criteria and conditions for decisions based on profiling pursuant to Article 22(2);

(g) issue guidelines, recommendations and best practices in accordance with point (e) of this paragraph for establishing the personal data breaches and determining the undue delay referred to in Article 33(1) and (2) and for the particular circumstances in which a controller or a processor is required to notify the personal data breach;

(h) issue guidelines, recommendations and best practices in accordance with point (e) of this paragraph as to the circumstances in which a personal data breach is likely to result in a high risk to the rights and freedoms of the natural persons referred to in Article 34(1).

(i) issue guidelines, recommendations and best practices in accordance with point (e) of this paragraph for the purpose of further specifying the criteria and requirements for personal data transfers based on binding corporate rules adhered to by controllers and binding corporate rules adhered to by processors and on further necessary requirements to ensure the protection of personal data of the data subjects concerned referred to in Article 47;

(j) issue guidelines, recommendations and best practices in accordance with point (e) of this paragraph for the purpose of further specifying the criteria and requirements for the personal data transfers on the basis of Article 49(1);

(k) draw up guidelines for supervisory authorities concerning the application of measures referred to in Article 58(1), (2) and (3) and the setting of administrative fines pursuant to Article 83;

(l) review the practical application of the guidelines, recommendations and best practices referred to in points (e) and (f);

(m) issue guidelines, recommendations and best practices in accordance with point (e) of this paragraph for establishing common procedures for reporting by natural persons of infringements of this Regulation pursuant to Article 54(2);

(n) encourage the drawing-up of codes of conduct and the establishment of data protection certification mechanisms and data protection seals and marks pursuant to Articles 40 and 42;

(o) carry out the accreditation of certification bodies and its periodic review pursuant to Article 43 and maintain a public register of accredited bodies pursuant to Article 43(6) and of the accredited controllers or processors established in third countries pursuant to Article 42(7);

(p) specify the requirements referred to in Article 43(3) with a view to the accreditation of certification bodies under Article 42;

(q) provide the Commission with an opinion on the certification requirements referred to in Article 43(8);

(r) provide the Commission with an opinion on the icons referred to in Article 12(7);

(s) provide the Commission with an opinion for the assessment of the adequacy of the level of protection in a third country or international organisation, including for the assessment whether a third country, a territory or one or more specified sectors within that third country, or an international organisation no longer ensures an adequate level of protection. To that end, the Commission shall provide the Board with all necessary documentation, including correspondence with the government of the third country, with regard to that third country, territory or specified sector, or with the international organisation.

(t) issue opinions on draft decisions of supervisory authorities pursuant to the consistency mechanism referred to in Article 64(1), on matters submitted pursuant to Article 64(2) and to issue binding decisions pursuant to Article 65, including in cases referred to in Article 66;

(u) promote the cooperation and the effective bilateral and multilateral exchange of information and best practices between the supervisory authorities;

(v) promote common training programmes and facilitate personnel exchanges between the supervisory authorities and, where appropriate, with the supervisory authorities of third countries or with international organisations;

(w) promote the exchange of knowledge and documentation on data protection legislation and practice with data protection supervisory authorities worldwide.

(x) issue opinions on codes of conduct drawn up at Union level pursuant to Article 40(9); and

(y) maintain a publicly accessible electronic register of decisions taken by supervisory authorities and courts on issues handled in the consistency mechanism.

2. Where the Commission requests advice from the Board, it may indicate a time limit, taking into account the urgency of the matter.

3. The Board shall forward its opinions, guidelines, recommendations, and best practices to the Commission and to the committee referred to in Article 93 and make them public.

4. The Board shall, where appropriate, consult interested parties and give them the opportunity to comment within a reasonable period. The Board shall, without prejudice to Article 76, make the results of the consultation procedure publicly available.

Article 71

Reports

1. The Board shall draw up an annual report regarding the protection of natural persons with regard to processing in the Union and, where relevant, in third countries and international organisations. The report shall be made public and be transmitted to the European Parliament, to the Council and to the Commission.

2. The annual report shall include a review of the practical application of the guidelines, recommendations and best practices referred to in point (l) of Article 70(1) as well as of the binding decisions referred to in Article 65.

Article 72

Procedure

1. The Board shall take decisions by a simple majority of its members, unless otherwise provided for in this Regulation.

2. The Board shall adopt its own rules of procedure by a two-thirds majority of its members and organise its own operational arrangements.

Article 73

Chair

1. The Board shall elect a chair and two deputy chairs from amongst its members by simple majority.

2. The term of office of the Chair and of the deputy chairs shall be five years and be renewable once.

Article 74

Tasks of the Chair

1. The Chair shall have the following tasks:

(a) to convene the meetings of the Board and prepare its agenda;

(b) to notify decisions adopted by the Board pursuant to Article 65 to the lead supervisory authority and the supervisory authorities concerned;

(c) to ensure the timely performance of the tasks of the Board, in particular in relation to the consistency mechanism referred to in Article 63.

2. The Board shall lay down the allocation of tasks between the Chair and the deputy chairs in its rules of procedure.

Article 75

Secretariat

1. The Board shall have a secretariat, which shall be provided by the European Data Protection Supervisor.

2. The secretariat shall perform its tasks exclusively under the instructions of the Chair of the Board.

3. The staff of the European Data Protection Supervisor involved in carrying out the tasks conferred on the Board by this Regulation shall be subject to separate reporting lines from the staff involved in carrying out tasks conferred on the European Data Protection Supervisor.

4. Where appropriate, the Board and the European Data Protection Supervisor shall establish and publish a Memorandum of Understanding implementing this Article, determining the terms of their cooperation, and applicable to the staff of the European Data Protection Supervisor involved in carrying out the tasks conferred on the Board by this Regulation.

5. The secretariat shall provide analytical, administrative and logistical support to the Board.

6. The secretariat shall be responsible in particular for:

(a) the day-to-day business of the Board;

(b) communication between the members of the Board, its Chair and the Commission;

(c) communication with other institutions and the public;

(d) the use of electronic means for the internal and external communication;

(e) the translation of relevant information;

(f) the preparation and follow-up of the meetings of the Board;

(g) the preparation, drafting and publication of opinions, decisions on the settlement of disputes between supervisory authorities and other texts adopted by the Board.

Article 76

Confidentiality

1. The discussions of the Board shall be confidential where the Board deems it necessary, as provided for in its rules of procedure.

2. Access to documents submitted to members of the Board, experts and representatives of third parties shall be governed by Regulation (EC) No 1049/2001 of the European Parliament and of the Council [(21)].

CHAPTER VIII

Remedies, liability and penalties

Article 77

Right to lodge a complaint with a supervisory authority

1. Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence, place of work or place of the alleged infringement if the data subject considers that the processing of personal data relating to him or her infringes this Regulation.

2. The supervisory authority with which the complaint has been lodged shall inform the complainant on the progress and the outcome of the complaint including the possibility of a judicial remedy pursuant to Article 78.

Article 78

Right to an effective judicial remedy against a supervisory authority

1. Without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them.

2. Without prejudice to any other administrative or non-judicial remedy, each data subject shall have the right to a an effective judicial remedy where the supervisory authority which is competent pursuant to Articles 55 and 56 does not handle a complaint or does not inform the data subject within three months on the progress or outcome of the complaint lodged pursuant to Article 77.

3. Proceedings against a supervisory authority shall be brought before the courts of the Member State where the supervisory authority is established.

4. Where proceedings are brought against a decision of a supervisory authority which was preceded by an opinion or a decision of the Board in the consistency mechanism, the supervisory authority shall forward that opinion or decision to the court.

Article 79

Right to an effective judicial remedy against a controller or processor

1. Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the right to an effective judicial remedy where he or she considers that

his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation.

2. Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers.

Article 80

Representation of data subjects

1. The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law.

2. Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority which is competent pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing.

Article 81

Suspension of proceedings

1. Where a competent court of a Member State has information on proceedings, concerning the same subject matter as regards processing by the same controller or processor, that are pending in a court in another Member State, it shall contact that court in the other Member State to confirm the existence of such proceedings.

2. Where proceedings concerning the same subject matter as regards processing of the same controller or processor are pending in a court in another Member State, any competent court other than the court first seized may suspend its proceedings.

3. Where those proceedings are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.

Article 82

Right to compensation and liability

1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

2. Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.

3. A controller or processor shall be exempt from liability under paragraph 2 if it proves that it is not in any way responsible for the event giving rise to the damage.

4. Where more than one controller or processor, or both a controller and a processor, are involved in the same processing and where they are, under paragraphs 2 and 3, responsible for any damage caused by processing, each controller or processor shall be held liable for the entire damage in order to ensure effective compensation of the data subject.

5. Where a controller or processor has, in accordance with paragraph 4, paid full compensation for the damage suffered, that controller or processor shall be entitled to claim back from the other controllers or processors involved in the same processing that part of the compensation corresponding to their part of responsibility for the damage, in accordance with the conditions set out in paragraph 2.

6. Court proceedings for exercising the right to receive compensation shall be brought before the courts competent under the law

of the Member State referred to in Article 79(2).

Article 83

General conditions for imposing administrative fines

1. Each supervisory authority shall ensure that the imposition of administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in paragraphs 4, 5 and 6 shall in each individual case be effective, proportionate and dissuasive.

2. Administrative fines shall, depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in points (a) to (h) and (j) of Article 58(2). When deciding whether to impose an administrative fine and deciding on the amount of the administrative fine in each individual case due regard shall be given to the following:

(a) the nature, gravity and duration of the infringement taking into account the nature scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them;

(b) the intentional or negligent character of the infringement;

(c) any action taken by the controller or processor to mitigate the damage suffered by data subjects;

(d) the degree of responsibility of the controller or processor taking into account technical and organisational measures implemented by them pursuant to Articles 25 and 32;

(e) any relevant previous infringements by the controller or processor;

(f) the degree of cooperation with the supervisory authority, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;

(g) the categories of personal data affected by the infringement;

(h) the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement;

(i) where measures referred to in Article 58(2) have previously been ordered against the controller or processor concerned with regard to the same subject-matter, compliance with those measures;

(j) adherence to approved codes of conduct pursuant to Article 40 or approved certification mechanisms pursuant to Article 42; and

(k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.

3. If a controller or processor intentionally or negligently, for the same or linked processing operations, infringes several provisions of this Regulation, the total amount of the administrative fine shall not exceed the amount specified for the gravest infringement.

4. Infringements of the following provisions shall, in accordance with paragraph 2, be subject to administrative fines up to 10 000 000 EUR, or in the case of an undertaking, up to 2 % of the total worldwide annual turnover of the preceding financial year, whichever is higher:

(a) the obligations of the controller and the processor pursuant to Articles 8, 11, 25 to 39 and 42 and 43;

(b) the obligations of the certification body pursuant to Articles 42 and 43;

(c) the obligations of the monitoring body pursuant to Article 41(4).

5. Infringements of the following provisions shall, in accordance with paragraph 2, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher:

(a) the basic principles for processing, including conditions for consent, pursuant to Articles 5, 6, 7 and 9;

(b) the data subjects' rights pursuant to Articles 12 to 22;

(c) the transfers of personal data to a recipient in a third country or an international organisation pursuant to Articles 44 to 49;

(d) any obligations pursuant to Member State law adopted under Chapter IX;

(e) non-compliance with an order or a temporary or definitive limitation on processing or the suspension of data flows by the

supervisory authority pursuant to Article 58(2) or failure to provide access in violation of Article 58(1).

6. Non-compliance with an order by the supervisory authority as referred to in Article 58(2) shall, in accordance with paragraph 2 of this Article, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.

7. Without prejudice to the corrective powers of supervisory authorities pursuant to Article 58(2), each Member State may lay down the rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State.

8. The exercise by the supervisory authority of its powers under this Article shall be subject to appropriate procedural safeguards in accordance with Union and Member State law, including effective judicial remedy and due process.

9. Where the legal system of the Member State does not provide for administrative fines, this Article may be applied in such a manner that the fine is initiated by the competent supervisory authority and imposed by competent national courts, while ensuring that those legal remedies are effective and have an equivalent effect to the administrative fines imposed by supervisory authorities. In any event, the fines imposed shall be effective, proportionate and dissuasive. Those Member States shall notify to the Commission the provisions of their laws which they adopt pursuant to this paragraph by 25 May 2018 and, without delay, any subsequent amendment law or amendment affecting them.

Article 84

Penalties

1. Member States shall lay down the rules on other penalties applicable to infringements of this Regulation in particular for infringements which are not subject to administrative fines pursuant to Article 83, and shall take all measures necessary to ensure that they are implemented. Such penalties shall be effective, proportionate and dissuasive.

2. Each Member State shall notify to the Commission the provisions of its law which it adopts pursuant to paragraph 1, by 25 May 2018 and, without delay, any subsequent amendment affecting them.

CHAPTER IX

Provisions relating to specific processing situations

Article 85

Processing and freedom of expression and information

1. Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.

2. For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations from Chapter II (principles), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries or international organisations), Chapter VI (independent supervisory authorities), Chapter VII (cooperation and consistency) and Chapter IX (specific data processing situations) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.

3. Each Member State shall notify to the Commission the provisions of its law which it has adopted pursuant to paragraph 2 and, without delay, any subsequent amendment law or amendment affecting them.

Article 86

Processing and public access to official documents

Personal data in official documents held by a public authority or a public body or a private body for the performance of a task carried out in the public interest may be disclosed by the authority or body in accordance with Union or Member State law to which the public authority or body is subject in order to reconcile public access to official documents with the right to the protection of personal data pursuant to this Regulation.

Article 87

Processing of the national identification number

Member States may further determine the specific conditions for the processing of a national identification number or any other identifier of general application. In that case the national identification number or any other identifier of general application shall be used only under appropriate safeguards for the rights and freedoms of the data subject pursuant to this Regulation.

Article 88

Processing in the context of employment

1. Member States may, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective agreements, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, protection of employer's or customer's property and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.

2. Those rules shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the work place.

3. Each Member State shall notify to the Commission those provisions of its law which it adopts pursuant to paragraph 1, by 25 May 2018 and, without delay, any subsequent amendment affecting them.

Article 89

Safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes

1. Processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, shall be subject to appropriate safeguards, in accordance with this Regulation, for the rights and freedoms of the data subject. Those safeguards shall ensure that technical and organisational measures are in place in particular in order to ensure respect for the principle of data minimisation. Those measures may include pseudonymisation provided that those purposes can be fulfilled in that manner. Where those purposes can be fulfilled by further processing which does not permit or no longer permits the identification of data subjects, those purposes shall be fulfilled in that manner.

2. Where personal data are processed for scientific or historical research purposes or statistical purposes, Union or Member State law may provide for derogations from the rights referred to in Articles 15, 16, 18 and 21 subject to the conditions and safeguards referred to in paragraph 1 of this Article in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes.

3. Where personal data are processed for archiving purposes in the public interest, Union or Member State law may provide for derogations from the rights referred to in Articles 15, 16, 18, 19, 20 and 21 subject to the conditions and safeguards referred to in paragraph 1 of this Article in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes.

4. Where processing referred to in paragraphs 2 and 3 serves at the same time another purpose, the derogations shall apply only to processing for the purposes referred to in those paragraphs.

Article 90

Obligations of secrecy

1. Member States may adopt specific rules to set out the powers of the supervisory authorities laid down in points (e) and (f) of Article 58(1) in relation to controllers or processors that are subject, under Union or Member State law or rules established by national competent bodies, to an obligation of professional secrecy or other equivalent obligations of secrecy where this is necessary and proportionate to reconcile the right of the protection of personal data with the obligation of secrecy. Those rules shall apply only with regard to personal data which the controller or processor has received as a result of or has obtained in an activity covered by that obligation of secrecy.

2. Each Member State shall notify to the Commission the rules adopted pursuant to paragraph 1, by 25 May 2018 and, without delay, any subsequent amendment affecting them.

Article 91

Existing data protection rules of churches and religious associations

1. Where in a Member State, churches and religious associations or communities apply, at the time of entry into force of this Regulation, comprehensive rules relating to the protection of natural persons with regard to processing, such rules may continue to apply, provided that they are brought into line with this Regulation.

2. Churches and religious associations which apply comprehensive rules in accordance with paragraph 1 of this Article shall be subject to the supervision of an independent supervisory authority, which may be specific, provided that it fulfils the conditions laid down in Chapter VI of this Regulation.

CHAPTER X

Delegated acts and implementing acts

Article 92

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The delegation of power referred to in Article 12(8) and Article 43(8) shall be conferred on the Commission for an indeterminate period of time from 24 May 2016.

3. The delegation of power referred to in Article 12(8) and Article 43(8) may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of power specified in that decision. It shall take effect the day following that of its publication in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 12(8) and Article 43(8) shall enter into force only if no objection has been expressed by either the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.

Article 93

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply.

CHAPTER XI

Final provisions

Article 94

Repeal of Directive 95/46/EC

1. Directive 95/46/EC is repealed with effect from 25 May 2018.

2. References to the repealed Directive shall be construed as references to this Regulation. References to the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by Article 29 of Directive 95/46/EC shall be construed as references to the European Data Protection Board established by this Regulation.

Article 95

Relationship with Directive 2002/58/EC

This Regulation shall not impose additional obligations on natural or legal persons in relation to processing in connection with the provision of publicly available electronic communications services in public communication networks in the Union in relation to matters for which they are subject to specific obligations with the same objective set out in Directive 2002/58/EC.

Article 96

Relationship with previously concluded Agreements

International agreements involving the transfer of personal data to third countries or international organisations which were concluded by Member States prior to 24 May 2016, and which comply with Union law as applicable prior to that date, shall remain in force until amended, replaced or revoked.

Article 97

Commission reports

1. By 25 May 2020 and every four years thereafter, the Commission shall submit a report on the evaluation and review of this Regulation to the European Parliament and to the Council. The reports shall be made public.

2. In the context of the evaluations and reviews referred to in paragraph 1, the Commission shall examine, in particular, the application and functioning of:

(a) Chapter V on the transfer of personal data to third countries or international organisations with particular regard to decisions adopted pursuant to Article 45(3) of this Regulation and decisions adopted on the basis of Article 25(6) of Directive 95/46/EC;

(b) Chapter VII on cooperation and consistency.

3. For the purpose of paragraph 1, the Commission may request information from Member States and supervisory authorities.

4. In carrying out the evaluations and reviews referred to in paragraphs 1 and 2, the Commission shall take into account the positions and findings of the European Parliament, of the Council, and of other relevant bodies or sources.

5. The Commission shall, if necessary, submit appropriate proposals to amend this Regulation, in particular taking into account of developments in information technology and in the light of the state of progress in the information society.

Article 98

Review of other Union legal acts on data protection

The Commission shall, if appropriate, submit legislative proposals with a view to amending other Union legal acts on the protection of personal data, in order to ensure uniform and consistent protection of natural persons with regard to processing. This shall in particular concern the rules relating to the protection of natural persons with regard to processing by Union institutions, bodies, offices and agencies and on the free movement of such data.

Article 99

Entry into force and application

1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

2. It shall apply from 25 May 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 27 April 2016.

For the European Parliament
The President
M. SCHULZ
For the Council
The President
J.A. HENNIS-PLASSCHAERT

The footnotes have been redacted by the CEEMC Organising Committee.

(Fictional) Commission Recommendation of 5th January 2017 regarding the rule of law in Lortnoc

COMMISSION RECOMMENDATION of 5th January 2017 regarding the rule of law in Lortnoc

THE EUROPEAN COMMISSION, Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof, Whereas:

(1) The European Union is founded on a common set of values enshrined in Article 2 of the Treaty on European Union, which include the respect for the rule of law. The Commission, beyond its task to ensure the respect of EU law, is also responsible, together with the European Parliament, the Member States and the Council, for guaranteeing the common values of the Union.

(2) For this reason the Commission, taking account of its responsibilities under the Treaties, adopted on 11 March 2014 a Communication 'A new EU Framework to Strengthen the Rule of Law' .
This Rule of Law Framework sets out how the Commission will react should clear indications of a threat to the rule of law emerge in a Member State of the Union and explains the principles which the rule of law entails.

(3) The Rule of Law Framework provides guidance for a dialogue between the Commission and the Member State concerned to prevent the escalation of systemic threats to the rule of law.

(4) The purpose of this dialogue is to enable the Commission to find a solution with the Member State concerned in order to prevent the emergence of a systemic threat to the rule of law that could develop into a 'clear risk of a serious breach' which would potentially trigger the use of the 'Article 7 TEU Procedure'. Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission can initiate a dialogue with that Member State under the Rule of Law Framework.

(5) Case law of the Court of Justice of the European Union and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the European Commission for Democracy through Law ('Venice Commission'), provides a non-exhaustive list of these principles and hence defines the core meaning of the rule of law as a common value of the Union in accordance with Article 2 of the Treaty on European Union (TEU). Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law In addition to upholding those principles and values, State institutions also have the duty of loyal cooperation

(6) The Framework is to be activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law

(7). The purpose is to address threats to the rule of law which are of a systemic nature

(8). The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened

(9). The Framework is to be activated in situations when national 'rule of law safeguards' do not seem capable of effectively addressing those threats. 12.8.2016 EN Official Journal of the European Union L 217/53 (1) COM(2014) 158 final, hereinafter 'the Communication'. (2) See COM(2014) 158 final, section 2, Annex I. (3) See para 4.1 of the Communication. (4) Ibid. (5) Ibid.

(10) The Rule of Law Framework has three stages. In a first stage ('Commission assessment') the Commission collects and examines all the relevant information and assesses whether there are clear indications of a systemic threat to the rule of law. If, as a result of this preliminary assessment, the Commission believes that there is a systemic threat to the rule of law, it will initiate a dialogue with the Member State concerned, by sending a 'rule of law opinion', substantiating its concerns and giving the Member State concerned the possibility to respond. The opinion could be the result of an exchange of correspondence and meetings with the relevant authorities and be followed by further exchanges. In a second stage ('Commission Recommendation'), if the matter has not been satisfactorily resolved, the Commission can issue a 'rule of law recommendation' addressed to the Member State. In such a case, the Commission indicates the reasons for its concerns and recommends that the Member State solves the problems

identified within a fixed time limit, and informs the Commission of the steps taken to that effect. In a third stage ('Follow-up to the Commission Recommendation'), the Commission monitors the followup given by the Member State to the recommendation. The entire process is based on a continuous dialogue between the Commission and the Member State concerned. If there is no satisfactory follow-up within the time limit set, resort can be had to the 'Article 7 TEU Procedure'; the procedure can be triggered by a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission.

(11) In 2015 the Commission became aware of a reform to the law on asylum/immigration appeals procedure in Lortnoc and concerns that it had resulted in the removal of an 'effective judicial remedy' for those seeking asylum in Lortnoc as it only permitted one route of appeal and removed the right of the appeal court to undertake a substantive review of the decision.

(12) The Commission further discovered that 98% of applicants seeking refugee or subsidiary status were refused by the immigration tribunal as not being eligible to claim either status and that appeals against immigration tribunal decisions had increased by 200% annually since 2015.

(13) It further discovered that on appeal, 70% of the initial decisions of the immigration tribunal were then annulled and returned for re-hearing with the appeal court indicating concerns that the procedure followed by the immigration tribunal did not take account of all available evidence when reaching its decisions.

(14) More worryingly, there was no change in the second hearing of claims, so that applicant's only remedy was a further appeal with the same effect as before, creating a vicious circle where the applicant was in the middle and unable to seek an effective remedy as required by Article 46(3) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013

(15) in a In a letter sent to the government of Lortnoc on 1st January 2016, the Commission first expressed its concern that the reform of Lortnoc asylum law had left natural persons without the necessary effective remedy that would satisfy the requirements of equivalence and effective as required by the jurisprudence of the CJEU and stated that it would expect this situation to be remedied by immediate action, pointing to the failure of the appeals mechanism to resolve the satisfy the requirements of EU law.

(16) The government of Lortnoc replied on the 30th January 2016 that they were satisfied that their national asylum procedure and system of appeals was in accordance with the requirements of EU law and refused to take any action to redress the problem.

(17) One year later, despite repeated requests to the government of Lortnoc to take action to redress the problem, the government of Lortnoc continues to refuse to take the necessary action to ensure that national persons seeking refugee or subsidiary status have an effective judicial remedy when their claims are refused…….
(additional measures regarding denial of rights to immigrants/ refugeesl NGO funding, border control provisions etc not extracted)
(30)……

HAS ADOPTED THIS RECOMMENDATION:

1. Lortnoc should duly take into account the Commission's analysis set out hereafter and take the measures set out below so that the problems identified are solved within the time limit set.

SCOPE OF THE RECOMMENDATION

2. The present recommendation sets out the concerns of the Commission with regard to the rule of law in Lortnoc and makes recommendations to the Lortnoc authorities on how to address these concerns. These concerns relate to the following issues:

(1) the failure to adopt an appropriate and effective immigration appeal procedure for claims of natural persons seeking refugee or subsidiary status in accordance with the provisions of Directive 2011/95 EU;

(2) by depriving any appeal court considering an asylum appeal the right to review substantive decisions of the competent asylum authority, even in a case where the appeal court has already declared the applicant's claims to be well founded but lacks legal instruments for imposing its decision, a failure to provide an effective remedy as required by Article 46(3) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013

(3) This raises serious concerns in respect of the rule of law, as it effectively prevents natural persons who might benefit from the provisions set out Directive 2011/95 EU from being able to claim their rights under EU law in the territory of Lortnoc.

(4) These concerns are supported by the statistics cited in points (12) and (13) above and will continue in cases pending in Lortnoc. *…… measures on migrants' rights, funding of NGO's and linked correspondence not extracted)*

(20)…..

FINDING OF A SYSTEMIC THREAT TO THE RULE OF LAW

[…]

3. For the reasons set out above the Commission is of the opinion that there is a situation of a systemic threat to the rule of law in Lortnoc. ……..

…….

……..

The fact that the Administrative Court is prevented from fully ensuring an effective review on appeal and limited to a declaration of annulment adversely affects its integrity, stability and proper functioning, which is one of the essential safeguards of the rule of law in Lortnoc. Where a constitutional justice system has been established, its effectiveness is a key component of the rule of law.

…….

……

7. Respect for the rule of law is not only a prerequisite for the protection of all fundamental values listed in Article 2 of the Treaty on European Union. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law, and for establishing mutual trust of citizens, businesses and national authorities in the legal systems of all other Member States.

RECOMMENDED ACTION

[...]

5. The Commission recommends that the Lortnoc authorities take appropriate action to address this systemic threat to the rule of law as a matter of urgency. In particular the Commission recommends that the Lortnoc authorities:

(a) implements fully the provisions required by Article 46(3) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013

(b) provides an effective and efficient system of appeals in for immigration claims, by enabling any appeal court to undertake a full and substantive review of the case and to substitute its own decision on merits for that of the immigration authority.

……. ……..

……

(g)……

6. The Commission underlines that the loyal cooperation which is required amongst the different state institutions in rule of law related matters is essential in order to find a solution in the present situation.

7. The Commission invites the Lortnoc Government to solve the problems identified in this recommendation within 3 months of receipt of this recommendation, and to inform the Commission of the steps taken to that effect.

8. On the basis of this recommendation, the Commission stands ready to pursue a constructive dialogue with the Lortnoc Government.

Done at Brussels, 5 January 2017.

PART C. CJEU JURISPRUDENCE

*(Ordered in accordance with case number. *)*

**** NB. This does not mean that the dates on which judgment was handed down in these cases follows the same order – it is not the same as a chronological ordering***

Case 106/77 - Amministrazione delle Finanze dello Stato v Simmenthal SpA

IN CASE 106/77

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE PRETORE DI SUSA (ITALY) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

AMMINISTRAZIONE DELLE FINANZE DELLO STATO (ITALIAN FINANCE ADMINISTRATION)

AND

SIMMENTHAL S.P.A ., HAVING ITS REGISTERED OFFICE AT MONZA ,

Subject of the case

ON THE INTERPRETATION OF ARTICLE 189 OF THE EEC TREATY AND , IN PARTICULAR , ON THE EFFECTS OF THE DIRECT APPLICABILITY OF COMMUNITY LAW IF IT IS INCONSISTENT WITH ANY PROVISIONS OF NATIONAL LAW WHICH MAY CONFLICT WITH IT .

Grounds

1. BY AN ORDER OF 28 JULY 1977 , RECEIVED AT THE COURT ON 29 AUGUST 1977 , THE PRETORE DI SUSA REFERRED TO THE COURT FOR A RULING PURSUANT TO ARTICLE 177 OF THE EEC TREATY , TWO QUESTIONS RELATING TO THE PRINCIPLE OF THE DIRECT APPLICABILITY OF COMMUNITY LAW AS SET OUT IN ARTICLE 189 OF THE TREATY FOR THE PURPOSE OF DETERMINING THE EFFECTS OF THAT PRINCIPLE WHEN A RULE OF COMMUNITY LAW CONFLICTS WITH A SUBSEQUENT PROVISION OF NATIONAL LAW .

2. IT IS APPROPRIATE TO DRAW ATTENTION TO THE FACT THAT AT A PREVIOUS STAGE OF THE PROCEEDINGS THE PRETORE REFERRED TO THE COURT FOR A PRELIMINARY RULING QUESTIONS DESIGNED TO ENABLE HIM TO DETERMINE WHETHER VETERINARY AND PUBLIC HEALTH FEES LEVIED ON IMPORTS OF BEEF AND VEAL UNDER THE CONSOLIDATED TEXT OF THE ITALIEN VETERINARY AND PUBLIC HEALTH LAWS , THE RATE OF WHICH WAS LAST FIXED BY THE SCALE ANNEXED TO LAW NO 1239 OF 30 DECEMBER 1970 (GAZZETA UFFICIALE NO 26 OF 1 FEBRUARY 1971), WERE COMPATIBLE WITH THE TREATY AND WITH CERTAIN REGULATIONS - IN PARTICULAR REGULATION (EEC) NO 805/68 OF THE COUNCIL OF 27 JUNE 1968 ON THE COMMON ORGANIZATION OF THE MARKET IN BEEF AND VEAL (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1968 (I), P . 187).

3. HAVING REGARD TO THE ANSWERS GIVEN BY THE COURT IN ITS JUDGMENT OF 15 DECEMBER 1976 IN CASE 35/76 (SIMMENTHAL S.P.A . V ITALIAN MINISTER FOR FINANCE (1976) ECR 1871) THE PRETORE HELD THAT THE LEVYING OF THE FEES IN QUESTION WAS INCOMPATIBLE WITH THE PROVISIONS OF COMMUNITY LAW AND ORDERED THE AMMINISTRAZIONE DELLE FINANZE DELLO STATO (ITALIAN FINANCE ADMINISTRATION) TO REPAY THE FEES UNLAWFULLY CHARGED , TOGETHER WITH INTEREST .

4. THE AMMINISTRAZIONE APPEALED AGAINST THAT ORDER .

5. THE PRETORE , TAKING INTO ACCOUNT THE ARGUMENTS PUT FORWARD BY THE PARTIES DURING THE PROCEEDINGS ARISING OUT OF THIS APPEAL , HELD THAT THE ISSUE BEFORE HIM INVOLVED A CONFLICT BETWEEN CERTAIN RULES OF COMMUNITY LAW AND A SUBSEQUENT NATIONAL LAW , NAMELY THE SAID LAW NO 1239/70 .

6. HE POINTED OUT THAT TO RESOLVE AN ISSUE OF THIS KIND , ACCORDING TO RECENTLY DECIDED CASES OF THE ITALIAN CONSTITUTIONAL COURT (JUDGMENTS NO 232/75 AND NO 205/76 AND ORDER NO 206/76), THE QUESTION WHETHER THE LAW IN QUESTION WAS UNCONSTITUTIONAL UNDER ARTICLE 11 OF THE CONSTITUTION MUST BE REFERRED TO THE CONSTITUTIONAL COURT ITSELF .

7 THE PRETORE , HAVING REGARD , ON THE ONE HAND , TO THE WELL-ESTABLISHED CASE-LAW OF THE COURT OF JUSTICE RELATING TO THE APPLICABILITY OF COMMUNITY LAW IN THE LEGAL SYSTEMS OF THE MEMBER STATES AND , ON THE OTHER HAND , TO THE DISADVANTAGES WHICH MIGHT ARISE IF THE NATIONAL COURT , INSTEAD OF DECLARING OF ITS OWN MOTION THAT A LAW IMPEDING THE FULL FORCE AND EFFECT OF COMMUNITY LAW WAS

INAPPLICABLE , WERE REQUIRED TO RAISE THE ISSUE OF CONSTITUTIONALITY , REFERRED TO THE COURT TWO QUESTIONS FRAMED AS FOLLOWS :

(A) SINCE , IN ACCORDANCE WITH ARTICLE 189 OF THE EEC TREATY AND THE ESTABLISHED CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES , DIRECTLY APPLICABLE COMMUNITY PROVISIONS MUST , NOTWITHSTANDING ANY INTERNAL RULE OR PRACTICE WHATSOEVER OF THE MEMBER STATES , HAVE FULL , COMPLETE AND UNIFORM EFFECT IN THEIR LEGAL SYSTEMS IN ORDER TO PROTECT SUBJECTIVE LEGAL RIGHTS CREATED IN FAVOUR OF INDIVIDUALS , IS THE SCOPE OF THE SAID PROVISIONS TO BE INTERPRETED TO THE EFFECT THAT ANY SUBSEQUENT NATIONAL MEASURES WHICH CONFLICT WITH THOSE PROVISIONS MUST BE FORTHWITH DISREGARDED WITHOUT WAITING UNTIL THOSE MEASURES HAVE BEEN ELIMINATED BY ACTION ON THE PART OF THE NATIONAL LEGISLATURE CONCERNED (REPEAL) OR OF OTHER CONSTITUTIONAL AUTHORITIES (DECLARATION THAT THEY ARE UNCONSTITUTIONAL) ESPECIALLY , IN THE CASE OF THE LATTER ALTERNATIVE , WHERE , SINCE THE NATIONAL LAW CONTINUES TO BE FULLY EFFECTIVE PENDING SUCH DECLARATION , IT IS IMPOSSIBLE TO APPLY THE COMMUNITY PROVISIONS AND , IN CONSEQUENCE , TO ENSURE THAT THEY ARE FULLY , COMPLETELY AND UNIFORMLY APPLIED AND TO PROTECT THE LEGAL RIGHTS CREATED IN FAVOUR OF INDIVIDUALS?

(B) ARISING OUT OF THE PREVIOUS QUESTION , IN CIRCUMSTANCES WHERE COMMUNITY LAW RECOGNIZES THAT THE PROTECTION OF SUBJECTIVE LEGAL RIGHTS CREATED AS A RESULT OF ' ' DIRECTLY APPLICABLE ' ' COMMUNITY PROVISIONS MAY BE SUSPENDED UNTIL ANY CONFLICTING NATIONAL MEASURES ARE ACTUALLY REPEALED BY THE COMPETENT NATIONAL AUTHORITIES , IS SUCH REPEAL IN ALL CASES TO HAVE A WHOLLY RETROACTIVE EFFECT SO AS TO AVOID ANY ADVERSE EFFECTS ON THOSE SUBJECTIVE LEGAL RIGHTS?

THE REFERENCE TO THE COURT

8. THE AGENT OF THE ITALIAN GOVERNMENT IN HIS ORAL OBSERVATIONS DREW THE ATTENTION OF THE COURT TO A JUDGMENT OF THE ITALIAN CONSTITUTIONAL COURT NO 163/77 OF 22 DECEMBER 1977 DELIVERED IN ANSWER TO QUESTIONS OF CONSTITUTIONALITY RAISED BY THE COURTS OF MILAN UND ROME , WHICH DECLARED THAT CERTAIN OF THE PROVISIONS OF LAW NO 1239 OF 30 DECEMBER 1970 INCLUDING THOSE AT ISSUE IN THE ACTION PENDING BEFORE THE PRETORE DI SUSA , WERE UNCONSTITUTIONAL .

9. IT WAS SUGGESTED THAT SINCE THE DISPUTED PROVISIONS HAVE BEEN SET ASIDE BY THE DECLARATION THAT THEY ARE UNCONSTITUTIONAL , THE QUESTIONS RAISED BY THE PRETORE NO LONGER HAVE RELEVANCE SO THAT IT IS NO LONGER NECESSARY TO ANSWER THEM .

10. ON THIS ISSUE IT SHOULD BE BORNE IN MIND THAT IN ACCORDANCE WITH ITS UNVARYING PRACTICE THE COURT OF JUSTICE CONSIDERS A REFERENCE FOR A PRELIMINARY RULING , PURSUANT TO ARTICLE 177 OF THE TREATY , AS HAVING BEEN VALIDLY BROUGHT BEFORE IT SO LONG AS THE REFERENCE HAS NOT BEEN WITHDRAWN BY THE COURT FROM WHICH IT EMANATES OR HAS NOT BEEN QUASHED ON APPEAL BY A SUPERIOR COURT .

11. THE JUDGMENT REFERRED TO , WHICH WAS DELIVERED IN PROCEEDINGS IN NO WAY CONNECTED WITH THE ACTION GIVING RISE TO THE REFERENCE TO THIS COURT , CANNOT HAVE SUCH A RESULT AND THE COURT CANNOT DETERMINE ITS EFFECT ON THIRD PARTIES .

12. THE PRELIMINARY OBJECTION RAISED BY THE ITALIAN GOVERNMENT MUST THEREFORE BE OVERRULED .

THE SUBSTANCE OF THE CASE

13. THE MAIN PURPOSE OF THE FIRST QUESTION IS TO ASCERTAIN WHAT CONSEQUENCES FLOW FROM THE DIRECT APPLICABILITY OF A PROVISION OF COMMUNITY LAW IN THE EVENT OF INCOMPATIBILITY WITH A SUBSEQUENT LEGISLATIVE PROVISION OF A MEMBER STATE .

14. DIRECT APPLICABILITY IN SUCH CIRCUMSTANCES MEANS THAT RULES OF COMMUNITY LAW MUST BE FULLY AND UNIFORMLY APPLIED IN ALL THE MEMBER STATES FROM THE DATE OF THEIR ENTRY INTO FORCE AND FOR SO LONG AS THEY CONTINUE IN FORCE .

15. THESE PROVISIONS ARE THEREFORE A DIRECT SOURCE OF RIGHTS AND DUTIES FOR ALL THOSE AFFECTED THEREBY , WHETHER MEMBER STATES OR INDIVIDUALS , WHO ARE PARTIES TO LEGAL RELATIONSHIPS UNDER COMMUNITY LAW .

16. THIS CONSEQUENCE ALSO CONCERNS ANY NATIONAL COURT WHOSE TASK IT IS AS AN ORGAN OF A MEMBER STATE TO PROTECT , IN A CASE WITHIN ITS JURISDICTION , THE RIGHTS CONFERRED UPON INDIVIDUALS BY

COMMUNITY LAW .

17. FURTHERMORE , IN ACCORDANCE WITH THE PRINCIPLE OF THE PRECEDENCE OF COMMUNITY LAW , THE RELATIONSHIP BETWEEN PROVISIONS OF THE TREATY AND DIRECTLY APPLICABLE MEASURES OF THE INSTITUTIONS ON THE ONE HAND AND THE NATIONAL LAW OF THE MEMBER STATES ON THE OTHER IS SUCH THAT THOSE PROVISIONS AND MEASURES NOT ONLY BY THEIR ENTRY INTO FORCE RENDER AUTOMATICALLY INAPPLICABLE ANY CONFLICTING PROVISION OF CURRENT NATIONAL LAW BUT - IN SO FAR AS THEY ARE AN INTEGRAL PART OF , AND TAKE PRECEDENCE IN , THE LEGAL ORDER APPLICABLE IN THE TERRITORY OF EACH OF THE MEMBER STATES - ALSO PRECLUDE THE VALID ADOPTION OF NEW NATIONAL LEGISLATIVE MEASURES TO THE EXTENT TO WHICH THEY WOULD BE INCOMPATIBLE WITH COMMUNITY PROVISIONS .

18. INDEED ANY RECOGNITION THAT NATIONAL LEGISLATIVE MEASURES WHICH ENCROACH UPON THE FIELD WITHIN WHICH THE COMMUNITY EXERCISES ITS LEGISLATIVE POWER OR WHICH ARE OTHERWISE INCOMPATIBLE WITH THE PROVISIONS OF COMMUNITY LAW HAD ANY LEGAL EFFECT WOULD AMOUNT TO A CORRESPONDING DENIAL OF THE EFFECTIVENESS OF OBLIGATIONS UNDERTAKEN UNCONDITIONALLY AND IRREVOCABLY BY MEMBER STATES PURSUANT TO THE TREATY AND WOULD THUS IMPERIL THE VERY FOUNDATIONS OF THE COMMUNITY .

19. THE SAME CONCLUSION EMERGES FROM THE STRUCTURE OF ARTICLE 177 OF THE TREATY WHICH PROVIDES THAT ANY COURT OR TRIBUNAL OF A MEMBER STATE IS ENTITLED TO MAKE A REFERENCE TO THE COURT WHENEVER IT CONSIDERS THAT A PRELIMINARY RULING ON A QUESTION OF INTERPRETATION OR VALIDITY RELATING TO COMMUNITY LAW IS NECESSARY TO ENABLE IT TO GIVE JUDGMENT .

20. THE EFFECTIVENESS OF THAT PROVISION WOULD BE IMPAIRED IF THE NATIONAL COURT WERE PREVENTED FROM FORTHWITH APPLYING COMMUNITY LAW IN ACCORDANCE WITH THE DECISION OR THE CASE-LAW OF THE COURT .

21. IT FOLLOWS FROM THE FOREGOING THAT EVERY NATIONAL COURT MUST , IN A CASE WITHIN ITS JURISDICTION , APPLY COMMUNITY LAW IN ITS ENTIRETY AND PROTECT RIGHTS WHICH THE LATTER CONFERS ON INDIVIDUALS AND MUST ACCORDINGLY SET ASIDE ANY PROVISION OF NATIONAL LAW WHICH MAY CONFLICT WITH IT , WHETHER PRIOR OR SUBSEQUENT TO THE COMMUNITY RULE .

22. ACCORDINGLY ANY PROVISION OF A NATIONAL LEGAL SYSTEM AND ANY LEGISLATIVE , ADMINISTRATIVE OR JUDICIAL PRACTICE WHICH MIGHT IMPAIR THE EFFECTIVENESS OF COMMUNITY LAW BY WITHHOLDING FROM THE NATIONAL COURT HAVING JURISDICTION TO APPLY SUCH LAW THE POWER TO DO EVERYTHING NECESSARY AT THE MOMENT OF ITS APPLICATION TO SET ASIDE NATIONAL LEGISLATIVE PROVISIONS WHICH MIGHT PREVENT COMMUNITY RULES FROM HAVING FULL FORCE AND EFFECT ARE INCOMPATIBLE WITH THOSE REQUIREMENTS WHICH ARE THE VERY ESSENCE OF COMMUNITY LAW .

23. THIS WOULD BE THE CASE IN THE EVENT OF A CONFLICT BETWEEN A PROVISION OF COMMUNITY LAW AND A SUBSEQUENT NATIONAL LAW IF THE SOLUTION OF THE CONFLICT WERE TO BE RESERVED FOR AN AUTHORITY WITH A DISCRETION OF ITS OWN , OTHER THAN THE COURT CALLED UPON TO APPLY COMMUNITY LAW , EVEN IF SUCH AN IMPEDIMENT TO THE FULL EFFECTIVENESS OF COMMUNITY LAW WERE ONLY TEMPORARY .

24. THE FIRST QUESTION SHOULD THEREFORE BE ANSWERED TO THE EFFECT THAT A NATIONAL COURT WHICH IS CALLED UPON , WITHIN THE LIMITS OF ITS JURISDICTION , TO APPLY PROVISIONS OF COMMUNITY LAW IS UNDER A DUTY TO GIVE FULL EFFECT TO THOSE PROVISIONS , IF NECESSARY REFUSING OF ITS OWN MOTION TO APPLY ANY CONFLICTING PROVISION OF NATIONAL LEGISLATION , EVEN IF ADOPTED SUBSEQUENTLY , AND IT IS NOT NECESSARY FOR THE COURT TO REQUEST OR AWAIT THE PRIOR SETTING ASIDE OF SUCH PROVISION BY LEGISLATIVE OR OTHER CONSTITUTIONAL MEANS .

25. THE ESSENTIAL POINT OF THE SECOND QUESTION IS WHETHER - ASSUMING IT TO BE ACCEPTED THAT THE PROTECTION OF RIGHTS CONFERRED BY PROVISIONS OF COMMUNITY LAW CAN BE SUSPENDED UNTIL ANY NATIONAL PROVISIONS WHICH MIGHT CONFLICT WITH THEM HAVE BEEN IN FACT SET ASIDE BY THE COMPETENT NATIONAL AUTHORITIES - SUCH SETTING ASIDE MUST IN EVERY CASE HAVE UNRESTRICTED RETROACTIVE EFFECT SO AS TO PREVENT THE RIGHTS IN QUESTION FROM BEING IN ANY WAY ADVERSELY AFFECTED .

26. IT FOLLOWS FROM THE ANSWER TO THE FIRST QUESTION THAT NATIONAL COURTS MUST PROTECT RIGHTS CONFERRED BY PROVISIONS OF THE COMMUNITY LEGAL ORDER AND THAT IT IS NOT NECESSARY FOR SUCH COURTS TO REQUEST OR AWAIT THE ACTUAL SETTING ASIDE BY THE NATIONAL AUTHORITIES EMPOWERED SO TO ACT OF ANY NATIONAL MEASURES WHICH MIGHT IMPEDE THE DIRECT AND IMMEDIATE APPLICATION OF COMMUNITY RULES .

27. THE SECOND QUESTION THEREFORE APPEARS TO HAVE NO PURPOSE .

Decision on costs

COSTS

28THE COSTS INCURRED BY THE GOVERNMENT OF THE ITALIAN REPUBLIC AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT ARE NOT RECOVERABLE .

29. AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE PRETORE DI SUSA , THE DECISION ON COSTS IS A MATTER FOR THAT COURT .

Operative part

ON THOSE GROUNDS

THE COURT ,

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE PRETORE DI SUSA BY ORDER OF 28 JULY 1977 , HEREBY RULES :

A NATIONAL COURT WHICH IS CALLED UPON , WITHIN THE LIMITS OF ITS JURISDICTION , TO APPLY PROVISIONS OF COMMUNITY LAW IS UNDER A DUTY TO GIVE FULL EFFECT TO THOSE PROVISIONS , IF NECESSARY REFUSING OF ITS OWN MOTION TO APPLY ANY CONFLICTING PROVISION OF NATIONAL LEGISLATION , EVEN IF ADOPTED SUBSEQUENTLY , AND IT IS NOT NECESSARY FOR THE COURT TO REQUEST OR AWAIT THE PRIOR SETTING ASIDE OF SUCH PROVISIONS BY LEGISLATIVE OR OTHER CONSTITUTIONAL MEANS .

Case C-322/88 - Salvatore Grimaldi v Fonds des maladies professionnelles

JUDGMENT OF THE COURT (Second Chamber) 13 December 1989

In Case C-322/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunal du travail (Labour Tribunal), Brussels, for a preliminary ruling in the proceedings pending before that court between

Salvatore Grimaldi, residing in Brussels, and

Fonds des maladies professionnelles (Occupational Diseases Fund), Brussels,

on the interpretation, in the light of the fifth paragraph of Article 189 of the EEC Treaty, of the Commission Recommendation to the Member States of 23 July 1962 concerning the adoption of a European schedule of occupational diseases (Joumal officiel 1962, 80, p. 2188) and of Commission Recommendation 66/462 of 20 July 1966 on the conditions for granting compensation to persons suffering from occupational diseases (Joumal officiel 1966, 147, p. 2696),

THE COURT (Second Chamber)

composed of: F. A. Schockweiler, President of Chamber, G. F. Mancini and T. F. O'Higgins, Judges,

Advocate General: J. Mischo

Registrar: D. Louterman, Principal Administrator

after considering the observations submitted on behalf of the Commission of the European Communities, represented by its Legal Adviser Jean-Claude Seché, acting as Agent, having regard to the Report for the Hearing and further to the hearing on 10 October 1989, after hearing the Opinion of the Advocate General delivered at the sitting on 10 October 1989, gives the following

Judgment

By judgment of 28 October 1988, which was received at the Court on 7 November 1988, the tribunal du travail, Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the fifth paragraph of Article 189 of the EEC Treaty and of the Commission Recommendation to the Member States of 23 July 1962 concerning the adoption of a European schedule of occupational diseases (Journal officiel 1962, 80, p. 2188).

2 The question was raised in proceedings between Salvatore Grimaldi, a migrant worker of Italian nationality, and the Fonds des maladies professionnelles (Occupational Diseases Fund), Brussels (hereinafter referred to as 'the Fund'), following the latter's refusal to recognize that Dupuytren's contracture, from which Mr Grimaldi suffers, was an occupational disease.

3 Mr Grimaldi worked in Belgium from 1953 to 1980. On 17 May 1983 he requested the Fund to recognize that the abovementioned disease, which is an osteo-articular or angio-neurotic disease of the hands caused by mechanical vibrations from the use of a pneumatic drill, was an occupational disease. The Fund took the contested decision on the ground that the disease in question did not appear in the Belgian schedule of occupational diseases.

4. In the action brought by Mr Grimaldi contesting that decision the tribunal du travail, Brussels, ordered an expert opinion which concluded that the plaintiff was suffering from Dupuytren's contracture, which was not contained in the Belgian schedule of occupational diseases but could be deemed to be a 'disease caused by the over-straining . . . of peritendinous tissue'. This disease appears in point F. 6(b) of the European schedule of occupational diseases which the Recommendation of 23 July 1962 recommended should be introduced into national law. In addition, the question arose whether Mr Grimaldi could be permitted to prove that a disease not included in the national list was occupational in origin in order to receive compensation under the 'mixed' system of compensation provided for by Commission Recommendation 66/462 of 20 July 1966 on the conditions for granting compensation to persons suffering from occupational diseases (Joumal officiel 1966, 147, p. 2696).

5 The tribunal du travail, Brussels, therefore decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Does a measure such as the "European schedule" of occupational diseases not have direct effect in a Member State on the basis of an interpretation of the fifth paragraph of Article 189 in the light of the spirit of the first paragraph thereof and the teleological approach of the Court's case-law, in so far as the schedule is clear, unconditional, sufficiently certain and unequivocal and does not confer any discretion as to the result to be achieved and in so far as it is annexed to a Commission recommendation which has not been formally implemented in a national legal system after more than 25 years?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts in the main proceedings, the Community provisions at issue, 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.

7 In so far as the preliminary question concerns the interpretation of recommendations, which, according to the fifth paragraph of Article 189 of the EEC Treaty, have no binding force, it is necessary to consider whether, under Article 177 of the Treaty, the Court has jurisdiction to give a ruling.

8 It is sufficient to state in that respect that, unlike Article 173 of the EEC Treaty, which excludes review by the Court of acts in the nature of recommendations, Article 177 confers on the Court jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community without exception.

9 Moreover, in proceedings under Article 177 the Court has already ruled on several occasions on the interpretation of recommendations adopted on the basis of the EEC Treaty (see judgments of 15 June 1976 in Case 1 13/75 Frecassetti v Atmninistrazione delle finanze dello Stato [1976] ECR 983, and of 9 June 1977 in Case 90/76 Van Ameyde v UCI[1977] ECR 1091). It is therefore necessary to consider the question submitted to the Court.

10 It appears from the documents before the Court that although the question refers only to the recommendation of 23 July 1962, it also seeks to ascertain the effects under national law of Recommendation 66/462 of 20 July 1966. The question must therefore be understood as asking whether, in the absence of any national measure to implement them, those recommendations confer on individuals rights upon which they may rely before national courts.

11. In the first place, the Court has consistently decided that whilst under Article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of measures covered by that article can never produce similar effects (see, in particular, judgment of 19 January 1982 in Case 8/81 Becker v Finanzamt Miinster-Innenstadt [1982] ECR 53).

12 In order to establish whether the two recommendations may confer rights on individuals, however, it is necessary first to ascertain whether they can produce binding effects.

13 Recommendations, which according to the fifth paragraph of Article 189 of the Treaty are not binding, are generally adopted by the institutions of the Community when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules.

14 Since it follows from the settled case-law of the Court (see, in particular, judgment of 29 January 1985 in Case 147/83 Bindererv Commission [1985] ECR 257) that the choice of form cannot alter the nature of a measure, it must nevertheless be ascertained whether the content of a measure is wholly consistent with the form attributed to it.

15 As regards the two recommendations at issue in these proceedings, it must be stated that in the statement of the reasons on which they are based reference is made to Article 155 of the EEC Treaty, which confers on the Commission a general power to formulate recommendations, and to Articles 1 17 and 118 of the Treaty. As the Court held in its judgment of 9 July 1987 in Joined Cases 281, 283, 284, 285 and 287/85 Federal Republic of Germany, France, the Netherlands, Denmark and the United Kingdom v Commission [1987] ECR 3203, Article 118 does not encroach upon the Member States' powers in the social field in so far as the latter is not covered by other provisions of the Treaty and provided that those powers are exercised in the framework of cooperation between Member States, which is to be organized by the Commission.

16 In these circumstances there is no reason to doubt that the measures in question are true recommendations, that is to say measures which, even as regards the persons to whom they are addressed, are not intended to produce binding effects. Consequently, they cannot create rights upon which individuals may rely before a national court.

17. In this regard, the fact that more than 25 years have elapsed since the first of the recommendations in question was adopted, without its having been implemented by all the Member States, cannot alter its legal effect.

18. However, in order to give a comprehensive reply to the question asked by the national court, it must be stressed that the measures in question cannot therefore be regarded as having no legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.

19 The reply to the question asked by the tribunal du travail, Brussels, must therefore be that in the light of the fifth paragraph of Article 189 of the EEC Treaty, the Commission Recommendation of 23 July 1962 concerning the adoption of a European schedule of occupational diseases and Commission Recommendation 66/462 of 20 July 1966 on the conditions for granting compensation to persons suffering from occupational diseases cannot in themselves confer rights on individuals upon which the latter may rely before national courts. However, national courts are bound to take those recommendations into consideration In order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law.

Costs

20 The costs incurred by the Commission of the European Communities, which has 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 (Second Chamber),

in answer to the question referred to it by the tribunal du travail, Brussels, by judgment of 28 October 1988, hereby rules:

In the light of the fifth paragraph of Article 189 of the EEC Treaty, the Commission Recommendation of 23 July 1962 concerning the adoption of the European schedule of industrial diseases and Commission Recommendation 66/462 of 20 July 1966 on the conditions for granting compensation to persons suffering from occupational diseases cannot in themselves confer rights on individuals upon which the latter may rely before national courts. However, national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law.

Case C-213/89 - The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others ["Factortame I"]

JUDGMENT OF THE COURT
19 June 1990

In Case C-213/89
REFERENCE to the Court under Article 177 of the EEC Treaty by the House of Lords for a preliminary ruling in the proceedings pending before that court in the case of

The Queen
v
Secretary of State for Transport, ex parte: Factortame Ltd and Others,

on the interpretation of Community law with regard to the extent of the power of national courts to grant interim relief where rights claimed under Community law are at issue,

THE COURT

composed of: O. Due, President, Sir Gordon Slynn, C. N. Kakouris, F. A. Schockweiler, M. Zuleeg (Presidents of Chambers), G. F. Mancini, R. Joliet, J. C. Moitinho de Almeida, G. C. Rodriguez Iglesias, F. Grévisse and M. Diez de Velasco, Judges,
Advocate General: G. Tesauro

Registrar: H. A. Rühl, Principal Administrator
after considering the written observations submitted on behalf of

- the United Kingdom, by T. J. G. Pratt, Principal Assistant Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell, QC, Solicitor-General, Mr Christopher Bellamy, QC, and Mr Christopher Vajda, barrister,
- Ireland, by Louis J. Dockery, Chief State Solicitor, acting as Agent, assisted by James O'Reilly, SC,
- Factortame Ltd and Others, by David Vaughan QC, Gerald Barling, barrister, David Anderson, barrister, and Stephen Swabey, solicitor, of Thomas Cooper & Stibbard,
- the Commission, by Mr Götz zur Hausen, Legal Adviser, and Peter Oliver, a member of its Legal Department, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral argument presented at the hearing on 5 April 1990 by the United Kingdom, Factortame Ltd and Others, Rawlings (Trawling) Ltd., the latter represented by N. Forwood, QC, and by the Commission,

after hearing the Opinion of the Advocate General delivered at the sitting on 17 May 1990,

gives the following

Judgment

1 By a judgment of 18 May 1989, which was received at the Court on 10 July 1989, the House of Lords referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Community law. Those questions concern the extent of the power of national courts to grant interim relief where rights claimed under Community law are at issue.

2 The questions were raised in proceedings brought against the Secretary of State for Transport by Factortame Ltd and other companies incorporated under the laws of the United Kingdom, and also the directors and shareholders of those companies, most of whom are Spanish nationals (hereinafter together referred to as the 'appellants in the main proceedings').

3 The companies in question are the owners or operators of 95 fishing vessels which were registered in the register of British vessels under the Merchant Shipping Act 1894. Of those vessels, 53 were originally registered in Spain and flew the Spanish flag, but on various dates as from 1980 they were registered in the British register. The remaining 42 vessels have always been registered

in the United Kingdom, but were purchased by the companies in question on various dates, mainly since 1983.

4 The statutory system governing the registration of British fishing vessels was radically altered by Part II of the Merchant Shipping Act 1988 and the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988 (SI 1988, No 1926). It is common ground that the United Kingdom amended the previous legislation in order to put a stop to the practice known as 'quota hopping' whereby, according to the United Kingdom, its fishing quotas are 'plundered' by vessels flying the British flag but lacking any genuine link with the United Kingdom.

5 The 1988 Act provided for the establishment of a new register in which henceforth all British fishing vessels were to be registered, including those which were already registered in the old general register maintained under the 1894 Act. However, only fishing vessels fulfilling the conditions laid down in Section 14 of the 1988 Act may be registered in the new register.

Paragraph I of that section provides that, subject to dispensations to be determined by the Secretary of State for Transport, a fishing vessel is eligible to be registered in the new register only if:
'(a) the vessel is British-owned,
(b) the vessel is managed, and its operations are directed and controlled, from within the United Kingdom and;
(c) any charterer, manager or operator of the vessel is a qualified person or company'.

6 According to Section 14(2), a fishing vessel is deemed to be British-owned if the legal title to the vessel is vested wholly in one or more qualified persons or companies and if the vessel is beneficially owned by one or more qualified companies or, as to not less than 75%, by one or more qualified persons. According to Section 14(7) 'qualified person' means a person who is a British citizen resident and domiciled in the United Kingdom and 'qualified company' means a company incorporated in the United Kingdom and having its principle place of business there, at least 75% of its shares being owned by one or more qualified persons or companies and at least 75% of its directors being qualified persons.

7 The 1988 Act and the 1988 Regulations entered into force on I December 1988. However, under Section 13 of the 1988 Act, the validity of registrations effected under the previous Act was extended for a transitional period until 31 March 1989.

8 On 4 August 1989 the Commission brought an action before the Court under Article 169 of the EEC Treaty for a declaration that, by imposing the nationality requirements laid down in Section 14 of the 1988 Act, the United Kingdom had failed to fulfil its obligations under Articles 7, 52 and 221 of the EEC Treaty. That action is the subject of Case 246/89, now pending before the Court. In a separate document, lodged at the Court Registry on the same date, the Commission applied to the Court for an interim order requiring the United Kingdom to suspend the application of those nationality requirements as regards the nationals of other Member States and in respect of fishing vessels which until 31 March 1989 were carrying on a fishing activity under the British flag and under a British fishing licence. By an order of 10 October 1989 in Case 246/89 R Commission v United Kingdom [1989] ECR 3125, the President of the Court granted that application. Pursuant to that order, the United Kingdom made an Order in Council amending Section 14 of the 1988 Act with effect from 2 November 1989.

9 At the time of the institution of the proceedings in which the appeal arises, the 95 fishing vessels of the appellants in the main proceedings failed to satisfy one or more of the conditions for registration under Section 14 of the 1988 Act and thus could not be registered in the new register.

10 Since those vessels were to be deprived of the right to engage in fishing as from 1 April 1989, the companies in question, by means of an application for judicial review, challenged the compatibility of Part II of the 1988 Act with Community law. They also applied for the grant of interim relief until such time as final judgment was given on their application for judicial review.

11 In its judgment of 10 March 1989, the Divisional Court of the Queen's Bench Division: (i) decided to stay the proceedings and to make a reference under Article 177 of the EEC Treaty for a preliminary ruling on the issues of Community law raised in the proceedings; and (ii) ordered that, by way of interim relief, the application of Part II of the 1988 Act and the 1988 Regulations should be suspended as regards the applicants.

12 On 13 March 1989, the Secretary of State for Transport appealed against the Divisional Court's order granting interim relief. By judgment of 22 March 1989, the Court of Appeal held that under national law the courts had no power to suspend, by way of interim relief, the application of Acts of Parliament. It therefore set aside the order of the Divisional Court.

13 The House of Lords, before which the matter was brought, gave its abovementioned judgment of 18 May 1989. In its

judgment it found in the first place that the claims by the appellants in the main proceedings that they would suffer irreparable damage if the interim relief which they sought were not granted and they were successful in the main proceedings were well founded. However, it held that, under national law, the English courts had no power to grant interim relief in a case such as the one before it. More specifically, it held that the grant of such relief was precluded by the old common-law rule that an interim injunction may not be granted against the Crown, that is to say against the government, in conjunction with the presumption that an Act of Parliament is in conformity with Community law until such time as a decision on its compatibility with that law has been given.

14 The House of Lords then turned to the question whether, notwithstanding that rule of national law, English courts had the power, under Community law, to grant an interim injunction against the Crown.

15 Consequently, taking the view that the dispute raised an issue concerning the interpretation of Community law, the House of Lords decided, pursuant to Article 177 of the EEC Treaty, to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

Where

(i) a party before the national court claims to be entitled to rights under Community law having direct effect in national law (the claimed"),

(ii) a national measure in clear terms will, if applied, automatically deprive that party of the rights claimed,

(iii) there are serious arguments both for and against the existence of the rights claimed and the national court has sought a preliminary ruling under Article 177 as to whether or not the rights claimed exist,

(iv) the national law presumes the national measure in question to be compatible with Community law unless and until it is declared incompatible,

(v) the national court has no power to give interim protection to the rights claimed by suspending the application of the national measure pending the preliminary ruling,

(vi) if the preliminary ruling is in the event in favour of the rights claimed, the party entitled to those rights is likely to have suffered irremediable damage unless given such interim protection,

does Community law either:

(a) oblige the national court to grant such interim protection of the rights claimed; or

(b) give the Court power to grant such interim protection of the rights claimed ?

(2) If Question I(a) is answered in the negative and Question I(b) in the affirmative, what are the criteria to be applied in deciding whether or not to grant such interim protection of the rights claimed?'

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

17 It is clear from the information before the Court, and in particular from the judgment making the reference and, as described above, the course taken by the proceedings in the national cour'ts before which the case came at first and second instance, that the preliminary question raised by the House of Lords seeks essentially to ascertain whether a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must disapply that rule.

18 For the purpose of replying to that question, it is necessary to point out that in its judgment of 9 March 1978 in Case 106/77 Amministrazione delle finanze dello Stato v Simmenthal SpA [1978] ECR 629 the Coun held that directly applicable rules of Community law 'musc be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force' (paragraph 14) and that 'in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures . . . by their entry into force render automatically inapplicable any conflicting provision of . . . national law' (paragraph 17).

19 In accordance with the case-law of the Court, it is for the national courts, in application of the principle of cooperation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law (see, most recently, the judgments of 10 July 1980 in Case 811/79 Ariete SpA v Amministrazione dellefinanze dello Stato [1980] ECR 2545 and Case 826/79 Mireco v Amministrazione delle finanze dello Stato [1980] ECR 2559).

20 The Court has also held that any provision of a national legal system and any legislative, administrative or judicial practice

which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law (judgment of 9 March 1978 in Simmenthal, cited above, paragraphs 22 and 23).

21 It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.

22 That interpretation is reinforced by the system established by Article 177 of the EEC Treaty whose effectiveness would be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice.

23 Consequently, the reply to the question raised should be that Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.

Costs

24 The costs incurred by the United Kingdom, Ireland 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in reply to the question referred to it for a preliminary ruling by the House of Lords, by judgment of 18 May 1989, hereby rules:

Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.

Joined cases C-46/93 and C-48/93 - Brasserie du Pêcheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others ["Factortame III"]

Joined Cases C-46/93 and C-48/93

Brasserie du Pêcheur SA
v
Federal Republic of Germany

and

The Queen
v
Secretary of State for Transport,
ex parte Factortame Ltd and Others

JUDGMENT OF THE COURT
5 March 1996 (1)

((Principle of Member State liability for damage caused to individuals by breaches of Community law attributable to the State – Breaches attributable to the national legislature – Conditions for State liability – Extent of reparation))

In Joined Cases C-46/93 and C-48/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesgerichtshof (Case C-46/93) and by the High Court of Justice, Queen's Bench Division, Divisional Court (Case C-48/93) for a preliminary ruling in the proceedings pending before those courts between
Brasserie du Pêcheur SA

and

Federal Republic of Germany
and between **The Queen**

and

Secretary of State for Transport ex parte: Factortame Ltd and Others
on the interpretation of the principle of the liability of the State for damage caused to individuals by breaches of Community law attributable to the State,

THE COURT,,

composed of: G.C. Rodríguez Iglesias (Rapporteur), President, C.N. Kakouris, D.A.O. Edward and G. Hirsch (Presidents of Chambers), G.F. Mancini, F.A. Schockweiler, J.C. Moitinho de Almeida, C. Gulmann and J.L. Murray, Judges,
Advocate General: G. Tesauro,
Registrars: H. von Holstein, Deputy Registrar, and H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of: **[various entities]**…

having regard to the Report for the Hearing,

after hearing the oral observations of : **[various entities]**…

after hearing the Opinion of the Advocate General at the sitting on 28 November 1995,

gives the following

Judgment

1. By orders of 28 January 1993 and 18 November 1992, received at the Court on 17 February 1993 and 18 February 1993, respectively, the Bundesgerichtshof (Federal Court of Justice) (Case C-46/93) and the High Court of Justice, Queen's Bench Division, Divisional Court (Case C-48/93) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty questions concerning the conditions under which a Member State may incur liability for damage caused to individuals by breaches of Community law attributable to that State.

2

The questions were raised in two sets of proceedings between, on the one hand, Brasserie du Pêcheur SA and the Federal Republic of Germany and, on the other, Factortame Ltd and others (hereinafter Factortame) and the United Kingdom of Great Britain and Northern Ireland.

Case C-46/93

3

Before the national court, Brasserie du Pêcheur, a French company based at Schiltigheim (Alsace), claims that it was forced to discontinue exports of beer to Germany in late 1981 because the competent German authorities considered that the beer it produced did not comply with the Reinheitsgebot (purity requirement) laid down in Paragraphs 9 and 10 of the Biersteuergesetz of 14 March 1952 (Law on Beer Duty, BGBl. I, p. 149), in the version dated 14 December 1976 (BGBl. I, p. 3341, hereinafter the BStG).

4

The Commission took the view that those provisions were contrary to Article 30 of the EEC Treaty and brought infringement proceedings against the Federal Republic of Germany on two grounds, namely the prohibition on marketing under the designation Bier (beer) beers lawfully manufactured by different methods in other Member States and the prohibition on importing beers containing additives. By judgment of 12 March 1987 in Case 178/84 *Commission* v *Germany* [1987] ECR 1227, the Court held that the prohibition on marketing beers imported from other Member States which did not comply with the provisions in question was incompatible with Article 30 of the Treaty.

5

Brasserie du Pêcheur consequently brought an action against the Federal Republic of Germany for reparation of the loss suffered by it as a result of that import restriction between 1981 and 1987, seeking damages in the sum of DM 1 800 000, representing a fraction of the loss actually incurred.

6

The Bundesgerichtshof refers to Paragraph 839 of the Bürgerliches Gesetzbuch (German Civil Code, the BGB) and Article 34 of the Grundgesetz (Basic Law, the GG). According to the first sentence of Paragraph 839 of the BGB, If an official wilfully or negligently commits a breach of official duty incumbent upon him as against a third party, he shall compensate the third party for any damage arising therefrom. Article 34 of the GG provides that If a person infringes, in the exercise of a public office entrusted to him, the obligations incumbent upon him as against a third party, liability therefor shall attach in principle to the State or to the body in whose service he is engaged.

7

If those provisions are read together, it appears that, in order for the State to be liable, the third party must be capable of being regarded as beneficiary of the obligation breached, which means that the State is liable for breach only of obligations conceived in

favour of a third party. However, as the Bundesgerichtshof points out, in the case of the BStG the task assumed by the national legislature concerns only the public at large and is not directed towards any particular person or class of persons who could be regarded as third parties within the meaning of the provisions mentioned above.

8

In this context, the Bundesgerichtshof has referred the following questions to the Court for a preliminary ruling:

1.

Does the principle of Community law according to which Member States are obliged to pay compensation for damage suffered by an individual as a result of breaches of Community law attributable to those States also apply where such a breach consists of a failure to adapt a national parliamentary statute to the higher-ranking rules of Community law (this case concerning a failure to adapt Paragraphs 9 and 10 of the German Biersteuergesetz to Article 30 of the EEC Treaty)?

2.

May the national legal system provide that any entitlement to compensation is to be subject to the same limitations as those applying where a national statute breaches higher-ranking national law, for example where an ordinary Federal law breaches the Grundgesetz of the Federal Republic of Germany?

3.

May the national legal system provide that entitlement to compensation is to be conditional on fault (intent or negligence) on the part of the organs of the State responsible for the failure to adapt the legislation?

4.

If Question 1 is to be answered in the affirmative and Question 2 in the negative:

(a)

May liability to pay compensation under the national legal system be limited to the reparation of damage done to specific individual legal interests, for example property, or does it require full compensation for all financial losses, including lost profits?

(b)

Does the obligation to pay compensation also require reparation of the damage already incurred before it was held in the judgment of the European Court of Justice of 12 March 1987 in Case 178/84 *Commission* v*Germany* [1987] ECR 1227 that Paragraph 10 of the German Biersteuergesetz infringed higher-ranking Community law?

Case C-48/93

9

On 16 December 1988 Factortame and others, being individuals and companies incorporated under the laws of the United Kingdom, together with the directors and shareholders of those companies, brought an action before the High Court of Justice, Queen's Bench Division, Divisional Court (hereinafter the Divisional Court), in which they challenged the compatibility of Part II of the Merchant Shipping Act 1988 with Community law, in particular Article 52 of the EEC Treaty. That act entered into force on 1 December 1988, subject to a transitional period expiring on 31 March 1989. It provided for the introduction of a new register for British fishing boats and made registration of such vessels, including those already registered in the former register, subject to certain conditions relating to the nationality, residence and domicile of the owners. Fishing boats ineligible for registration in the new register were deprived of the right to fish.

10

In answer to questions referred by the Divisional Court, the Court held by judgment of 25 July 1991 in Case C-221/89 *Factortame II* [1991] ECR I-3905 that conditions relating to the nationality, residence and domicile of vessel owners and operators as laid down by the registration system introduced by the United Kingdom were contrary to Community law, but that it was not contrary to Community law to stipulate as a condition for registration that the vessels in question must be managed and their operations directed and controlled from within the United Kingdom.

11

On 4 August 1989 the Commission brought infringement proceedings against the United Kingdom. In parallel, it applied for interim measures ordering the suspension of the abovementioned nationality conditions on the ground that they were contrary to Articles 7, 52 and 221 of the EEC Treaty. By order of 10 October 1989 in Case 246/89 R *Commission* v *United Kingdom* [1989] ECR 3125,

the President of the Court granted that application. Pursuant to that order, the United Kingdom adopted provisions amending the new registration system with effect from 2 November 1989. By judgment of 4 October 1991 in Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585, the Court confirmed that the registration conditions challenged in the infringement proceedings were contrary to Community law.

12

Meanwhile, on 2 October 1991, the Divisional Court made an order designed to give effect to this Court's judgment of 25 July 1991 in *Factortame II* and, at the same time, directed the claimants to give detailed particulars of their claims for damages. Subsequently, the claimants provided the national court with a detailed statement of their various heads of claim, covering expenses and losses incurred between 1 April 1989, when the legislation at issue entered into force, and 2 November 1989, when it was repealed.

13

Lastly, by order of 18 November 1992, the Divisional Court gave Rawlings (Trawling) Ltd, the 37th claimant in Case C-48/93, leave to amend its claim to include a claim for exemplary damages for unconstitutional behaviour on the part of the public authorities.

14

In that context, the Divisional Court referred the following questions to the Court for a preliminary ruling:

1.

In all the circumstances of this case, where:

(a)

a Member State's legislation laid down conditions relating to the nationality, domicile and residence of the owners and managers of fishing vessels, and of the shareholders and directors in vessel-owning and managing companies, and

(b)

such conditions were held by the Court of Justice in Cases C-221/89 and C-246/89 to infringe Articles 5, 7, 52 and 221 of the EEC Treaty, are those persons who were owners or managers of such vessels, or directors and/or shareholders in vessel-owning and managing companies, entitled as a matter of Community law to compensation by that Member State for losses which they have suffered as a result of all or any of the above infringements of the EEC Treaty?

2.

If Question 1 is answered in the affirmative, what considerations, if any, does Community law require the national court to apply in determining claims for damages and interest relating to:

(a)

expenses and/or loss of profit and/or loss of income during the period subsequent to the entry into force of the said conditions, during which the vessels were forced to lay up, to make alternative arrangements for fishing and/or to seek registration elsewhere;

(b)

losses consequent on sales at an undervalue of the vessels, or of shares therein, or of shares in vessel-owning companies;

(c)

losses consequent on the need to provide bonds, fines and legal expenses for alleged offences connected with the exclusion of vessels from the national register;

(d)

losses consequent on the inability of such persons to own and operate further vessels;

(e)

loss of management fees;

(f)

expenses incurred in an attempt to mitigate the above losses;

(g)

exemplary damages as claimed?

15

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

State liability for acts and omissions of the national legislature contrary to Community law (first question in both Case C-46/93 and Case C-48/93)

16

By their first questions, each of the two national courts essentially seeks to establish whether the principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where the national legislature was responsible for the infringement in question.

17

In Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 37, the Court held that it is a principle of Community law that Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

18

The German, Irish and Netherlands Governments contend that Member States are required to make good loss or damage caused to individuals only where the provisions breached are not directly effective: in*Francovich and Others* the Court simply sought to fill a lacuna in the system for safeguarding rights of individuals. In so far as national law affords individuals a right of action enabling them to assert their rights under directly effective provisions of Community law, it is unnecessary, where such provisions are breached, also to grant them a right to reparation founded directly on Community law.

19

That argument cannot be accepted.

20

The Court has consistently held that the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty (see, in particular, Case 168/85 *Commission* v *Italy* [1986] ECR 2945, paragraph 11, Case C-120/88 *Commission* v *Italy* [1991] ECR I-621, paragraph 10, and C-119/89*Commission* v *Spain* [1991] ECR I-641, paragraph 9). The purpose of that right is to ensure that provisions of Community law prevail over national provisions. It cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State. As appears from paragraph 33 of the judgment in *Francovich and Others* , the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law.

21

This will be so where an individual who is a victim of the non-transposition of a directive and is precluded from relying on certain of its provisions directly before the national court because they are insufficiently precise and unconditional, brings an action for damages against the defaulting Member State for breach of the third paragraph of Article 189 of the Treaty. In such circumstances, which obtained in the case of*Francovich and Others* , the purpose of reparation is to redress the injurious consequences of a Member State's failure to transpose a directive as far as beneficiaries of that directive are concerned.

22

It is all the more so in the event of infringement of a right directly conferred by a Community provision upon which individuals are entitled to rely before the national courts. In that event, the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.

23

In this case, it is undisputed that the Community provisions at issue, namely Article 30 of the Treaty in Case C-46/93 and Article 52

in Case C-48/93, have direct effect in the sense that they confer on individuals rights upon which they are entitled to rely directly before the national courts. Breach of such provisions may give rise to reparation.

24

The German Government further submits that a general right to reparation for individuals could be created only by legislation and that for such a right to be recognized by judicial decision would be incompatible with the allocation of powers as between the Community institutions and the Member States and with the institutional balance established by the Treaty.

25

It must, however, be stressed that the existence and extent of State liability for damage ensuing as a result of a breach of obligations incumbent on the State by virtue of Community law are questions of Treaty interpretation which fall within the jurisdiction of the Court.

26

In this case, as in *Francovich and Others* , those questions of interpretation have been referred to the Court by national courts pursuant to Article 177 of the Treaty.

27

Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by Article 164 of the Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.

28

Indeed, it is to the general principles common to the laws of the Member States that the second paragraph of Article 215 of the Treaty refers as the basis of the non-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties.

29

The principle of the non-contractual liability of the Community expressly laid down in Article 215 of the Treaty is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused. That provision also reflects the obligation on public authorities to make good damage caused in the performance of their duties.

30

In any event, in many national legal systems the essentials of the legal rules governing State liability have been developed by the courts.

31

In view of the foregoing considerations, the Court held in *Francovich and Others* , at paragraph 35, that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible is inherent in the system of the Treaty.

32

It follows that that principle holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach.

33

In addition, in view of the fundamental requirement of the Community legal order that Community law be uniformly applied (see, in particular, Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 26), the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities.

34

As the Advocate General points out in paragraph 38 of his Opinion, in international law a State whose liability for breach of an

international commitment is in issue will be viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. This must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals.

35

The fact that, according to national rules, the breach complained of is attributable to the legislature cannot affect the requirements inherent in the protection of the rights of individuals who rely on Community law and, in this instance, the right to obtain redress in the national courts for damage caused by that breach.

36

Consequently, the reply to the national courts must be that the principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where the national legislature was responsible for the breach in question.

Conditions under which the State may incur liability for acts and omissions of the national legislature contrary to Community law (second question in Case C-46/93 and first question in Case C-48/93)

37

By these questions, the national courts ask the Court to specify the conditions under which a right to reparation of loss or damage caused to individuals by breaches of Community law attributable to a Member State is, in the particular circumstances, guaranteed by Community law.

38

Although Community law imposes State liability, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage (*Francovich and Others* , paragraph 38).

39

In order to determine those conditions, account should first be taken of the principles inherent in the Community legal order which form the basis for State liability, namely, first, the full effectiveness of Community rules and the effective protection of the rights which they confer and, second, the obligation to cooperate imposed on Member States by Article 5 of the Treaty (*Francovich and Others* , paragraphs 31 to 36).

40

In addition, as the Commission and the several governments which submitted observations have emphasized, it is pertinent to refer to the Court's case-law on non-contractual liability on the part of the Community.

41

First, the second paragraph of Article 215 of the Treaty refers, as regards the non-contractual liability of the Community, to the general principles common to the laws of the Member States, from which, in the absence of written rules, the Court also draws inspiration in other areas of Community law.

42

Second, the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.

43

The system of rules which the Court has worked out with regard to Article 215 of the Treaty, particularly in relation to liability for legislative measures, takes into account, *inter alia* , the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question.

44

Thus, in developing its case-law on the non-contractual liability of the Community, in particular as regards legislative measures involving choices of economic policy, the Court has had regard to the wide discretion available to the institutions in implementing Community policies.

45

The strict approach taken towards the liability of the Community in the exercise of its legislative activities is due to two considerations. First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterized by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraphs 5 and 6).

46

That said, the national legislature — like the Community institutions — does not systematically have a wide discretion when it acts in a field governed by Community law. Community law may impose upon it obligations to achieve a particular result or obligations to act or refrain from acting which reduce its margin of discretion, sometimes to a considerable degree. This is so, for instance, where, as in the circumstances to which the judgment in *Francovich and Others* relates, Article 189 of the Treaty places the Member State under an obligation to take, within a given period, all the measures needed in order to achieve the result required by a directive. In such a case, the fact that it is for the national legislature to take the necessary measures has no bearing on the Member State's liability for failing to transpose the directive.

47

In contrast, where a Member State acts in a field where it has a wide discretion, comparable to that of the Community institutions in implementing Community policies, the conditions under which it may incur liability must, in principle, be the same as those under which the Community institutions incur liability in a comparable situation.

48

In the case which gave rise to the reference in Case C-46/93, the German legislature had legislated in the field of foodstuffs, specifically beer. In the absence of Community harmonization, the national legislature had a wide discretion in that sphere in laying down rules on the quality of beer put on the market.

49

As regards the facts of Case C-48/93, the United Kingdom legislature also had a wide discretion. The legislation at issue was concerned, first, with the registration of vessels, a field which, in view of the state of development of Community law, falls within the jurisdiction of the Member States and, secondly, with regulating fishing, a sector in which implementation of the common fisheries policy leaves a margin of discretion to the Member States.

50

Consequently, in each case the German and United Kingdom legislatures were faced with situations involving choices comparable to those made by the Community institutions when they adopt legislative measures pursuant to a Community policy.

51

In such circumstances, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

52

Firstly, those conditions satisfy the requirements of the full effectiveness of the rules of Community law and of the effective protection of the rights which those rules confer.

53

Secondly, those conditions correspond in substance to those defined by the Court in relation to Article 215 in its case-law on liability of the Community for damage caused to individuals by unlawful legislative measures adopted by its institutions.

54

The first condition is manifestly satisfied in the case of Article 30 of the Treaty, the relevant provision in Case C-46/93, and in the case of Article 52, the relevant provision in Case C-48/93. Whilst Article 30 imposes a prohibition on Member States, it nevertheless gives rise to rights for individuals which the national courts must protect (Case 74/76 *Iannelli & Volpi* v *Meroni* [1977]

ECR 557, paragraph 13). Likewise, the essence of Article 52 is to confer rights on individuals (Case 2/74 *Reyners* [1974] ECR 631, paragraph 25).

55

As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.

56

The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.

57

On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.

58

While, in the present cases, the Court cannot substitute its assessment for that of the national courts, which have sole jurisdiction to find the facts in the main proceedings and decide how to characterize the breaches of Community law at issue, it will be helpful to indicate a number of circumstances which the national courts might take into account.

59

In Case C-46/93 a distinction should be drawn between the question of the German legislature's having maintained in force provisions of the Biersteuergesetz concerning the purity of beer prohibiting the marketing under the designation Bier of beers imported from other Member States which were lawfully produced in conformity with different rules, and the question of the retention of the provisions of that same law prohibiting the import of beers containing additives. As regards the provisions of the German legislation relating to the designation of the product marketed, it would be difficult to regard the breach of Article 30 by that legislation as an excusable error, since the incompatibility of such rules with Article 30 was manifest in the light of earlier decisions of the Court, in particular Case 120/78 *Rewe-Zentral* [1979] ECR 649 (Cassis de Dijon) and Case 193/80 *Commission* v *Italy* [1981] ECR 3019 (vinegar). In contrast, having regard to the relevant case-law, the criteria available to the national legislature to determine whether the prohibition of the use of additives was contrary to Community law were significantly less conclusive until the Court's judgment of 12 March 1987 in *Commission* v *Germany* , cited above, in which the Court held that prohibition to be incompatible with Article 30.

60

A number of observations may likewise be made about the national legislation at issue in Case C-48/93.

61

The decision of the United Kingdom legislature to introduce in the Merchant Shipping Act 1988 provisions relating to the conditions for the registration of fishing vessels has to be assessed differently in the case of the provisions making registration subject to a nationality condition, which constitute direct discrimination manifestly contrary to Community law, and in the case of the provisions laying down residence and domicile conditions for vessel owners and operators.

62

The latter conditions are prima facie incompatible with Article 52 of the Treaty in particular, but the United Kingdom sought to justify them in terms of the objectives of the common fisheries policy. In the judgment in*Factortame II* , cited above, the Court rejected that justification.

63

In order to determine whether the breach of Article 52 thus committed by the United Kingdom was sufficiently serious, the national court might take into account, *inter alia* , the legal disputes relating to particular features of the common fisheries policy, the attitude of the Commission, which made its position known to the United Kingdom in good time, and the assessments as to the state of

certainty of Community law made by the national courts in the interim proceedings brought by individuals affected by the Merchant Shipping Act.

64

Lastly, consideration should be given to the assertion made by Rawlings (Trawling) Ltd, the 37th claimant in Case C-48/93, that the United Kingdom failed to adopt immediately the measures needed to comply with the Order of the President of the Court of 10 October 1989 in *Commission* v *United Kingdom,* cited above, and that this needlessly increased the loss it sustained. If this allegation — which was certainly contested by the United Kingdom at the hearing — should prove correct, it should be regarded by the national court as constituting in itself a manifest and, therefore, sufficiently serious breach of Community law.

65

As for the third condition, it is for the national courts to determine whether there is a direct causal link between the breach of the obligation borne by the State and the damage sustained by the injured parties.

66

The aforementioned three conditions are necessary and sufficient to found a right in individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law.

67

As appears from paragraphs 41, 42 and 43 of *Francovich and Others* , cited above, subject to the right to reparation which flows directly from Community law where the conditions referred to in the preceding paragraph are satisfied, the State must make reparation for the consequences of the loss and damage caused in accordance with the domestic rules on liability, provided that the conditions for reparation of loss and damage laid down by national law must not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation (see also Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595).

68

In that regard, restrictions that exist in domestic legal systems as to the non-contractual liability of the State in the exercise of its legislative function may be such as to make it impossible in practice or excessively difficult for individuals to exercise their right to reparation, as guaranteed by Community law, of loss or damage resulting from the breach of Community law.

69

In Case C-46/93 the national court asks in particular whether national law may subject any right to compensation to the same restrictions as apply where a law is in breach of higher-ranking national provisions, for instance, where an ordinary Federal law infringes the Grundgesetz of the Federal Republic of Germany.

70

While the imposition of such restrictions may be consistent with the requirement that the conditions laid down should not be less favourable than those relating to similar domestic claims, it is still to be considered whether such restrictions are not such as in practice to make it impossible or excessively difficult to obtain reparation.

71

The condition imposed by German law where a law is in breach of higher-ranking national provisions, which makes reparation dependent upon the legislature's act or omission being referable to an individual situation, would in practice make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law, since the tasks falling to the national legislature relate, in principle, to the public at large and not to identifiable persons or classes of person.

72

Since such a condition stands in the way of the obligation on national courts to ensure the full effectiveness of Community law by guaranteeing effective protection for the rights of individuals, it must be set aside where an infringement of Community law is attributable to the national legislature.

73

Likewise, any condition that may be imposed by English law on State liability requiring proof of misfeasance in public office, such an abuse of power being inconceivable in the case of the legislature, is also such as in practice to make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law where the breach is attributable

to the national legislature.

74

Accordingly, the reply to the questions from the national courts must be that, where a breach of Community law by a Member State is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. Subject to that reservation, the State must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation.

The possibility of making reparation conditional upon the existence of fault (third question in Case C-46/93)

75

By its third question, the Bundesgerichtshof essentially seeks to establish whether, pursuant to the national legislation which it applies, the national court is entitled to make reparation conditional upon the existence of fault (whether intentional or negligent) on the part of the organ of the State to which the infringement is attributable.

76

As is clear from the case-file, the concept of fault does not have the same content in the various legal systems.

77

Next, it follows from the reply to the preceding question that, where a breach of Community law is attributable to a Member State acting in a field in which it has a wide discretion to make legislative choices, a finding of a right to reparation on the basis of Community law will be conditional, *inter alia* , upon the breach having been sufficiently serious.

78

So, certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining whether or not a given breach of Community law is serious (see the factors mentioned in paragraphs 56 and 57 above).

79

The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order.

80

Accordingly, the reply to the question from the national court must be that, pursuant to the national legislation which it applies, reparation of loss or damage cannot be made conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law.

The actual extent of the reparation (question 4(a) in Case C-46/93 and the second question in Case C-48/93)

81

By these questions, the national courts essentially ask the Court to identify the criteria for determination of the extent of the reparation due by the Member State responsible for the breach.

82

Reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights.

83

In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for

determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation.

84

In particular, in order to determine the loss or damage for which reparation may be granted, the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.

85

Indeed, it is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the damage himself (Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 33).

86

The Bundesgerichtshof asks whether national legislation may generally limit the obligation to make reparation to damage done to certain, specifically protected individual interests, for example property, or whether it should also cover loss of profit by the claimants. It states that the opportunity to market products from other Member States is not regarded in German law as forming part of the protected assets of the undertaking.

87

Total exclusion of loss of profit as a head of damage for which reparation may be awarded in the case of a breach of Community law cannot be accepted. Especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible.

88

As for the various heads of damage referred to in the Divisional Court's second question, Community law imposes no specific criteria. It is for the national court to rule on those heads of damage in accordance with the domestic law which it applies, subject to the requirements set out in paragraph 83 above.

89

As regards in particular the award of exemplary damages, such damages are based under domestic law, as the Divisional Court explains, on the finding that the public authorities concerned acted oppressively, arbitrarily or unconstitutionally. In so far as such conduct may constitute or aggravate a breach of Community law, an award of exemplary damages pursuant to a claim or an action founded on Community law cannot be ruled out if such damages could be awarded pursuant to a similar claim or action founded on domestic law.

90

Accordingly, the reply to the national courts must be that reparation by Member States of loss or damage which they have caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims or actions based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law.

Extent of the period covered by reparation (question 4(b) in Case C-46/93)

91

By this question, the Bundesgerichtshof asks whether the damage for which reparation may be awarded extends to harm sustained before a judgment is delivered by the Court finding that an infringement has been committed.

92

Following from the reply to the second question, the right to reparation under Community law exists where the conditions set out in

paragraph 51 above are satisfied.

93

One of those conditions is that the breach of Community law must have been sufficiently serious. The fact that there is a prior judgment of the Court finding an infringement will certainly be determinative, but it is not essential in order for that condition to be satisfied (see paragraphs 55, 56 and 57 of this judgment).

94

Were the obligation of the Member State concerned to make reparation to be confined to loss or damage sustained after delivery of a judgment of the Court finding the infringement in question, that would amount to calling in question the right to reparation conferred by the Community legal order.

95

In addition, to make the reparation of loss or damage conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to a Member State would be contrary to the principle of the effectiveness of Community law, since it would preclude any right to reparation so long as the presumed infringement had not been the subject of an action brought by the Commission under Article 169 of the Treaty and of a finding of an infringement by the Court. Rights arising for individuals out of Community provisions having direct effect in the domestic legal systems of the Member States cannot depend on the Commission's assessment of the expediency of taking action against a Member State pursuant to Article 169 of the Treaty or on the delivery by the Court of any judgment finding an infringement (see, to this effect, Joined Cases 314/81, 315/81, 316/81 and 83/82 *Waterkeyn and Others* [1982] ECR 4337, paragraph 16).

96

Accordingly, the reply to the national court's question must be that the obligation for Member States to make good loss or damage caused to individuals by breaches of Community law attributable to the State cannot be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question.

The request that the temporal effects of the judgment should be limited

97

The German Government requests the Court to limit any damage to be made good by the Federal Republic of Germany to loss or damage sustained after delivery of judgment in this case, in so far as the victims did not bring legal proceedings or make an equivalent claim before. It considers that such a temporal limitation of the effects of this judgment is necessary owing to the scale of its financial consequences for the Federal Republic of Germany.

98

It must be borne in mind that, were the national court to find that the conditions for liability of the Federal Republic of Germany are satisfied in this case, the State would have to make good the consequences of the damage caused within the framework of its domestic law on liability. Substantive and procedural conditions laid down by national law on reparation of damage are able to take account of the requirements of the principle of legal certainty.

99

However, those conditions may not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation (*Francovich and Others* , paragraph 43).

100

In view of the foregoing, there is no need for the Court to limit the temporal effects of this judgment.

Costs

101

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesgerichtshof, by order of 28 January 1993, and by the High Court of Justice, Queen's Bench Division, Divisional Court, by order of 18 November 1992, hereby rules:

1. The principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where the national legislature was responsible for the breach in question.

2. Where a breach of Community law by a Member State is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. Subject to that reservation, the state must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation.

3. Pursuant to the national legislation which it applies, reparation of loss or damage cannot be made conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law.

4. Reparation by Member States of loss or damage which they have caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims or actions based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law.

5. The obligation for Member States to make good loss or damage caused to individuals by breaches of Community law attributable to the State cannot be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question.

Case C-224/01 - Gerhard Köbler v Republik Österreich,

JUDGMENT OF THE COURT

30 September 2003 (1)

(Equal treatment - Remuneration of university professors - Indirect discrimination - Length-of-service increment - Liability of a Member State for damage caused to individuals by infringements of Community law for which it is responsible - Infringements attributable to a national court)

In Case C-224/01,

REFERENCE to the Court under Article 234 EC by the Landesgericht für Zivilrechtssachen Wien (Austria), for a preliminary ruling in the proceedings pending before that court between

Gerhard Köbler

and

Republik Österreich,

on the interpretation, first, of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and, secondly, the judgments of the Court in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame*[1996] ECR I-1029 and Case C-54/96 *Dorsch Consult* [1997] ECR I-4961,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet, R. Schintgen and C.W.A. Timmermans (Rapporteur) (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and A. Rosas, Judges,

Advocate General: P. Léger,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of **[the parties and interveners]**: and having regard to the Report for the Hearing,

after hearing the oral observations of **[the parties and interveners]**:

after hearing the Opinion of the Advocate General at the sitting on 8 April 2003,

gives the following

Judgment

1. By an order of 7 May 2001, received at the Court on 6 June 2001, the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of, first, Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and, secondly, the judgments of the Court in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029 and Case C-54/96 *Dorsch Consult* [1997] ECR I-4961.

2.

Those questions were raised in the course of an action for a declaration of liability brought by Mr Köbler against the Republic of Austria for breach of a provision of Community law by a judgment of the Verwaltungsgerichtshof (Supreme Administrative Court), Austria.

Legal framework

3.

Article 48(3) of the Gehaltsgesetz 1956 (law on salaries of 1956, BGBl. 1956/54), as amended in 1997 (BGBl. I, 1997/109) (hereinafter 'the GG'), provides:

'In so far as may be necessary in order to secure the services of a scientific expert or an artist from the country or from abroad, the Federal President may grant a basic salary higher than that provided for in Article 48(2) on appointment to a post as a university professor (Article 21 of the Bundesgesetz über die Organisation der Universitäten (Federal law on the organisation of universities), BGBl. 1993/805, hereinafter "the UOG 1993") or as an ordinary professor of universities or of an institution of higher education.'

4.

Article 50a(1) of the GG is worded as follows:

'A university professor (Article 21 of the UOG 1993) or an ordinary professor at a university or an institution of higher education who has completed 15 years service in that capacity in Austrian universities or institutions of higher education and who for four years has been in receipt of the length-of-service increment provided for in Article 50(4) shall be eligible, with effect from the date on which those two conditions are fulfilled, for a special length-of-service increment to be taken into account in the calculation of his retirement pension the amount of which shall correspond to that of the length-of-service increment provided for in Article 50(4).'

Dispute in the main proceedings

5.

Mr Köbler has been employed since 1 March 1986 under a public-law contract with the Austrian State in the capacity of ordinary university professor in Innsbruck (Austria). On his appointment he was awarded the salary of an ordinary university professor, tenth step, increased by the normal length-of-service increment.

6.

By letter of 28 February 1996, Mr Köbler applied under Article 50a of the GG for the special length-of-service increment for university professors. He claimed that, although he had not completed 15 years' service as a professor at Austrian universities, he had completed the requisite length of service if the duration of his service in universities of other Member States of the European Community were taken into consideration. He claimed that the condition of completion of 15 years service solely in Austrian universities - with no account being taken of periods of service in universities in other Member States - amounted to indirect discrimination unjustified under Community law.

7.

In the dispute to which Mr Köbler's claim gave rise, the Verwaltungsgerichtshof, Austria, referred to the Court, by order of 22 October 1997, a request for a preliminary ruling which was registered at the Registry of the Court under Case number C-382/97.

8.

By letter of 11 March 1998, the Registrar of the Court asked the Verwaltungsgerichtshof whether, in the light of the judgment of 15 January 1998 in Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47, it deemed it necessary to maintain its request for a preliminary ruling.

9.

By order of 25 March 1998 the Verwaltungsgerichtshof asked the parties for their views on the request by the Registrar of the Court, since on a provisional view the legal issue which was the subject-matter of the question submitted for a preliminary ruling had been resolved in favour of Mr Köbler.

10.

By order of 24 June 1998, the Verwaltungsgerichtshof withdrew its request for a preliminary ruling and, by a judgment of the same date, dismissed Mr Köbler's application on the ground that the special length-of-service increment was a loyalty bonus which objectively justified a derogation from the Community law provisions on freedom of movement for workers.

11.

That judgment of 24 June 1998 states in particular:

'... In its order for reference of 22 October 1997 [in Case C-382/97] the Verwaltungsgerichtshof took the view that the "special length-of-service increment for ordinary university professors" is in the nature of neither a loyalty bonus nor a reward, but is rather a component of salary under the system of career advancement.

That interpretation of the law, which is not binding on the parties to proceedings before the Verwaltungsgerichtshof, cannot be upheld.

...

It is thus clear that the special length-of-service increment under Paragraph 50a of the 1956 salary law is unrelated to the "market value assessment" to be undertaken in the course of the appointment procedure, but, rather, its purpose must be seen as the provision of a positive incentive to academics in a very mobile labour market to spend their career in Austrian universities. It cannot therefore be a component of salary as such and, because of its function as a loyalty bonus, requires a certain length of service as an ordinary university professor at Austrian universities as a precondition for eligibility. The treatment of the special length-of-service increment as a component of monthly earnings and the consequent permanent character of the loyalty bonus do not essentially preclude the above interpretation.

Since, in Austria, - in so far as this is of relevance in the present case - the legal personality of the universities is vested in the Federal State alone, the rules in Paragraph 50a of the 1956 salary law apply to only one employer - in contrast to the situation in Germany contemplated in the judgment of the Court of Justice in Case C-15/96 *Kalliope Schöning-Kougebetopoulou* [1998] ECR I-47. Previous periods of service are taken into account in reckoning length of service, as the plaintiff demands, in the course of the assessment of "market value" in the appointment procedure. There is no provision for any further account to be taken of such previous periods of service in the special length-of-service increment even for Austrian academics who resume teaching in Austria after spending time working abroad and such provision would not be consistent with the notion of rewarding many years' loyalty to an employer deemed by the Court of Justice to justify a rule which in itself breaches the prohibition on discrimination.

As the claim which the complainant seeks to assert here is for a special length of service increment under Paragraph 50a of the 1956 salary law which is a statutory loyalty bonus and as such is recognised by the Court of Justice as justification for legislation conflicting with the prohibition on discrimination, the complaint based on breach of that prohibition on discrimination is unfounded; it should be dismissed ...'

12.
Mr Köbler brought an action for damages before the referring court against the Republic of Austria for reparation of the loss which he allegedly suffered as a result of the non-payment to him of a special length-of-service increment. He maintains that the judgment of the Verwaltungsgerichtshof of 24 June 1998 infringed directly applicable provisions of Community law, as interpreted by the Court in the judgments in which it held that a special length-of-service increment does not constitute a loyalty bonus.
13.
The Republic of Austria contends that the judgment of the Verwaltungsgerichtshof of 24 June 1998 does not infringe the directly applicable Community law. Moreover, in its view, the decision of a court adjudicating at last instance such as the Verwaltungsgerichtshof cannot found an obligation to afford reparation as against the State.

The questions referred

14.
Taking the view that in the case before it the interpretation of Community law was not free from doubt and that such interpretation was necessary in order for it to give its decision, the Landesgericht für Zivilrechtssachen Wien decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the case-law of the Court of Justice to the effect that it is immaterial as regards State liability for a breach of Community law which institution of a Member State is responsible for that breach (see Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029) also applicable when the conduct of an institution purportedly contrary to Community law is a decision of a supreme court of a Member State, such as, as in this case, the Verwaltungsgerichtshof?

(2) If the answer to Question 1 is yes:

Is the case-law of the Court of Justice according to which it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law (see inter alia Case C-54/96 *Dorsch Consult* [1997] ECR I-4961) also applicable when the conduct of an institution purportedly contrary to Community law is a judgment of a supreme court of a Member State, such as, in this case, the Verwaltungsgerichtshof?

(3) If the answer to Question 2 is yes:

Does the legal interpretation given in the abovementioned judgment of the Verwaltungsgerichtshof, according to which the special length-of-service increment is a form of loyalty bonus, breach a rule of directly applicable Community law, in particular the prohibition on indirect discrimination in Article 48 [of the Treaty] and the relevant settled case-law of the Court of Justice?

(4) If the answer to Question 3 is yes:

Is this rule of directly applicable Community law such as to create a subjective right for the applicant in the main proceedings?

(5) If the answer to Question 4 is yes:

Does the Court ... have sufficient information in the content of the order for reference to enable it to rule itself as to whether the Verwaltungsgerichtshof in the circumstances of the main proceedings described has clearly and significantly exceeded the discretion available to it, or is it for the referring Austrian court to answer that question?'

First and second questions

15.
By its first and second questions, which must be examined together, the referring court is essentially asking whether the principle according to which Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance and whether, if so, it is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation.

Observations submitted to the Court

16.
Mr Köbler, the German and Netherlands Governments and the Commission consider that a Member State can be rendered liable for breach of Community law owing to a fault attributable to a court. However, those governments and the Commission consider that that liability should be limited and subject to different restrictive conditions additional to those already laid down in the *Brasserie du Pêcheur and Factortame*judgment.
17.
In that connection the German and Netherlands Governments claim that there is a 'sufficiently serious breach' for the purposes of that judgment only if a judicial decision disregarded the applicable Community law in a particularly serious and manifest way. According to the German Government, breach of a rule of law by a court is particularly serious and manifest only where the interpretation or non-application of Community law is, first, objectively indefensible and, secondly, must be subjectively regarded as intentional. Such restrictive criteria are justified in order to safeguard both the principle of *res judicata* and the independence of the judiciary. Moreover, a restrictive regime of State liability for damage caused by mistaken judicial decisions is in keeping, in the German Government's view, with a general principle common to the laws of the Member States as laid down in Article 288 EC.
18.
The German and Netherlands Governments maintain that the liability of the Member State should remain limited to judicial decisions against which no appeal lies, in particular because Article 234 EC imposes an obligation to make a reference for a preliminary ruling only on courts called upon to make such decisions. The Netherlands Government considers that State liability can be incurred only in the event of a manifest and serious infringement of that obligation to make a reference.
19.
The Commission submits that a limitation of State liability on account of judicial decisions exists in all the Member States and is necessary in order to safeguard the authority of *res judicata* of final decisions and thus the stability of the law. For that reason it advocates that the existence of a 'sufficiently serious breach' of Community law should be recognised only where the national court

is manifestly abusing its power or discernibly disregarding the meaning and scope of Community law. In the present case, the alleged fault by the Verwaltungsgerichtshof is excusable and that fact is one of the criteria enabling it to be concluded that there has not been a sufficiently serious breach of the law (Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 43).

20.

For their part the Republic of Austria and the Austrian Government (hereinafter together referred to as 'the Republic of Austria'), and the French and United Kingdom Governments, maintain that the liability of a Member State cannot be incurred in the case of a breach of Community law attributable to a court. They rely on arguments based on *res judicata*, the principle of legal certainty, the independence of the judiciary, the judiciary's place in the Community legal order and the comparison with procedures available before the Court to render the Community liable under Article 288 EC.

21.

The Republic of Austria claims in particular that a re-examination of the legal appraisal by a court adjudicating at last instance would be incompatible with the function of such a court since the purpose of its decisions is to bring a dispute to a definitive conclusion. Moreover, since the Verwaltungsgerichtshof conducted a detailed examination of Community law in its judgment of 24 June 1998, it would be consonant with Community law to preclude another possibility of bringing proceedings before an Austrian court. Moreover, the Republic of Austria maintains that the conditions for rendering a Member State liable cannot differ from those applicable to the liability of the Community in comparable circumstances. Since the second paragraph of Article 288 EC cannot be applied to an infringement of Community law by the Court of Justice, because in such a case it would be required to determine a question concerning damage which it itself had caused, so as to render it judge and party at the same time, nor can the liability of the Member States be incurred in respect of damage caused by a court adjudicating at last instance.

22.

Moreover, the Republic of Austria contends that Article 234 EC is not intended to confer rights on individuals. In the context of a preliminary-reference procedure pending before the Court the parties to the main proceedings can neither amend the questions referred for a preliminary ruling nor have them declared irrelevant (Case 44/65 *Singer* [1965] ECR 965). Moreover, only the infringement of a provision intended to confer rights on individuals is capable in a proper case of rendering the Member State liable. Accordingly, that liability cannot be incurred in the case of an infringement of Article 234 EC by a court adjudicating at last instance.

23.

The French Government claims that a right to reparation on the ground of an allegedly mistaken application of Community law by a definitive decision of a national court would be contrary to the principle of *res judicata*, as upheld by the Court in Case C-126/97 *Eco Swiss* [1999] ECR I-3055. That government claims in particular that the principle of *res judicata* constitutes a fundamental value in legal systems founded on the rule of law and the observance of judicial decisions. However, if State liability for infringement of Community law by a judicial body were recognised, that would be to call in question the rule of law and observance of such decisions.

24.

The United Kingdom Government states that, as a matter of principle and save where a judicial act infringes a fundamental right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), signed in Rome on 4 November 1950, no action in damages can be brought against the Crown in respect of judicial decisions. It adds that the principle on which the principle of State liability is based, namely that rights conferred by Community rules must be effectively protected, is far from being absolute and cites in that regard the application of fixed limitation periods. That principle would be capable of founding a remedy in damages against the State only in rare cases and in respect of certain strictly defined national judicial decisions. The advantage to be gained from acknowledging that damages may be obtained in respect of judicial decisions is therefore correspondingly small. The United Kingdom Government considers that that advantage must be weighed against certain powerful policy concerns.

25.

In that regard it cites, first, the principles of legal certainty and *res judicata*. The law discourages re-litigation of judicial decisions except by means of an appeal. That is both to protect the interests of the successful party and to further the public interest in legal certainty. The Court has in the past shown itself willing to limit the principle of effective protection in order to uphold 'the basic principles of the national judicial system, such as the principle of legal certainty and acceptance of *res judicata*, which is an expression of that principle' (judgment in *Eco Swiss*, cited above, paragraphs 43 to 48). Acknowledgment of State liability for a mistake by the judiciary would throw the law into confusion and would leave the litigating parties perpetually uncertain as to where they stood.

26.

Secondly, the United Kingdom Government submits that the authority and reputation of the judiciary would be diminished if a judicial mistake could in the future result in an action for damages. Thirdly, it maintains that the independence of the judiciary within the national constitutional order is a fundamental principle in all the Member States but one which can never be taken for granted. Acceptance of State liability for judicial acts would be likely to give rise to the risk that that independence might be called in question.

27.

Fourthly, inherent in the freedom given to national courts to decide matters of Community law for themselves is the acceptance that those courts will sometimes make errors that cannot be appealed or otherwise corrected. That is a disadvantage which has

always been considered acceptable. In that regard the United Kingdom Government points out that, in the event that the State could be rendered liable for a mistake by the judiciary, with the result that the Court could be called upon to give a preliminary ruling on that point, the Court would be empowered not only to pronounce upon the correctness of judgments of national supreme courts but to assess the seriousness and excusability of any error into which they had fallen. The consequences of this for the vital relationship between the Court and the national courts would clearly not be beneficial.

28.

Fifthly, the United Kingdom Government points to the difficulties in determining the court competent to adjudicate on such a case of State liability, particularly in the United Kingdom where there is a unitary court system and a strict doctrine of *stare decisis*. Sixthly, it maintains that, if State liability for a mistake by the judiciary can be incurred, the same conditions for the liability of the Community for mistakes by the Community judicature would have to apply.

29.

Specifically in regard to the second question, Mr Köbler and the Austrian and German Governments submit that it is for the legal system of each Member State to designate the court competent to adjudicate on disputes involving individual rights derived from Community law. That question should therefore be answered in the affirmative.

Reply by the Court

Principle of State liability

30.

First, as the Court has repeatedly held, the principle of liability on the part of a Member State for damage caused to individuals as a result of breaches of Community law for which the State is responsible is inherent in the system of the Treaty (Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35; *Brasserie du Pêcheur and Factortame*, cited above, paragraph 31; Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 38; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 24; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 20, Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531, paragraph 106 and *Haim*, cited above, paragraph 26).

31.

The Court has also held that that principle applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach (*Brasserie du Pêcheur and Factortame,* cited above, paragraph 32; Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 62 and *Haim,* cited above, paragraph 27).

32.

In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals (*Brasserie du Pêcheur and Factortame,* cited above, paragraph 34).

33.

In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.

34.

It must be stressed, in that context, that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights.

35.

Moreover, it is, in particular, in order to prevent rights conferred on individuals by Community law from being infringed that under the third paragraph of Article 234 EC a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice.

36.

Consequently, it follows from the requirements inherent in the protection of the rights of individuals relying on Community law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance (see in that connection *Brasserie du Pêcheur and Factortame,* cited above,

paragraph 35).

37.

Certain of the governments which submitted observations in these proceedings claimed that the principle of State liability for damage caused to individuals by infringements of Community law could not be applied to decisions of a national court adjudicating at last instance. In that connection arguments were put forward based, in particular, on the principle of legal certainty and, more specifically, the principle of *res judicata*, the independence and authority of the judiciary and the absence of a court competent to determine disputes relating to State liability for such decisions.

38.

In that regard the importance of the principle of *res judicata* cannot be disputed (see judgment in *Eco Swiss*, cited above, paragraph 46). In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question.

39.

However, it should be borne in mind that recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as *res judicata*. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage.

40.

It follows that the principle of *res judicata* does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance.

41.

Nor can the arguments based on the independence and authority of the judiciary be upheld.

42.

As to the independence of the judiciary, the principle of liability in question concerns not the personal liability of the judge but that of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question.

43.

As to the argument based on the risk of a diminution of the authority of a court adjudicating at last instance owing to the fact that its final decisions could by implication be called in question in proceedings in which the State may be rendered liable for such decisions, the existence of a right of action that affords, under certain conditions, reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary.

44.

Several governments also argued that application of the principle of State liability to decisions of a national court adjudicating at last instance was precluded by the difficulty of designating a court competent to determine disputes concerning the reparation of damage resulting from such decisions.

45.

In that connection, given that, for reasons essentially connected with the need to secure for individuals protection of the rights conferred on them by Community rules, the principle of State liability inherent in the Community legal order must apply in regard to decisions of a national court adjudicating at last instance, it is for the Member States to enable those affected to rely on that principle by affording them an appropriate right of action. Application of that principle cannot be compromised by the absence of a competent court.

46.

According to settled case-law, in the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law (see the judgments in Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 13; Case 68/79 *Just* [1980] ECR 501, paragraph 25; *Frankovich and Others*, cited above, paragraph 42, and Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12).

47.

Subject to the reservation that it is for the Member States to ensure in each case that those rights are effectively protected, it is not for the Court to become involved in resolving questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system (judgments in Case C-446/93 *SEIM* [1996] ECR I-73, paragraph 32 and *Dorsch Consult*, cited above, paragraph 40).

48.

It should be added that, although considerations to do with observance of the principle of *res judicata* or the independence of the judiciary have caused national legal systems to impose restrictions, which may sometimes be stringent, on the possibility of rendering the State liable for damage caused by mistaken judicial decisions, such considerations have not been such as absolutely to exclude that possibility. Indeed, application of the principle of State liability to judicial decisions has been accepted in one form or another by most of the Member States, as the Advocate General pointed out at paragraphs 77 to 82 of his Opinion, even if subject only to restrictive and varying conditions.

49.

It may also be noted that, in the same connection, the ECHR and, more particularly, Article 41 thereof enables the European Court of Human Rights to order a State which has infringed a fundamental right to provide reparation of the damage resulting from that conduct for the injured party. The case-law of that court shows that such reparation may also be granted when the infringement stems from a decision of a national court adjudicating at last instance (see ECt.HR, *Dulaurans* v *France*, 21 March 2000, not yet published).

50.

It follows from the foregoing that the principle according to which the Member States are liable to afford reparation of damage caused to individuals as a result of infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance. It is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation.

Conditions governing State liability

51.

As to the conditions to be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State is responsible, the Court has held that these are threefold: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties (*Haim*, cited above, paragraph 36).

52.

State liability for loss or damage caused by a decision of a national court adjudicating at last instance which infringes a rule of Community law is governed by the same conditions.

53.

With regard more particularly to the second of those conditions and its application with a view to establishing possible State liability owing to a decision of a national court adjudicating at last instance, regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, as the Member States which submitted observations in this case have also contended. State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law.

54.

In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it.

55.

Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC.

56.

In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter (see to that effect *Brasserie du Pêcheur and Factortame,* cited above, paragraph 57).

57.

The three conditions mentioned at paragraph 51 hereof are necessary and sufficient to found a right in favour of individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law (see *Brasserie du Pêcheur and Factortame,* cited above, paragraph 66).

58.

Subject to the existence of a right to obtain reparation which is founded directly on Community law where the conditions mentioned above are met, it is on the basis of rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused, with the proviso that the conditions for reparation of loss and damage laid down by the national legislation

must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation (*Francovich and Others*, paragraphs 41 to 43 and *Norbrook Laboratories*, paragraph 111).

59. In the light of all the foregoing, the reply to the first and second questions must be that the principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.

Third question

60. At the outset it must be recalled that the Court has consistently held that, in the context of the application of Article 234 EC, it has no jurisdiction to decide whether a national provision is compatible with Community law. The Court may, however, extract from the wording of the questions formulated by the national court, and having regard to the facts stated by the latter, those elements which concern the interpretation of Community law, for the purpose of enabling that court to resolve the legal problems before it (see, inter alia, the judgment in Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, paragraph 19).

61. In its third question the national court essentially seeks to ascertain whether Article 48 of the Treaty and Article 7(1) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475) are to be interpreted as meaning that they preclude the grant, under conditions such as those laid down in Article 50a of the GG, of a special length-of-service increment which, according to the interpretation of the Verwaltungsgerichtshof in its judgment of 24 June 1998, constitutes a loyalty bonus.

Observations submitted to the Court

62. First, Mr Köbler claims that the special length-of-service increment provided for in Article 50 of the GG is not a loyalty bonus but an ordinary element of salary, as the Verwaltungsgerichtshof initially acknowledged. Moreover, until the judgment of the Verwaltungsgerichtshof of 24 June 1998 no Austrian court considered that the abovementioned allowance constituted a loyalty bonus.

63. Next, even on the supposition that that allowance is a loyalty bonus and such a bonus could justify indirect discrimination, Mr Köbler maintains that there is no settled and certain case-law of the Court on this point. In those circumstances the Verwaltungsgerichtshof acted *ultra vires* in withdrawing its request for a preliminary ruling and in reaching its determination alone since the interpretation and definition of concepts of Community law is exclusively a matter for the Court.

64. Finally, Mr Köbler submits that the criteria governing the grant of the special length-of-service increment preclude any justification for the indirect discrimination which it applies against him. That allowance is payable irrespective of the question as to the Austrian university in which the claimant has performed his duties and it is not even a requirement that the claimant should have taught for 15 years continuously in the same discipline.

65. Stating that the Court cannot interpret national law, the Republic of Austria maintains that the third question must be construed as meaning that the referring court wishes to obtain an interpretation of Article 48 of the Treaty. In that regard it claims that that provision does not preclude a system of remuneration which enables account to be taken of the qualifications acquired with other national or foreign employers by a candidate for a post with a view to determining his salary and which, moreover, provides for an allowance which may be termed a loyalty bonus, eligibility for which is linked to a specific period of service with the same employer.

66. The Republic of Austria explains that, in the light of the fact that Mr Köbler, as an ordinary university professor, is in an employment relationship governed by public law, his employer is the Austrian State. Therefore, a professor passing from one Austrian university to another does not change employer. The Republic of Austria points out that there are also private universities in Austria. The professors teaching there are employees of those establishments and not of the State with the result that their employment

relationship is not governed by the GG.

67.

The Commission contends for its part that Article 50a of the GG discriminates, in breach of Article 48 of the Treaty, between periods of service completed in Austrian universities and those completed in the universities of other Member States.

68.

According to the Commission, the Verwaltungsgerichtshof in its final assessment clearly misconstrued the scope of the judgment in *Schöning-Kougebetopoulou*, cited above. In the light of the fresh elements of national law, the Commission considers that that court ought to have persisted with its request for a preliminary ruling at the same time as reformulating it. In fact, the Court has never expressly adjudged that a loyalty bonus can justify a discriminatory provision in regard to the workers of other Member States.

69.

Moreover, the Commission claims that, even if the special length-of-service increment at issue in the main proceedings is to be regarded as a loyalty bonus, it cannot justify an impediment to freedom of movement for workers. It considers that, in principle, Community law does not preclude an employer from seeking to retain qualified employees by offering increases in salary or bonuses to its staff depending on length of service in the undertaking. None the less, the 'loyalty bonus' provided for in Article 50a of the GG is to be distinguished from bonuses which produce their effects solely within the undertaking inasmuch as it operates at the level of the Member State concerned to the exclusion of the other Member States and thus directly affects freedom of movement of teachers. Moreover, the Austrian universities are not only in competition with the establishments of the other Member States but also amongst themselves. Yet, the provision mentioned does not produce effects in regard to the latter type of competition.

Reply by the Court

70.

The special length-of-service increment granted by the Austrian State *qua* employer to university professors under Article 50a of the GG secures a financial benefit in addition to basic salary the amount of which is already dependent on length of service. A university professor receives that increment if he has carried on that profession for at least 15 years with an Austrian university and if, furthermore, he has been in receipt for at least four years of the normal length-of-service increment.

71.

Accordingly, Article 50a of the GG precludes, for the purpose of the grant of the special length-of-service increment for which it provides, any possibility of taking into account periods of activity completed by a university professor in a Member State other than the Republic of Austria.

72.

Such a regime is clearly likely to impede freedom of movement for workers in two respects.

73.

First, that regime operates to the detriment of migrant workers who are nationals of Member States other than the Republic of Austria where those workers are refused recognition of periods of service completed by them in those States in the capacity of university professor on the sole ground that those periods were not completed in an Austrian university (see, in that connection, with regard to a comparable Greek provision, Case C-187/96 *Commission* v *Greece* [1998] ECR I-1095, paragraphs 20 and 21).

74.

Secondly, that absolute refusal to recognise periods served as a university professor in a Member State other than the Republic of Austria impedes freedom of movement for workers established in Austria inasmuch as it is such as to deter the latter from leaving the country to exercise that freedom. In fact, on their return to Austria, their years of experience in the capacity of university professor in another Member State, that is to say in the pursuit of comparable activities, are not taken into account for the purposes of the special length-of-service increment provided for in Article 50a of the GG.

75.

Those considerations are not altered by the fact relied on by the Republic of Austria that, owing to the possibility afforded by Article 48(3) of the GG to grant migrant university professors a higher basic salary in order to promote the recruitment of foreign university professors, their remuneration is often more than that received by professors of Austrian universities, even after account is taken of the special length-of-service increment.

76.

In fact, on the one hand, Article 48(3) of the GG offers merely a possibility and does not guarantee that a professor from a foreign university will receive as from his appointment as a professor of an Austrian university a higher remuneration than that received by professors of Austrian universities with the same experience. Secondly, the additional remuneration available under Article 48(3) of the GG upon appointment is quite different from the special length-of-service increment. Thus, that provision does not prevent Article 50a of the GG from having the effect of occasioning unequal treatment in regard to migrant university professors as opposed to professors of Austrian universities and thus creates an impediment to the freedom of movement of workers secured by Article 48 of

the Treaty.

77.

Consequently, a measure such as the grant of a special length-of-service increment provided for in Article 50a of the GG is likely to constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty and Article 7(1) of Regulation No 1612/68. Such a measure could be accepted only if it pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of that measure would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose (see, inter alia, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37 and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 104).

78.

In its judgment of 24 June 1998 the Verwaltungsgerichtshof held that the special length-of-service increment provided for in Article 50a of the GG constituted under national law a bonus seeking to reward the loyalty of professors of Austrian universities to their sole employer, namely the Austrian State.

79.

Accordingly, it is necessary to examine whether the fact that under national law that benefit constitutes a loyalty bonus may be deemed under Community law to indicate that it is dictated by a pressing public-interest reason capable of justifying the obstacle to freedom of movement that the bonus involves.

80.

The Court has not yet had the opportunity of deciding whether a loyalty bonus can justify an obstacle to freedom of movement for workers.

81.

At paragraphs 27 of the judgment in *Schöning-Kougebetopoulou*, cited above, and 49 of the judgment in Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, the Court rejected the arguments advanced in that regard by the German and Austrian Governments respectively. Indeed, the Court there stated that the legislation at issue was not on any view capable of seeking to reward the employee's loyalty to his employer, because the increase in salary which that worker received in respect of his length of service was determined by the years of service completed with a number of employers. Since, in the cases giving rise to those judgments, the increase in salary did not constitute a loyalty bonus, it was not necessary for the Court to examine whether such a bonus could in itself justify an obstacle to freedom of movement for workers.

82.

In the present case the Verwaltungsgerichtshof held in its judgment of 24 June 1998 that the special length-of-service increment provided for in Article 50a of the GG rewards an employee's loyalty to a single employer.

83.

Although it cannot be excluded that an objective of rewarding workers' loyalty to their employers in the context of policy concerning research or university education constitutes a pressing public-interest reason, given the particular characteristics of the measure at issue in the main proceedings, the obstacle which it entails clearly cannot be justified in the light of such an objective.

84.

First, although all the professors of Austrian public universities are the employees of a single employer, namely the Austrian State, they are assigned to different universities. However, on the employment market for university professors, the various Austrian universities are in competition not only with the universities of other Member States and those of non-Member States but also amongst themselves. As to that second kind of competition the measure at issue in the main proceedings does nothing to promote the loyalty of a professor to the Austrian university where he performs his duties.

85.

Second, although the special length-of-service increment seeks to reward workers' loyalty to their employer, it also has the effect of rewarding the professors of Austrian universities who continue to exercise their profession on Austrian territory. The benefit in question is therefore likely to have consequences in regard to the choice made by those professors between a post in an Austrian university and a post in the university of another Member State.

86.

Accordingly, the special length-of-service increment at issue in the main proceedings does not solely have the effect of rewarding the employee's loyalty to his employer. It also leads to a partitioning of the market for the employment of university professors in Austria and runs counter to the very principle of freedom of movement for workers.

87.

It follows from the foregoing that a measure such as the special length-of-service increment provided for in Article 50a of the GG results in an obstacle to freedom of movement for workers which cannot be justified by a pressing public-interest reason.

88.

Accordingly, the reply to the third question referred for a preliminary ruling must be that Articles 48 of the Treaty and 7(1) of Regulation No 1612/68 are to be interpreted as meaning that they preclude the grant, under conditions such as those laid down in

Article 50a of the GG, of a special length-of-service increment which, according to the interpretation of the Verwaltungsgerichtshof in its judgment of 24 June 1998, constitutes a loyalty bonus.

Fourth and fifth questions

89.
By its fourth and fifth questions, which must be dealt with together, the national court is essentially seeking to ascertain whether, in the main proceedings, the liability of the Member State is incurred owing to an infringement of Community law by the judgment of the Verwaltungsgerichtshof of 24 June 1998.

Observations submitted to the Court

90.
In regard to the fourth question, Mr Köbler, the German Government and the Commission claim that Article 48 of the Treaty is directly applicable and creates for individuals subjective rights which the authorities and national courts are required to safeguard.
91.
The Republic of Austria maintains that it is appropriate to give a reply to the fourth question only if the Court does not reply to the preceding questions in the manner suggested by it. Inasmuch as the fourth question was raised only in the event of an affirmative reply to the third question, which it regards as inadmissible, it proposes that the Court should not reply to that fourth question. Moreover, it claims that it is unclear since the order for reference contains no reasoning in regard to it.
92.
As regards the fifth question, Mr Köbler maintains that the reply to it should be in the affirmative since the Court has to hand all the materials enabling it to rule itself on whether in the main proceedings the Verwaltungsgerichtshof clearly and significantly exceeded the discretion available to it.
93.
The Republic of Austria considers that it is for the national courts to apply the criteria concerning the liability of the Member States for loss or damage caused to individuals by infringements of Community law.
94.
None the less, in the event that the Court should itself reply to the question whether the liability of the Republic of Austria is incurred, it maintains, first, that Article 177 of the EC Treaty (now Article 234 EC) is not intended to confer rights on individuals. It considers therefore that that condition governing liability is not satisfied.
95.
Secondly, it is undeniable that, in the context of a dispute pending before them, the national courts have a large margin of discretion in determining whether or not they are obliged to formulate a request for a preliminary ruling. In that regard the Republic of Austria maintains that, since in its judgment in *Schöning-Kougebetopoulou* the Court considered that loyalty bonuses are not, in principle, contrary to the provisions relating to freedom of movement for workers, the Verwaltungsgerichtshof rightly concluded that, in the case before it, it was entitled itself to decide the questions of Community law.
96.
Thirdly, should the Court acknowledge that the Verwaltungsgerichtshof did not observe Community law in its judgment of 24 June 1998, the conduct of that court could not in any event be characterised as a sufficiently serious breach of that law.
97.
Fourthly, the Republic of Austria claims that there cannot be any causal link between the withdrawal by the Verwaltungsgerichtshof of the request for a preliminary ruling addressed to the Court and the damage actually alleged by Mr Köbler. Those arguments are in fact based on the plainly unacceptable supposition that, if the request had been maintained, the preliminary ruling by the Court would necessarily have upheld Mr Köbler's arguments. In other words, underlying those arguments is the implication that the damage constituted by non-payment of the special length-of-service increment for the period from 1 January 1995 to 28 February 2001 would not have occurred if the request for a preliminary ruling had been maintained and had resulted in a decision of the Court. However, it is neither possible for a party to the main proceedings to found arguments on a prejudgment as to what the Court would have decided in the case of a request for a preliminary ruling, nor is it permissible to claim damage under that head.
98.
For its part, the German Government maintains that it is for the national court to determine whether the conditions governing the liability of the Member State are satisfied.
99.
The Commission considers that the liability of the Member State is not incurred in the main proceedings. In fact, although in its view the Verwaltungsgerichtshof in its judgment of 24 June 1998 misinterpreted the *Schöning-Kougebetopoulou* judgment, cited

above and, moreover, infringed Article 48 of the Treaty in ruling that Article 50a of the GG was not contrary to Community law, that infringement is in some way excusable.

Reply by the Court

100.
It is clear from the case-law of the Court that it is, in principle, for the national courts to apply the criteria for establishing the liability of Member States for damage caused to individuals by breaches of Community law (*Brasserie du Pêcheur and Factortame*, paragraph 58), in accordance with the guidelines laid down by the Court for the application of those criteria (*Brasserie du Pêcheur and Factortame*, paragraphs 55 to 57; *British Telecommunications*, cited above, paragraph 411; Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit and Others* [1996] ECR I-5063, paragraph 49, and *Konle*, cited above, paragraph 58).
101.
None the less, in the present case the Court has available to it all the materials enabling it to establish whether the conditions necessary for liability of the Member State to be incurred are fulfilled.

The rule of law infringed, which must confer rights on individuals

102.
The rules of Community law whose infringement is at issue in the main proceedings are, as is apparent from the reply to the third question, Articles 48 of the Treaty and 7(1) of Regulation No 1612/68. Those provisions specify the consequences resulting from the fundamental principle of freedom of movement for workers within the Community by way of the prohibition of any discrimination based on nationality as between the workers of the Member States, in particular as to remuneration.
103.
It cannot be disputed that those provisions are intended to confer rights on individuals.

The sufficiently serious nature of the breach

104.
The course of the procedure which led to the judgment of the Verwaltungsgerichtshof of 24 June 1998 should be kept in view.
105.
In the dispute pending before it between Mr Köbler and the Bundesminister für Wissenschaft, Forschung und Kunst (Federal Minister for Science, Research and Art) concerning the latter's refusal to grant Mr Köbler the special length-of-service increment provided for in Article 50a of the GG, that court, by order of 22 October 1997 registered at the Registry of the Court under Case number C-382/97, referred to the Court for a preliminary ruling a question on the interpretation of Article 48 of the Treaty and Articles 1 to 3 of Regulation No 1612/68.
106.
The Verwaltungsgerichtshof states in that order, inter alia, that in order to decide the issue pending before it: 'it is essential to know whether it is contrary to Community law under Article 48 of the EC Treaty ... for the Austrian legislature to make the grant of the "special length-of-service increment for ordinary university professors", which is in the nature of neither a loyalty bonus nor a reward, but is rather a component of salary under the advancement system, dependent on 15 years service at an Austrian university.'
107.
First, that order for reference reveals without any ambiguity that the Verwaltungsgerichtshof considered at that time that under national law the special length-of-service increment in question did not constitute a loyalty bonus.
108.
Next, it follows from the written observations of the Austrian Government in Case C-382/97 that, in order to demonstrate that Article 50a of the GG was not capable of infringing the principle of freedom of movement for workers enshrined in Article 48 of the Treaty, that Government merely contended that the special length-of-service increment provided for by that provision constituted a loyalty bonus.
109.
Finally, the Court had already held at paragraphs 22 and 23 of its *Schöning-Kougebetopoulou* judgment, cited above, that a measure which makes a worker's remuneration dependent on his length of service but excludes any possibility for comparable periods of employment completed in the public service of another Member State to be taken into account is likely to infringe Article 48 of the Treaty.
110.
Given that the Court had already adjudged that such a measure was such as to infringe that provision of the Treaty and also that

the only justification cited in that regard by the Austrian Government was not pertinent in the light of the order for reference itself, the Registrar of the Court, by letter of 11 March 1998, forwarded a copy of the judgment in *Schöning-Kougebetopoulou* to the Verwaltungsgerichtshof so that it could examine whether it had available to it the elements of interpretation of Community law necessary to determine the dispute pending before it and asked it whether, in the light of that judgment, it deemed it necessary to maintain its request for a preliminary ruling.

111.

By order of 25 March 1998, the Verwaltungsgerichtshof asked the parties to the dispute before it for their views on the request by the Registrar of the Court, observing, on a provisional basis, that the point of law forming the subject-matter of the preliminary-reference procedure in question had been resolved in favour of Mr Köbler.

112.

By order of 24 June 1998, the Verwaltungsgerichtshof withdrew its reference for a preliminary ruling, taking the view that it was no longer necessary to persist with that request in order to resolve the dispute. It stated that the decisive question in the present case was whether the special length-of-service increment provided for in Article 50a of the GG was a loyalty bonus or not and that that question had to be decided in the context of national law.

113.

In its judgment of 24 June 1998 the Verwaltungsgerichtshof held that, 'in its order for reference of 22 October 1997, it had taken the view that the "special length of service increment for ordinary university professors" is in the nature neither of a loyalty bonus nor of a reward', and that 'that interpretation of the law, which is not binding on the parties to proceedings before the Verwaltungsgerichtshof, cannot be upheld.' The Verwaltungsgerichtshof then comes to the conclusion that that benefit is in fact a loyalty bonus.

114.

It follows from the foregoing that, after the Registrar of the Court had asked the Verwaltungsgerichtshof whether it was maintaining its request for a preliminary ruling, the latter reviewed the classification under national law of the special length-of-service increment.

115.

Following that reclassification of the special length-of-service increment provided for in Article 50a of the GG, the Verwaltungsgerichtshof dismissed Mr Köbler's action. In its judgment of 24 June 1998 it inferred from the judgment in *Schöning-Kougebetopoulou* that since that benefit was to be deemed a loyalty bonus, it could be justified even if it was in itself contrary to the principle of non-discrimination laid down in Article 48 of the Treaty.

116.

However, as is clear from paragraphs 80 and 81 hereof, the Court did not express a view in the judgment in *Schöning-Kougebetopoulou* on whether and if so under what conditions the obstacle to freedom of movement for workers constituted by a loyalty bonus could be justified. Thus the inferences drawn by the Verwaltungsgerichtshof from that judgment are based on an incorrect reading of it.

117.

Accordingly, since the Verwaltungsgerichtshof amended its interpretation of national law by classifying the measure provided for in Article 50a of the GG as a loyalty bonus after the judgment in *Schöning-Kougebetopoulou* had been sent to it and since the Court had not yet had the opportunity of expressing a view on whether the obstacle to freedom of movement for workers constituted by a loyalty bonus could be justified, the Verwaltungsgerichtshof ought to have maintained its request for a preliminary ruling.

118.

That court was not entitled to take the view that resolution of the point of law at issue was clear from the settled case-law of the Court or left no room for any reasonable doubt (Case 283/81 *CILFIT and Others* [1982] ECR 3415, paragraphs 14 and 16). It was therefore obliged under the third paragraph of Article 177 of the Treaty to maintain its request for a preliminary ruling.

119.

Moreover, as is clear from the reply to the third question, a measure such as the special length-of-service increment provided for in Article 50a of the GG, even if it may be classified as a loyalty bonus, entails an obstacle to freedom of movement for workers contrary to Community law. Accordingly, the Verwaltungsgerichtshof infringed Community law by its judgment of 24 June 1998.

120.

It must therefore be examined whether that infringement of Community law is manifest in character having regard in particular to the factors to be taken into consideration for that purpose as indicated in paragraphs 55 and 56 above.

121.

In the first place, the infringement of Community rules at issue in the reply to the third question cannot in itself be so characterised.

122.

Community law does not expressly cover the point whether a measure for rewarding an employee's loyalty to his employer, such as a loyalty bonus, which entails an obstacle to freedom of movement for workers, can be justified and thus be in conformity with Community law. No reply was to be found to that question in the Court's case-law. Nor, moreover, was that reply obvious.

123.

In the second place, the fact that the national court in question ought to have maintained its request for a preliminary ruling, as has been established at paragraph 118 hereof, is not of such a nature as to invalidate that conclusion. In the present case the Verwaltungsgerichtshof had decided to withdraw the request for a preliminary ruling, on the view that the reply to the question of Community law to be resolved had already been given in the judgment in *Schöning-Kougebetopoulou*, cited above. Thus, it was owing to its incorrect reading of that judgment that the Verwaltungsgerichtshof no longer considered it necessary to refer that question of interpretation to the Court.

124.

In those circumstances and in the light of the circumstances of the case, the infringement found at paragraph 119 hereof cannot be regarded as being manifest in nature and thus as sufficiently serious.

125.

It should be added that that reply is without prejudice to the obligations arising for the Member State concerned from the Court's reply to the third question referred.

126.

The reply to the fourth and fifth questions must therefore be that an infringement of Community law, such as that stemming in the circumstances of the main proceedings from the judgment of the Verwaltungsgerichtshof of 24 June 1998, does not have the requisite manifest character for liability under Community law to be incurred by a Member State for a decision of one of its courts adjudicating at last instance.

Costs

127.

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Landesgericht für Zivilrechtssachen Wien by order of 7 May 2001, hereby rules:

1. The principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.

2. Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and Article 7(1) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community are to be interpreted as meaning that they preclude the grant, under conditions such as those laid down in Article 50a of the Gehaltsgesetz 1956 (law on salaries of 1956), as amended in 1997, of a special length-of-service increment which, according to the interpretation of the Verwaltungsgerichtshof (Austria) in its judgment of 24 June 1998, constitutes a loyalty bonus.

3. An infringement of Community law, such as that stemming in the circumstances of the main proceedings from the judgment of the Verwaltungsgerichtshof of 24 June 1998, does not have the requisite manifest character for liability under Community law to be incurred by a Member State for a decision of one of its courts adjudicating at last instance.

Joined Cases C 411/10 and C 493/10 - N. S. v Secretary of State for the Home Department

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2011 (*)

(European Union law – Principles – Fundamental rights – Implementation of European Union law – Prohibition of inhuman or degrading treatment – Common European Asylum System – Regulation (EC) No 343/2003 – Concept of 'safe countries' – Transfer of an asylum seeker to the Member State responsible – Obligation – Rebuttable presumption of compliance, by that Member State, with fundamental rights)

In Joined Cases C-411/10 and C-493/10,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom) and the High Court (Ireland), by decisions of 12 July and 11 October 2010, lodged at the Court on 18 August and 15 October 2010 respectively, in the proceedings

N. S. (C-411/10)

v

Secretary of State for the Home Department

and

M. E. (C-493/10),

A. S. M.,

M. T.,

K. P.,

E. H.

v

Refugee Applications Commissioner,

Minister for Justice, Equality and Law Reform,

intervening parties:

Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) (C-411/10),

United Nations High Commissioner for Refugees (UNHCR) (UK) (C-411/10),

Equality and Human Rights Commission (EHRC) (C-411/10),

Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (IRL) (C-493/10),

United Nations High Commissioner for Refugees (UNHCR) (IRL) (C-493/10),

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, J. Malenosvský and U. Lõhmus, Presidents of Chambers, A. Rosas (Rapporteur), M. Ilešič, T. von Danwitz, A. Arabadjiev, C. Toader and J.J. Kasel, Judges,

Advocate General: V. Trstenjak,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 June 2011,

after considering the observations submitted on behalf of **[the parties and interveners]**::

after hearing the Opinion of the Advocate General at the sitting on 22 September 2011, gives the following

Judgment

1 The two references for preliminary rulings concern the interpretation, first, of Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1) and, second, the fundamental rights of the European Union, including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and, third, Protocol (No 30) on the application of the Charter to Poland and to the United Kingdom (OJ 2010 C 83, p. 313; 'Protocol (No 30)').

2 The references have been made in proceedings between asylum seekers who were to be returned to Greece pursuant to Regulation No 343/2003 and, respectively, the United Kingdom and Irish authorities.

Legal context

International law

3 The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, Vol 189, p. 150, No 2545 (1954)) ('the Geneva Convention'), entered into force on 22 April 1954. It was extended by the Protocol relating to the Status of Refugees of 31 January 1967 ('the 1967 Protocol'), which entered into force on 4 October 1967.

4 All the Member States are contracting parties to the Geneva Convention and the 1967 Protocol, as are the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Principality of Liechtenstein. The European Union is not a contracting party to the Geneva Convention or to the 1967 Protocol, but Article 78 TFEU and Article 18 of the Charter provide that the right to asylum is to be guaranteed with due respect for the Geneva Convention and the 1967 Protocol.

5 Article 33(1) of the Geneva Convention, headed 'Prohibition of expulsion or return ("refoulement")', provides:

'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

The Common European Asylum System

6 In order to achieve the objective, laid down by the European Council meeting in Strasbourg on 8 and 9 December 1989, of the harmonisation of their asylum policies, the Member States signed in Dublin, on 15 June 1990, the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (OJ 1997 C 254, p. 1; 'the Dublin Convention'). The Dublin Convention entered into force on 1 September 1997 for the twelve original signatories, on 1 October 1997 for the Republic of Austria and the Kingdom of Sweden, and on 1 January 1998 for the Republic of Finland.

7 The conclusions of the European Council meeting in Tampere on 15 and 16 October 1999 envisaged, inter alia, the establishment of a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to a place where they again risk being persecuted, that is to say, maintaining the principle of non-refoulement.

8 The Amsterdam Treaty of 2 October 1997 introduced Article 63 into the EC Treaty, which conferred competence on the European Community to adopt the measures recommended by the European Council in Tampere. That treaty also annexed to the EC Treaty the Protocol (No 24) on asylum for nationals of Member States of the European Union (OJ 2010 C 83, p. 305), according to which those States are to be regarded as constituting safe countries of origin in respect to each other for all legal and practical purposes in relation to asylum matters.

9 The adoption of Article 63 EC made it possible, inter alia, to replace between the Member States, with the exception of the Kingdom of Denmark, the Dublin Convention by Regulation No 343/2003, which entered into force on 17 March 2003. It is also on that legal basis that the directives applicable to the cases in the main proceedings were adopted, for the purpose of establishing the Common European Asylum System foreseen by the conclusions of the Tampere European Council.

10 Since entry into force of the Lisbon Treaty, the relevant provisions in asylum matters are Article 78 TFEU, which provides for the establishment of a Common European Asylum System, and Article 80 TFEU, which reiterates the principle of solidarity and fair sharing of responsibility between the Member States.

11 The European Union legislation of relevance to the present cases includes:

(1) Regulation No 343/2003;

(2) Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18);

(3) Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12, and corrigendum, OJ 2005 L 204, p. 24);

(4) Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13, and corrigendum, OJ 2006 L 236, p. 36).

12 It is also appropriate to mention Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ 2001 L 212, p. 12). As is apparent from recital 20 in the preamble to that directive, one of its objectives is to provide for a solidarity mechanism intended to contribute to the attainment of a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons in the event of a mass influx.

13 The recording of the fingerprint data of foreign nationals illegally crossing an external border of the European Union makes it possible to determine the Member State responsible for an asylum application. Such recording is provided for by Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2000 L 316, p. 1).

14 Regulation No 343/2003 and Directives 2003/9, 2004/83 and 2005/85 refer, in their first recitals, to the fact that a common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community. They also refer, in their second recitals, to the conclusions of the Tampere European Council.

15 Each of those texts states that it respects the fundamental rights and observes the principles recognised, in particular, by the Charter. Among others, recital 15 in the preamble to Regulation No 343/2003 states that it seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter; recital 5 in the preamble to Directive 2003/9 states that, in particular, that directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter; and recital

10 in the preamble to Directive 2004/83 states that, in particular, that directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.

16 Article 1 of Regulation No 343/2003 lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.

17 Article 3(1) and (2) of that regulation provide:

'1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.'

18 In order to determine which is 'the Member State responsible' for the purposes of Article 3(1) of Regulation No 343/2003, Chapter III of that regulation lists objective and hierarchical criteria relating to unaccompanied minors, family unity, the issue of a residence document or visa, irregular entry into or residence in a Member State and applications made in an international transit area of an airport.

19 Article 13 of that regulation provides that, where no Member State can be designated according to the hierarchy of criteria, the default rule is that the first Member State with which the application was lodged will be responsible for examining the asylum application.

20 According to Article 17 of Regulation No 343/2003, where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible, call upon the other Member State to take charge of the applicant.

21 Article 18(7) of that regulation provides that failure by the requested Member State to act before the expiry of a two-month period, or within one month where urgency is pleaded, is to be tantamount to accepting the request, and entails the obligation, for that Member State, to take charge of the person, including the provisions for proper arrangements for arrival.

22 Article 19 of Regulation No 343/2003 is worded as follows:

'1. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.

2. The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case-by-case basis if national legislation allows for this.

…

4. Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

…'

23 The United Kingdom participates in the application of each of the regulations and the four directives mentioned in paragraphs 11 to 13 of the present judgment. Ireland, by contrast, participates in the application of the regulations and of Directives 2004/83, 2005/85 and 2001/55, but not Directive 2003/9.

24 The Kingdom of Denmark is bound by the Agreement which it concluded with the European Community extending to Denmark the provisions of Council Regulation (EC) No 2725/2000, approved by Council Decision 2006/188/EC of 21 February 2006 (OJ 2006 L 66, p. 37). It is not bound by the directives referred to in paragraph 11 of the present judgment.

25 The European Community has also concluded an Agreement with the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway, approved by Council Decision 2001/258/EC of 15 March 2001 (OJ 2001 L 93, p. 38).

26 The European Community has similarly concluded an Agreement with the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, approved by Council Decision 2008/147/EC of 28 January 2008 (OJ 2008 L 53, p. 3), and the Protocol with the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, approved by Council Decision 2009/487/EC of 24 October 2008 (OJ 2009 L 161, p. 6).

27 Directive 2003/9 lays down minimum standards for the reception of asylum seekers in Member States. Those standards concern in particular the obligations concerning the information and documents which must be provided to asylum seekers, the decisions which may be adopted by the Member States concerning residence and freedom of movement of asylum seekers within their territory, families, medical screening, schooling and education of minors, employment of asylum seekers and their access to vocational training, the general rules on material reception conditions and health care available to asylum applicants, the modalities for material reception conditions and the health care which must be granted to asylum applicants.

28 Directive 2003/9 also provides for an obligation to control the level of reception conditions and the possibility of appealing with regard to the matters and decisions covered by it. In addition, it contains rules concerning the training of the authorities and the necessary resources in connection with the national provisions enacted to implement the Directive.

29 Directive 2004/83 lays down minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Chapter II thereof contains several provisions explaining how to assess applications. Chapter III thereof lays down the conditions which must be satisfied in order to qualify for being a refugee. Chapter IV concerns refugee status. Chapters V and VI concern the conditions which must be satisfied in order to qualify for subsidiary protection and the status conferred thereby. Chapter VII contains various rules setting out the content of international protection. According to Article 20(1) of Directive 2004/83, that chapter is to be without prejudice to the rights laid down in the Geneva Convention.

30 Directive 2005/85 lays down the rights of asylum seekers and the procedures for examining applications.

31 Article 36(1) of Directive 2005/85, under the heading ‘The European safe third countries concept’ states:

‘Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II, shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.’

32 The conditions laid down in Article 36(2) include:

– ratification of and compliance with the provisions of the Geneva Convention;

– the existence of an asylum procedure prescribed by law;

– ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4

November 1950 ('the ECHR'), and compliance with its provisions, including the standards relating to effective remedies.

33 Article 39 of Directive 2005/85 sets out the effective remedies that it must be possible to pursue before the courts of the Member States. Article 39(1)(a)(iii) refers to decisions not to conduct an examination pursuant to Article 36 of the directive.

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

Case C-411/10

34 N.S., the appellant in the main proceedings, is an Afghan national who came to the United Kingdom after travelling through, among other countries, Greece. He was arrested in Greece on 24 September 2008 but did not make an asylum application.

35 According to him, the Greek authorities detained him for four days and, on his release, gave him an order to leave Greece within 30 days. He claims that, when he tried to leave Greece, he was arrested by the police and was expelled to Turkey, where he was detained in appalling conditions for two months. He states that he escaped from his place of detention in Turkey and travelled from that State to the United Kingdom, where he arrived on 12 January 2009 and where, that same day, he lodged an asylum application.

36 On 1 April 2009, the Secretary of State for the Home Department ('the Secretary of State') made a request to the Hellenic Republic, pursuant to Article 17 of Regulation No 343/2003, to take charge of the appellant in the main proceedings in order to examine his asylum application. The Hellenic Republic failed to respond to that request within the time limit stipulated by Article 18(7) of the Regulation and was accordingly deemed, on 18 June 2009, pursuant to that provision, to have accepted responsibility for examining the appellant's claim.

37 On 30 July 2009, the Secretary of State notified the appellant in the main proceedings that directions had been given for his removal to Greece on 6 August 2009.

38 On 31 July 2009, the Secretary of State notified the appellant in the main proceedings of a decision certifying that, under paragraph 5(4) of Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ('the 2004 Asylum Act'), his claim that his removal to Greece would violate his rights under the ECHR was clearly unfounded, since Greece is on the 'list of safe countries' in Part 2 of Schedule 3 to the 2004 Asylum Act.

39 The consequence of that certification decision was, in accordance with paragraph 5(4) of Part 2 of Schedule 3 to the 2004 Asylum Act, that the appellant in the main proceedings did not have a right to lodge an immigration appeal in the United Kingdom, with suspensive effect, against the decision ordering his transfer to Greece, an appeal to which he would have been entitled in the absence of such a certification decision.

40 On 31 July 2009, the appellant in the main proceedings requested the Secretary of State to accept responsibility for examining his asylum claim under Article 3(2) of the Regulation, on the ground that there was a risk that his fundamental rights under European Union law, the ECHR and/or the Geneva Convention would be breached if he were returned to Greece. By letter of 4 August 2009, the Secretary of State maintained his decision to transfer the appellant in the main proceedings to Greece and his decision certifying that the claim of the appellant in the main proceedings based on the ECHR was clearly unfounded.

41 On 6 August 2009, the appellant in the main proceedings issued proceedings seeking judicial review of the Secretary of State's decisions. As a result, the Secretary of State annulled the directions for his transfer. On 14 October 2009, the permission sought by the appellant for judicial review was granted.

42 The application was examined by the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) from 24 to 26 February 2010. By judgment of 31 March 2010, Mr Justice Cranston dismissed the application but granted the appellant in the main proceedings leave to appeal to the Court of Appeal (England & Wales) (Civil Division).

43 The appellant in the main proceedings appealed to that court on 21 April 2010.

44 It emerges from the order for reference, in which the Court of Appeal refers to the judgment of the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), that:

(1) asylum procedures in Greece are said to have serious shortcomings: applicants encounter numerous difficulties in carrying out the necessary formalities; they are not provided with sufficient information and assistance; their claims are not examined with due care;

(2) the proportion of asylum applications which are granted is understood to be extremely low;

(3) judicial remedies are stated to be inadequate and very difficult to access;

(4) the conditions for reception of asylum seekers are considered to be inadequate: applicants are either detained in inadequate conditions or they live outside in destitution, without shelter or food.

45 The High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) considered that the risks of refoulement from Greece to Afghanistan and Turkey were not established in the case of persons returned under Regulation No 343/2003, but that view is contested by the appellant in the main proceedings before the referring court.

46 Before the Court of Appeal (England & Wales) (Civil Division), the Secretary of State accepted that 'the fundamental rights set out in the Charter can be relied on as against the United Kingdom and … that the Administrative Court erred in holding otherwise'. According to the Secretary of State, the Charter simply restates rights which already form an integral part of European Union law and does not create any new rights. However, the Secretary of State contended that the High Court of Justice (England & Wales) Queen's Bench Division (Administrative Court) was wrong to find that she was bound to take into account European Union fundamental rights when exercising her discretion under Article 3(2) of the Regulation. According to the Secretary of State, that discretionary power does not fall within the scope of European Union law.

47 In the alternative, the Secretary of State contended that the obligation to observe European Union fundamental rights does not require her to take into account the evidence that, if the appellant were returned to Greece, there would be a substantial risk that his fundamental rights under European Union law would be infringed. She maintained that the scheme of Regulation No 343/2003 entitles her to rely on the conclusive presumption that Greece (or any other Member State) would comply with its obligations under European Union law.

48 Finally, the appellant in the main proceedings contended before the referring court that the protection conferred by the Charter is higher than and goes beyond that guaranteed by, inter alia, Article 3 of the ECHR, which might lead to a different outcome in the present case.

49 At the hearing of 12 July 2010, the referring court decided that decisions on certain questions of European Union law were necessary for it to give judgment on the appeal.

50 In those circumstances, the Court of Appeal (England & Wales) (Civil Division) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a decision made by a Member State under Article 3(2) of … Regulation No 343/2003 whether to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the Regulation fall within the scope of EU law for the purposes of Article 6 [TEU] and/or Article 51 of the Charter …?

If Question 1 is answered in the affirmative:

(2) Is the duty of a Member State to observe EU fundamental rights (including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the Charter) discharged where that State sends the asylum seeker to the Member State which Article 3(1) [of Regulation No 343/2003] designates as the responsible State in accordance with the criteria set out in Chapter III of the regulation ("the responsible State"), regardless of the situation in the responsible State?

(3) In particular, does the obligation to observe EU fundamental rights preclude the operation of a conclusive presumption that the responsible State will observe (i) the claimant's fundamental rights under European Union law; and/ or (ii) the minimum standards

imposed by Directives 2003/9 …, 2004/83 … and 2005/85 …?

(4) Alternatively, is a Member State obliged by European Union law, and, if so, in what circumstances, to exercise the power under Article 3(2) of the Regulation to examine and take responsibility for a claim, where transfer to the responsible State would expose the [asylum] claimant to a risk of violation of his fundamental rights, in particular the rights set out in Articles 1, 4, 18, 19(2) and/or 47 of the Charter, and/or to a risk that the minimum standards set out in Directives [2003/9, 2004/83 and 2005/85] will not be applied to him?

(5) Is the scope of the protection conferred upon a person to whom Regulation [No 343/2003] applies by the general principles of European Union law, and, in particular, the rights set out in Articles 1, 18 and 47 of the Charter wider than the protection conferred by Article 3 of the ECHR?

(6) Is it compatible with the rights set out in Article 47 of the Charter for a provision of national law to require a court, for the purpose of determining whether a person may lawfully be removed to another Member State pursuant to Regulation [No 343/2003], to treat that Member State as a State from which the person will not be sent to another State in contravention of his rights pursuant to the [ECHR] or his rights pursuant to the [Geneva Convention] and [the 1967 Protocol]?

(7) In so far as the preceding questions arise in respect of the obligations of the United Kingdom, are the answers to [the second to sixth questions] qualified in any respect so as to take account of the Protocol (No 30)?'

Case C-493/10

51 This case concerns five appellants in the main proceedings, all unconnected with each other, originating from Afghanistan, Iran and Algeria. Each of them travelled via Greece and was arrested there for illegal entry. They then travelled to Ireland, where they claimed asylum. Three of the appellants in the main proceedings claimed asylum without disclosing that they had previously been in Greece, whilst the other two admitted they had previously been in Greece. The Eurodac system confirmed that all five appellants had previously entered Greece, but that none of them had claimed asylum there.

52 Each of the appellants in the main proceedings resists return to Greece. As is apparent from the order for reference, it has not been argued that the transfer of the appellants to Greece under Regulation No 343/2003 would violate Article 3 ECHR because of a risk of refoulement, chain refoulement, ill treatment or suspension of asylum claims. It is also not alleged that the transfer would breach another article of the ECHR. The appellants in the main proceedings argued that the procedures and conditions for asylum seekers in Greece are inadequate and that Ireland is therefore required to exercise its power under Article 3(2) of Regulation No 343/2003 to accept responsibility for examining and deciding on their asylum claims.

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

'(1) Is the transferring Member State under … Regulation (EC) No 343/2003 obliged to assess the compliance of the receiving Member State with Article 18 of the Charter …, … Directives 2003/9/EC, 2004/83/EC and 2005/85/EC and Regulation (EC) No 343/2003?

(2) If the answer is yes, and if the receiving Member State is found not to be in compliance with one or more of those provisions, is the transferring Member Sate obliged to accept responsibility for examining the application under Article 3(2) of … Regulation (EC) No 343/2003?'

54 Cases C-411/10 and C-493/10 were, by order of the President of the Court of 16 May 2011, joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred for a preliminary ruling

The first question in Case C-411/10

55 By its first question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the

decision adopted by a Member State on the basis of Article 3(2) of Regulation No 343/2003 to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of that regulation falls within the scope of European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.

Observations submitted to the Court

56 N.S., the Equality and Human Rights Commission (EHRC), Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK), the United Nations High Commissioner for Refugees (UNHCR), the French, Netherlands, Austrian and Finnish Governments and the European Commission consider that a decision adopted on the basis of Article 3(2) of Regulation No 343/2003 falls within the scope of European Union law.

57 N.S. points out, in that regard, that the exercise of the power provided for by that provision will not necessarily be more favourable to the applicant, which explains why, in its assessment of the Dublin system (COM (2007) 299 final), the Commission proposed that exercise of the power provided for by Article 3(2) of Regulation No 343/2003 should be subject to the consent of the asylum seeker.

58 According to Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) and the French Government, in particular, the possibility provided for in Article 3(2) of Regulation No 343/2003 is justified by the fact that the purpose of the Regulation is to protect fundamental rights and that it might be necessary to exercise the power provided for by that article.

59 The Finnish Government emphasises that Regulation No 343/2003 forms part of a set of rules establishing a system.

60 According to the Commission, when a regulation confers a discretionary power on a Member State, it must exercise that power in accordance with European Union law (Case 5/88 *Wachauf* [1989] ECR 2609; Case C-578/08 *Chakroun* [2010] ECR I-1839; and Case C-400/10 PPU *McB.* [2010] ECR I-0000). It points out that a decision adopted by a Member State on the basis of Article 3(2) of Regulation No 343/2003 has consequences for that Member State, which will be bound by the procedural obligations of the European Union and by the directives.

61 Ireland, the United Kingdom, the Belgian Government and the Italian Government, on the other hand, consider that such a decision under Article 3(2) of the Regulation does not fall within the scope of European Union law. The arguments put forward are the clarity of the text, which provides for an option, the reference to a 'sovereignty' clause or 'discretionary clause' in the Commission documents, the raison d'être of such a clause, that is humanitarian grounds, and, lastly, the logic of the system established by Regulation No 343/2003.

62 The United Kingdom emphasises that a sovereignty clause is not a derogation within the meaning of Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43. It also points out that the fact that the exercise of that clause does not implement European Union law does not mean that Member States are disregarding fundamental rights, since they are bound by the Geneva Convention and the ECHR. The Belgian Government, however, submits that carrying out the decision to transfer the asylum seeker implements Regulation No 343/2003 and therefore falls within the scope of Article 6 TEU and the Charter.

63 The Czech Government takes the view that the decision by a Member State falls within European Union law when that State exercises the sovereignty clause, but not when it does not exercise that power.

The Court's reply

64 Article 51(1) of the Charter states that the provisions thereof are addressed to the Member States only when they are implementing European Union law.

65 Scrutiny of Article 3(2) of Regulation No 343/2003 shows that it grants Member States a discretionary power which forms an integral part of the Common European Asylum System provided for by the FEU Treaty and developed by the European Union legislature.

66 As stated by the Commission, that discretionary power must be exercised in accordance with the other provisions of that regulation.

67 In addition, Article 3(2) of Regulation No 343/2003 states that the derogation from the principle laid down in Article 3(1) of that regulation gives rise to the specific consequences provided for by that regulation. Thus, a Member State which decides to examine an asylum application itself becomes the Member State responsible within the meaning of Regulation No 343/2003 and must, where appropriate, inform the other Member State or Member States concerned by the asylum application.

68 Those factors reinforce the interpretation according to which the discretionary power conferred on the Member States by Article 3(2) of Regulation No 343/2003 forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that regulation and, therefore, merely an element of the Common European Asylum System. Thus, a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter.

69 The answer to the first question in Case C-411/10 is therefore that the decision by a Member State on the basis of Article 3(2) of Regulation No 343/2003 whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.

The second to fourth questions and the sixth question in Case C-411/10 and the two questions in Case C-493/10

70 By the second question in Case C-411/10 and the first question in Case C-493/10, the referring courts ask, in essence, whether the Member State which should transfer the asylum seeker to the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible is obliged to assess the compliance, by that Member State, with the fundamental rights of the European Union, Directives 2003/9, 2004/83 and 2005/85 and with Regulation No 343/2003.

71 By the third question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the obligation on the Member State which should transfer the asylum seeker to observe fundamental rights precludes the operation of a conclusive presumption that the responsible State will observe the claimant's fundamental rights under European Union law and/or the minimum standards imposed by the abovementioned directives.

72 By the fourth question in Case C-411/10 and the second question in Case C-493/10, the referring courts ask, in essence, whether, where the Member State responsible is found not to be in compliance with fundamental rights, the Member State which should transfer the asylum seeker is obliged to accept responsibility for examining the asylum application under Article 3(2) of Council Regulation (EC) No 343/2003?

73 Finally, by its sixth question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether a provision of national law which requires a court, for the purpose of determining whether a person may lawfully be removed to another Member State pursuant to Regulation No 343/2003, to treat that Member State as a 'safe country' is compatible with the rights set out in Article 47 of the Charter.

74 Those questions should be considered together.

75 The Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted. Article 18 of the Charter and Article 78 TFEU provide that the rules of the Geneva Convention and the 1967 Protocol are to be respected (see Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, paragraph 53, and Case C-31/09 *Bolbol* [2010] ECR I-5539, paragraph 38).

76 As stated in paragraph 15 above, the various regulations and directives relevant to in the cases in the main proceedings provide that they comply with the fundamental rights and principles recognised by the Charter.

77 According to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28).

78 Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard.

79 It is precisely because of that principle of mutual confidence that the European Union legislature adopted Regulation No 343/2003 and the conventions referred to in paragraphs 24 to 26 of the present judgment in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.

80 In those circumstances, it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR.

81 It is not however inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.

82 Nevertheless, it cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003.

83 At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.

84 In addition, it would be not be compatible with the aims of Regulation No 343/2003 were the slightest infringement of Directives 2003/9, 2004/83 or 2005/85 to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible. Regulation No 343/2003 aims – on the assumption that the fundamental rights of the asylum seeker are observed in the Member State primarily responsible for examining the application – to establish, as is apparent inter alia from points 124 and 125 of the Opinion in Case C-411/10, a clear and effective method for dealing with an asylum application. In order to achieve that objective, Regulation No 343/2003 provides that responsibility for examining an asylum application lodged in a European Union country rests with a single Member State, which is determined on the basis of objective criteria.

85 If the mandatory consequence of any infringement of the individual provisions of Directives 2003/9, 2004/83 or 2005/85 by the Member State responsible were that the Member State in which the asylum application was lodged is precluded from transferring the applicant to the first mentioned State, that would add to the criteria for determining the Member State responsible set out in Chapter III of Regulation No 343/2003 another exclusionary criterion according to which minor infringements of the abovementioned directives committed in a certain Member State may exempt that Member State from the obligations provided for under Regulation No 343/2003. Such a result would deprive those obligations of their substance and endanger the realisation of the objective of quickly designating the Member State responsible for examining an asylum claim lodged in the European Union.

86 By contrast, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.

87 With regard to the situation in Greece, the parties who have submitted observations to the Court are in agreement that that Member State was, in 2010, the point of entry in the European Union of almost 90% of illegal immigrants, that influx resulting in a disproportionate burden being borne by it compared to other Member States and the inability to cope with the situation in practice. The Hellenic Republic stated that the Member States had not agreed to the Commission's proposal that the application of Regulation No 343/2003 be suspended and that it be amended by mitigating the criterion of first entry.

88 In a situation similar to those at issue in the cases in the main proceedings, that is to say the transfer, in June 2009, of an

asylum seeker to Greece, the Member State responsible within the meaning of Regulation No 343/2003, the European Court of Human Rights held, inter alia, that the Kingdom of Belgium had infringed Article 3 of the ECHR, first, by exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece, since the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities and, second, by knowingly exposing him to conditions of detention and living conditions that amounted to degrading treatment (European Court of Human Rights, *M.S.S.* v. *Belgium and Greece*, § 358, 360 and 367, judgment of 21 January 2011, not yet published in the *Reports of Judgments and Decisions*).

89 The extent of the infringement of fundamental rights described in that judgment shows that there existed in Greece, at the time of the transfer of the applicant M.S.S., a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers.

90 In finding that the risks to which the applicant was exposed were proved, the European Court of Human Rights took into account the regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency of the system and the effective protection of fundamental rights (*M.S.S.* v *Belgium and Greece*, § 347-350).

91 Thus, and contrary to the submissions of the Belgian, Italian and Polish Governments, according to which the Member States lack the instruments necessary to assess compliance with fundamental rights by the Member State responsible and, therefore, the risks to which the asylum seeker would be exposed were he to be transferred to that Member State, information such as that cited by the European Court of Human Rights enables the Member States to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate those risks.

92 The relevance of the reports and proposals for amendment of Regulation No 343/2003 emanating from the Commission should be noted – these must be known to the Member State which has to carry out the transfer, given its participation in the work of the Council of the European Union, which is one of the addressees of those documents.

93 In addition, Article 80 TFEU provides that asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Directive 2001/55 is an example of that solidarity but, as was stated at the hearing, the solidarity mechanisms which it contains apply only to wholly exceptional situations falling within the scope of that directive, that is to say, a mass influx of displaced persons.

94 It follows from the foregoing that in situations such as that at issue in the cases in the main proceedings, to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

95 With regard to the question whether the Member State which cannot carry out the transfer of the asylum seeker to the Member State identified as 'responsible' in accordance with Regulation No 343/2003 is obliged to examine the application itself, it should be recalled that Chapter III of that Regulation refers to a number of criteria and that, in accordance with Article 5(1) of that regulation, those criteria apply in the order in which they are set out in that chapter.

96 Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to Greece, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

97 In accordance with Article 13 of Regulation No 343/2003, where the Member State responsible for examining the application for asylum cannot be designated on the basis of the criteria listed in that Regulation, the first Member State with which the application for asylum was lodged is to be responsible for examining it.

98 The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, that Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

99 It follows from all of the foregoing considerations that, as stated by the Advocate General in paragraph 131 of her Opinion, an application of Regulation No 343/2003 on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply Regulation No 343/2003 in a manner consistent with fundamental rights.

100 In addition, as stated by N.S., were Regulation No 343/2003 to require a conclusive presumption of compliance with fundamental rights, it could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States.

101 That would be the case, inter alia, with regard to a provision which laid down that certain States are 'safe countries' with regard to compliance with fundamental rights, if that provision had to be interpreted as constituting a conclusive presumption, not admitting of any evidence to the contrary.

102 In that regard, it should be pointed out that Article 36 of Directive 2005/85, concerning the safe third country concept, provides, in paragraph 2(a) and (c), that a third country can only be considered as a 'safe third country' where not only has it ratified the Geneva Convention and the ECHR but it also observes the provisions thereof.

103 Such wording indicates that the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that that State observes those conventions. The same principle is applicable both to Member States and third countries.

104 In those circumstances, the presumption underlying the relevant legislation, stated in paragraph 80 above, that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable.

105 In the light of those factors, the answer to the questions referred is that European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.

106 Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

107 Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

108 The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

The fifth question in Case C-411/10

109 By its fifth question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the extent of the protection conferred on a person to whom Regulation No 343/2003 applies by the general principles of EU law, and, in

particular, the rights set out in Articles 1, concerning human dignity, 18, concerning the right to asylum, and 47, concerning the right to an effective remedy, of the Charter, is wider than the protection conferred by Article 3 of the ECHR.

110 According to the Commission, the answer to that question must make it possible to identify the provisions of the Charter the infringement of which by the Member State responsible would result in the secondary responsibility of the Member State which has to decide on the transfer.

111 Even if the Court of Appeal (England & Wales) (Civil Division) did not expressly provide reasons, in the order for reference, why it required an answer to the question in order to give judgment, a reading of that decision in fact suggests that that question can be accounted for by the decision of 2 December 2008 in *K.R.S.* v. *United Kingdom*, not yet published in the *Reports of Judgments and Decisions*, in which the European Court of Human Rights held inadmissible an application claiming that Article 3 and 13 of the ECHR would be infringed were the applicant to be transferred by the United Kingdom to Greece. Before the Court of Appeal (England & Wales) (Civil Division), a number of parties claimed that the protection of fundamental rights stemming from the Charter is wider than that conferred by the ECHR and that, taking the Charter into account, their request not to transfer the applicant in the main proceedings to Greece would have to be granted.

112 After the order for reference was made, the European Court of Human Rights reviewed its position in the light of new evidence and held, in *M.S.S.* v *Belgium and Greece*, not only that the Hellenic Republic had infringed Article 3 of the ECHR owing to the applicant's detention and living conditions in Greece and also Article 13 of the ECHR read in conjunction with the aforesaid Article 3 on account of the deficiencies in the asylum procedure conducted in the applicant's case, but also that the Kingdom of Belgium had infringed Article 3 of the ECHR by exposing the applicant to the risks linked to the deficiencies in the asylum procedure in Greece and to detention and living conditions in Greece which did not comply with that article.

113 As follows from paragraph 106 above, a Member State would infringe Article 4 of the Charter if it transferred an asylum seeker to the Member State responsible within the meaning of Regulation No 343/2003 in the circumstances described in paragraph 94 of the present judgment.

114 Articles 1, 18 and 47 of the Charter do not lead to a different answer than that given to the second to fourth questions and to the sixth question in Case C-411/10 and to the two questions in Case C-493/10.

115 Consequently, the answer to the fifth question in Case C-411/10 is that Articles 1, 18 and 47 of the Charter do not lead to a different answer than that given to the second to fourth questions and to the sixth question in Case C-411/10 and to the two questions in Case C-493/10.

The seventh question in Case C-411/10

116 By its seventh question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether, in so far as the preceding questions arise in respect of the obligations of the United Kingdom, the answers to the second to sixth questions should be qualified in any respect so as to take account of Protocol (No 30).

117 As noted by the EHRC, that question arises because of the position taken by the Secretary of State before the High Court of Justice (England & Wales) (Administrative Court) that the provisions of the Charter do not apply in the United Kingdom.

118 Even if the Secretary of State no longer maintained that position before the Court of Appeal (England & Wales) (Civil Division), it must be noted that Protocol (No 30) provides, in Article 1(1), that the Charter is not to extend the ability of the Court of Justice or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it affirms.

119 According to the wording of that provision, as noted by the Advocate General in points 169 and 170 of her Opinion in Case C-411/10, Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, according to the third recital in the preamble to Protocol (No 30), Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not

create new rights or principles.

120 In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.

121 Since the rights referred to in the cases in the main proceedings do not form part of Title IV of the Charter, there is no need to rule on the interpretation of Article 1(2) of Protocol (No 30).

122 The answer to the seventh question in Case C-411/10 is therefore that, in so far as the preceding questions arise in respect of the obligations of the United Kingdom, the answers to the second to sixth questions referred in Case C-411/10 do not require to be qualified in any respect so as to take account of Protocol (No 30).

Costs

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

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

1. The decision adopted by a Member State on the basis of Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter of Fundamental Rights of the European Union.

2. European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.

Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

The Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

3. Articles 1, 18 and 47 of the Charter of Fundamental Rights of the European Union do not lead to a different answer.

4. In so far as the preceding questions arise in respect of the obligations of the United Kingdom of Great Britain and

Northern Ireland, the answers to the second to sixth questions referred in Case C-411/10 do not require to be qualified in any respect so as to take account of Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom.

Case C-614/14 - Atanas Ognyanov v Sofiyska gradska prokuratura

JUDGMENT OF THE COURT (Grand Chamber)

5 July 2016 (*)

(Reference for a preliminary ruling — Article 267 TFEU — Article 94 of the Rules of Procedure of the Court — Content of a request for a preliminary ruling — National rule providing that the national court is to be disqualified because it stated a provisional opinion in the request for a preliminary ruling when setting out the factual and legal context — Charter of Fundamental Rights of the European Union — Second paragraph of Article 47 and Article 48(1))

In Case C-614/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sofiyski gradski sad (Sofia City Court, Bulgaria), made by decision of 15 December 2014, received at the Court on 31 December 2014, in the criminal proceedings against

Atanas Ognyanov

intervening party:

Sofiyska gradska prokuratura,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič, J.L. da Cruz Vilaça, A. Arabadjiev, C. Toader and F. Biltgen, Presidents of Chambers, J.-C. Bonichot, M. Safjan, M. Berger (Rapporteur), E. Jarašiūnas, C.G. Fernlund, C. Vajda and S. Rodin, Judges,

Advocate General: Y. Bot,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 12 January 2016,

after considering the observations submitted on behalf of **[the parties and interveners]**::

after hearing the Opinion of the Advocate General at the sitting on 23 February 2016, gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 267 TFEU and Article 94 of the Rules of Procedure of the Court and of the second paragraph of Article 47 and Article 48(1) of the Charter of Fundamental Rights of the European Union (the 'Charter').

2 The request has been made in proceedings relating to the recognition of a criminal conviction and the execution, in Bulgaria, of a sentence of imprisonment imposed by a Danish court on Mr Atanas Ognyanov.

Legal context

EU law

3 Article 94 of the Rules of Procedure, headed 'Content of the request for a preliminary ruling', provides:

'In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

(a) a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;

(b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.'

Bulgarian law

4 It is stated in the order for reference that, in accordance with Article 29 of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure; 'the NPK'), a judge may not take any part in the hearing of a case where, inter alia, there are reasons to believe that judge to be biased. According to the case-law of the Varhoven kasatsionen sad (Supreme Court of Appeal, Bulgaria), if a judge expresses a provisional opinion on the substance of a case before the final judgment is delivered, that constitutes one particular example of bias.

5 In the event of bias, the panel of judges allocated the case are obliged to disqualify themselves, which means, first, that those judges are to undertake no further examination of the case, second, that the case is re-allocated to other judges of the court concerned and, third, that the designated new panel of judges recommences examination of the case at issue *ab initio*.

6 If a judge fails to disqualify himself, continues to examine the case and delivers a final judgment, that judgment will be defective, because its adoption will have taken place in 'breach of essential procedural rules'. The higher court will set aside that judgment and the case at issue will be re-allocated to another judge for examination anew.

7 The referring court states that Bulgarian case-law adopts a particularly strict interpretation of the criterion of 'bias'. In that regard, the referring court observes, inter alia, that review of that criterion is undertaken of the courts' own motion and that even the slightest indication with respect to the facts of the case at issue or their legal classification leads automatically to there being grounds for the disqualification of a judge.

8 It is also stated in the order for reference that the expression by a judge of a provisional opinion entails not only that the judge is disqualified and his or her final judgment set aside, but also that an action for damages will be brought against the judge for a disciplinary offence. In accordance with points 2.3 and 7.4 of the Kodeks za etichno povedenie (National Code of Conduct), a judge is prohibited from making public statements on the outcome of a case for the examination of which he or she is responsible or from stating a provisional opinion. Further, point 7.3 of the National Code of Conduct provides that a judge may state a view on questions of legal principle, but may not refer to specific facts and their legal classification.

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

9 By judgment of 28 November 2012, Mr Ognyanov, a Bulgarian national, was convicted of murder and aggravated theft by Retten i Glostrup (the court of Glostrup, Denmark) and sentenced to a cumulative fifteen years imprisonment. After having served part of his sentence of imprisonment in Denmark, Mr Ognyanov was handed over to the Bulgarian authorities, on 1 October 2013, so that he could serve the remainder of his sentence in Bulgaria.

10 By a request for a preliminary ruling, of 25 November 2014 brought in Case C-554/14, *Ognyanov*, repeated and thereafter supplemented by two requests of 15 December 2014, the Sofiyski gradski sad (Sofia City Court, Bulgaria) referred to the Court various questions on the interpretation of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

11 After the lodging of those questions for a preliminary ruling in Case C-554/14, *Ognyanov*, the Sofiyska gradska prokuratura (the Sofia City Prosecutor, Bulgaria), a party to the main proceedings, requested that, inter alia, the panel of judges of the Sofiyski gradski sad (Sofia City Court) that was responsible for the examination of the case at issue should disqualify themselves, on the ground that, by setting out, in paragraphs 2 to 4 of the request for a preliminary ruling, the factual and legal context of that case, that court was expressing a provisional opinion on questions of fact and law before deliberations had begun.

12 The referring court questions the legality, having regard to EU law, of a national rule, such as that at issue in the main proceedings, which obliges a panel of judges in a Bulgarian court to be disqualified because it expressed, in the request for a preliminary ruling addressed to the Court, a provisional opinion, in that it set out the factual and legal context of the case at issue in the main proceedings.

13 In those circumstances the Sofiyski gradski sad (Sofia City Court, Bulgaria) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does it constitute an infringement of EU law (second paragraph of Article 267 TFEU, in conjunction with Article 94 of the Rules of Procedure of the Court of Justice, Articles 47 and 48 of the Charter … and other applicable provisions) if the court which submitted the request for a preliminary ruling allows the proceedings to continue before it after delivery of the preliminary ruling and delivers a decision on the merits of the case without disqualifying itself? The ground for such disqualification is the expression by that court of a preliminary view on the merits of the case in the request for a preliminary ruling (in that it considered certain facts to have been established and a certain legal provision to be applicable to those facts.

The question is referred on the assumption that all procedural provisions protecting the parties' rights to adduce evidence and to make submissions were complied with in the determination of the facts and applicable law for the purposes of submitting the request for a preliminary ruling.

(2) If the answer to the first question is that it is lawful for the hearing of the case to continue, does it constitute an infringement of EU law if:

(a) The court reproduces in its final decision, without amendment, all the findings set out in its request for a preliminary ruling and declines to take new evidence or to hear the parties in relation to those factual and legal outcomes (with the court, in practice, taking new evidence and hearing the parties only in respect of matters not regarded as having been established in the request for a preliminary ruling)?

(b) The court takes new evidence and hears the parties on all relevant issues, including those on which it has already stated its view in the request for a preliminary ruling, and sets out its view in its final decision on the basis of all the evidence adduced and after examining all the parties' arguments, irrespective of whether the evidence was adduced before submission of the request for a preliminary ruling or after delivery of the preliminary ruling, and of whether the arguments were put forward beforehand or afterwards?

(3) If the answer to the first question is that it is compatible with EU law for the hearing of the case to continue, is it compatible with EU law if the court decides not to allow the main proceedings to continue before it and to disqualify itself from the case on the ground of bias, it being contrary to national law (which offers a higher level of protection in respect of the interests of the parties and of justice) for the proceedings to be allowed to continue, and where such disqualification is based on the fact that:

(a) before delivering its final decision, the court had expressed a preliminary view on the proceedings in the request for a preliminary ruling, which is permissible under EU law but which is prohibited under national law;

b) the court's final view would be set out in two legal acts instead of one (on the assumption that the request for a preliminary ruling constitutes a final, rather than a preliminary, view), which is permissible under EU law but which is prohibited under national law?'

Consideration of the questions referred for a preliminary ruling

The first question

14 By its first question, the referring court seeks, in essence, to ascertain whether Article 267 TFEU and Article 94 of the Rules of

Procedure, read in the light of the second paragraph of Article 47 and Article 48(1) of the Charter, must be interpreted as precluding a national rule being interpreted in such a way that it obliges a referring court to disqualify itself from a pending case on the ground that it set out, in its request for a preliminary ruling, the factual and legal context of that case.

15 First, it must be recalled that the preliminary ruling procedure provided for in Article 267 TFEU constitutes the keystone of the European Union judicial system, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see Opinion 2/13 of 18 December 2014, EU:C:2014:2454, paragraph 176 and the case-law cited).

16 In accordance with settled case-law, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts and tribunals, by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate (see orders of 8 September 2011, *Abdallah*, C-144/11, not published, EU:C:2011:565, paragraph 9 and the case-law cited; of 19 March 2015, *Andre*, C-23/15, not published, EU:C:2015:194, paragraph 4 and the case-law cited, and the judgment of 6 October 2015, *Capoda Import-Export*, C-354/14, EU:C:2015:658, paragraph 23).

17 In accordance with equally settled case-law, Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them. National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate (see judgments of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 26 and the case-law cited, and of 11 September 2014, *A*, C-112/13, EU:C:2014:2195, paragraph 39 and the case-law cited). The choice of the most appropriate time to refer a question for a preliminary ruling lies within their exclusive jurisdiction (see judgments of 15 March 2012, *Sibilio*, C-157/11, not published, EU:C:2012:148, paragraph 31 and the case-law cited, and of 7 April 2016, *Degano Trasporti*, C-546/14, EU:C:2016:206, paragraph 16).

18 The need to provide an interpretation of EU law which will be of use to the national court means that the national court must define the factual and legal context of the questions it is asking or, at the very least, explain the assumptions of fact on which those questions are based (see orders of 8 September 2011, *Abdallah*, C-144/11, not published, EU:C:2011:565, paragraph 10 and the case-law cited; of 19 March 2015, *Andre*, C-23/15, not published, EU:C:2015:194, paragraph 5 and the case-law cited, and the judgment of 10 March 2016, *Safe Interenvíos*, C-235/14, EU:C:2016:154, paragraph 114).

19 The requirements concerning the content of a request for a preliminary ruling, are expressly set out in Article 94 of the Rules of Procedure, of which the national court should, in the context of the cooperation instituted by Article 267 TFEU, be aware and which it is bound to observe scrupulously (see order of 3 July 2014, *Talasca*, C-19/14, EU:C:2014:2049, paragraph 21).

20 There is moreover no dispute that the information provided in orders for reference serves not only to enable the Court to provide useful answers but also to give the governments of the Member States and other interested parties the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union, and that it is the Court's duty to ensure that that opportunity is safeguarded, given that, under that article, only the orders for reference are notified to the interested parties (see order of 8 September 2011, *Abdallah*, C-144/11, not published, EU:C:2011:565, paragraph 11 and the case-law cited, and the judgment of 10 March 2016, *Safe Interenvíos*, C-235/14, EU:C:2016:154, paragraph 116).

21 Last, if the relevant factual and legal context is not stated, that may constitute a ground for the request for a preliminary ruling to be declared to be manifestly inadmissible (see, to that effect, orders of 8 September 2011, *Abdallah*, C-144/11, not published, EU:C:2011:565, paragraph 12; 4 July 2012, *Abdel*, C-75/12, not published, EU:C:2012:412, paragraphs 6 and 7; 19 March 2014, *Grimal*, C-550/13, not published, EU:C:2014:177, paragraph 19, and of 19 March 2015, *Andre*, C-23/15, not published, EU:C:2015:194, paragraphs 8 and 9).

22 In setting out, in its request for a preliminary ruling, the factual and legal context of the main proceedings, a referring court, such as the Sofiyski gradski sad (Sofia City Court), is therefore doing no more than meeting the requirements of Article 267 TFEU and Article 94 of the Rules of Procedure.

23 That being the case, where a referring court, such as the court hearing the main proceedings, presents, in its request for a preliminary ruling, the relevant factual and legal context of the main proceedings, that is a response to the requirement of cooperation

that is inherent in the preliminary reference mechanism and cannot, in itself, be a breach of either the right to a fair trial, enshrined in the second paragraph of Article 47 of the Charter, or the right to the presumption of innocence, guaranteed by Article 48(1) of the Charter.

24 In this case, it follows from the combined application of Article 29 of the NPK, as interpreted by the Varhoven kasatsionen sad (Supreme Court of Appeal), and points 2.3., 7.3. and 7.4. of the National Code of Conduct, that the presentation by a Bulgarian judge, in a request for a preliminary ruling, of the factual and legal context of the case at issue in the main proceedings is deemed to be the expression by that judge of a provisional opinion, which entails not only that the judge is disqualified and his final judgment set aside, but also that an action for damages will be brought against him for a disciplinary offence.

25 It follows that one effect of a national rule such as that at issue in the main proceedings is likely to be that a national court may choose to refrain from referring questions for a preliminary ruling to the Court, in order to avoid, on the one hand, being disqualified and exposed to disciplinary penalties or, on the other, lodging requests for preliminary rulings that are inadmissible. Consequently, such a rule is detrimental to the prerogatives granted to national courts and tribunals by Article 267 TFEU and, consequently, to the effectiveness of the cooperation between the Court and the national court and tribunals established by the preliminary ruling mechanism.

26 In the light of all the foregoing, the answer to the first question referred is that Article 267 TFEU and Article 94 of the Rules of Procedure, read in the light of the second paragraph of Article 47 and of Article 48(1) of the Charter, must be interpreted as precluding a national rule which is interpreted in such a way as to oblige a referring court to disqualify itself from a pending case, on the ground that it set out, in its request for a preliminary ruling, the factual and legal context of that case.

The second question

27 By its second question, the referring court seeks, in essence, to ascertain whether EU law, and in particular Article 267 TFEU, must be interpreted as precluding the possibility, after the delivery of the preliminary ruling, of the referring court making no change to the findings of fact or law made in the request for a preliminary ruling or, on the contrary, the possibility, after that delivery of the preliminary ruling, of the referring court hearing the parties again and undertaking further inquiries, which might lead it to alter those findings of fact or law.

28 In that regard, it must be recalled that, in accordance with settled case-law, Article 267 TFEU requires the referring court to give full effect to the interpretation of EU law provided by the Court (see, to that effect, judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraphs 38 to 40 and the case-law cited).

29 On the other hand, neither that article, nor any other provision of EU law, requires the referring court, after the delivery of the preliminary ruling, to alter the findings of fact or law made in a request for a preliminary ruling. Equally, no provision of EU law prohibits the referring court from altering, after the delivery of the preliminary ruling, its findings in respect of the relevant factual and legal context.

30 In the light of the foregoing, the answer to the second question referred is that EU law, and in particular Article 267 TFEU, must be interpreted as meaning that it does not require the referring court, after the delivery of the preliminary ruling, to hear the parties again and to undertake further inquiries, which might lead it to alter the findings of fact or law made in the request for a preliminary ruling, nor does it prohibit the referring court from doing so, provided that the referring court gives full effect to the interpretation of EU law adopted by the Court.

The third question

31 By its third question, the referring court seeks, in essence, to ascertain whether EU law must be interpreted as precluding the referring court from applying a national rule, such as that at issue in the main proceedings, which is deemed to be contrary to EU law, on the ground that that rule ensures a higher degree of protection of the parties' fundamental rights.

32 In that regard, it must be observed at the outset that the assumption that underlies that question, that the national rule at issue in the main proceedings provides an individual with enhanced protection of his right to a fair trial, within the meaning of the second paragraph of Article 47 of the Charter, cannot be accepted. As was stated in paragraph 23 of this judgment, the fact that a national court sets out, in the request for a preliminary ruling, in accordance with what is required by Article 267 TFEU and Article 94 of the

Rules of Procedure, the factual and legal context of the main proceedings is not, in itself, a breach of that fundamental right. Consequently, the obligation to disqualify itself, imposed by that rule on a referring court which has, in a reference for a preliminary ruling, acted in that way cannot be considered as serving to enhance the protection of that right.

33 That said, it must be recalled that, in accordance with settled case-law, a judgment in which the Court gives a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings (see judgments of 20 October 2011, *Interedil*, C-396/09, EU:C:2011:671, paragraph 36 and the case-law cited, and of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 38).

34 In addition, it must be stated that, in accordance with settled case-law, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law, is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national law, and it is not necessary for that court to request or to await the prior setting aside of that provision of national law by legislative or other constitutional means (see judgments of 20 October 2011, *Interedil*, C-396/09, EU:C:2011:671, paragraph 38 and the case-law cited; of 4 June 2015, *Kernkraftwerke Lippe-Ems*, C-5/14, EU:C:2015:354, paragraph 32 and the case-law cited, and of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 40 and the case-law cited).

35 Last, it must be added that the requirement to give full effect to EU law includes the obligation on a national court to alter established case-law, where necessary, if that is based on an interpretation of national law that is incompatible with EU law (see, to that effect, judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 33 and the case-law cited).

36 It follows that, in this case, the referring court is obliged to ensure that Article 267 TFEU is given full effect, and if necessary to disapply, of its own motion, Article 29 of the NPK as interpreted by the Varhoven kasatsionen sad (Supreme Court of Appeal), where that interpretation is not compatible with EU law (see, to that effect, judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 34).

37 In the light of the foregoing, the answer to the third question referred is that EU law must be interpreted as precluding a referring court from applying a national rule, such as that at issue in the main proceedings, which is deemed to be contrary to EU law.

Costs

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

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

1. Article 267 TFEU and Article 94 of the Rules of Procedure of the Court, read in the light of the second paragraph of Article 47 and of Article 48(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a national rule which is interpreted in such a way as to oblige the referring court to disqualify itself from a pending case, on the ground that it set out, in its request for a preliminary ruling, the factual and legal context of that case.

2. EU law, and in particular Article 267 TFEU, must be interpreted as meaning that it does not require the referring court, after the delivery of the preliminary ruling, to hear the parties again and to undertake further inquiries, which might lead it to alter the findings of fact or law made in the request for a preliminary ruling, nor does it prohibit the referring court from doing so, provided that the referring court gives full effect to the interpretation of EU law adopted by the Court of Justice of the European Union.

3. EU law must be interpreted as precluding a referring court from applying a national rule, such as that at issue in the main proceedings, which is deemed to be contrary to EU law.

Cases C 404/15 and C 659/15 PPU - Pál Aranyosi (C 404/15) and Robert Căldăraru (C 659/15 PPU)

JUDGMENT OF THE COURT (Grand Chamber)

5 April 2016 (*)

(Reference for a preliminary ruling — Police and judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — European arrest warrant — Grounds for refusal to execute — Charter of Fundamental Rights of the European Union — Article 4 — Prohibition of inhuman or degrading treatment — Conditions of detention in the issuing Member State)

In Joined Cases C-404/15 and C-659/15 PPU,

REQUESTS for a preliminary ruling under Article 267 TFEU made by the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen, Germany), made by decisions of 23 July and 8 December 2015, received at the Court on 24 July and 9 December 2015 respectively, in proceedings relating to the execution of European arrest warrants issued in respect of

Pál Aranyosi (C-404/15)

Robert Căldăraru (C-659/15 PPU),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, L. Bay Larsen, T. von Danwitz and D. Šváby, Presidents of Chambers, A. Rosas, E. Juhász, A. Borg Barthet, J. Malenovský, M. Safjan (Rapporteur), M. Berger, A. Prechal, E. Jarašiūnas, M. Vilaras and E. Regan, Judges,

Advocate General: Y. Bot,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 15 February 2016,

after considering the observations submitted on behalf of **[the parties and interveners]**:

after hearing the Opinion of the Advocate General at the sitting on 3 March 2016,

gives the following

Judgment

1 The requests for a preliminary ruling concern the interpretation of Article 1(3), Article 5 and Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24; 'the Framework Decision').

2 These requests have been made in the context of the execution, in Germany, of two European arrest warrants issued in respect of Mr Aranyosi on 4 November and 31 December 2014 respectively by the examining magistrate at the Miskolci járásbíróság (District Court of Miskolc, Hungary), and of a European arrest warrant issued in respect of Mr Căldăraru on 29 October 2015 by the Judecătoria Făgăraş (Court of first instance of Fagaras, Romania).

Legal context

ECHR

3 Under the heading 'Prohibition of torture', Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), signed in Rome on 4 November 1950, provides:

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

4 Article 15 ECHR, headed 'Derogation in time of emergency', provides:

'1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from … or from Articles 3 … shall be made under this provision.

…'

5 Article 46(2) ECHR, that article being headed 'Binding force and execution of judgments', provides:

'The final judgment of the [European Court of Human Rights; 'EctHR'] shall be transmitted to the Committee of Ministers, which shall supervise its execution.'

EU law

The Charter

6 Article 1 of the Charter of Fundamental Rights of the European Union ('the Charter'), headed 'Human dignity', states:

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

7 Article 4 of the Charter, headed 'Prohibition of torture and inhuman or degrading treatment or punishment', states:

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

8 The Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17; 'the Explanations relating to the Charter') state that '[t]he right in Article 4 [of the Charter] is the right guaranteed by Article 3 of the ECHR which has the same wording … By virtue of Article 52(3) of the Charter, it therefore has the same meaning and the same scope as the ECHR Article'.

9 Article 6 of the Charter, headed 'Right to liberty and security', provides:

'Everyone has the right to liberty and security of person.'

10 Article 48(1) of the Charter, that article being headed 'Presumption of innocence and rights of defence', provides:

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

11 Article 51(1) of the Charter, that article being headed 'Field of application', provides:

'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. …'

12 Article 52(1) of the Charter, that article being headed 'Scope and interpretation of rights and principles', provides:

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

The Framework Decision

13 Recitals 5 to 8, 10 and 12 in the preamble of the Framework Decision are worded as follows:

‘(5) … the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. …

(6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the “cornerstone” of judicial cooperation.

(7) Since the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 [EU] and Article 5 [EC]. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective.

(8) Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender.

…

(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [EU, now after amendment, Article 2 TEU], determined by the Council pursuant to Article 7(1) [EU, now after amendment, Article 7(2) TEU] with the consequences set out in Article [7(2) EU].

…

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 [EU] and reflected by the Charter …, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person’s position may be prejudiced for any of these reasons.

…’

14 Article 1 of the Framework Decision, headed ‘Definition of the European arrest warrant and obligation to execute it’, provides:

‘1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

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

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU].’

15 Articles 3, 4 and 4a of the Framework Decision set out the grounds for mandatory and optional non-execution of the European arrest warrant.

16 Article 5 of the Framework Decision, headed ‘Guarantees to be given by the issuing Member State in particular cases’, provides:

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

…

(2) if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure;

(3) where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.’

17 Article 6 of the Framework Decision, headed ‘Determination of the competent judicial authorities’, provides:

‘1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.

3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.’

18 Article 7 of the Framework Decision, headed ‘Recourse to the central authority’, reads as follows:

‘1. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.

2. A Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.

Member State[s] wishing to make use of the possibilities referred to in this Article shall communicate to the General Secretariat of the Council information relating to the designated central authority or central authorities. These indications shall be binding upon all the authorities of the issuing Member State.’

19 Article 12 of the Framework Decision, headed ‘Keeping the person in detention’, states:

‘When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding.’

20 Article 15 of the Framework Decision, headed ‘Surrender decision’, provides:

‘1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe

the time limits set in Article 17.

3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.'

21 Article 17 of the Framework Decision, headed 'Time limits and procedures for the decision to execute the European arrest warrant', provides:

'1. A European arrest warrant shall be dealt with and executed as a matter of urgency.

2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.

3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.

4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

5. As long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled.

…

7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.'

22 Article 23 of the Framework Decision, headed 'Time limits for surrender of the person', provides:

'1. The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.

2. He or she shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant.

…

4. The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.

5. Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released.'

German law

23 The Framework Decision was transposed into the German legal system by Paragraphs 78 to 83k of the Law on international mutual legal assistance in criminal matters (Gesetz über die internationale Rechtshilfe in Strafsachen) of 23 December 1982, as amended by the Law on the European arrest warrant (Europäisches Haftbefehlsgesetz) of 20 July 2006 (BGBl. 2006 I, p. 1721; 'the IRG').

24 Under Paragraph 15 of the IRG, headed 'Detention pending extradition':

'1. On receipt of the request for extradition, an order may made for the individual sought to be detained pending extradition, where

(1) there is a risk that the individual will not cooperate with the extradition procedure or the enforcement of the extradition, or

(2) there is specific evidence to support a strong suspicion that the individual sought will hinder the determination of the facts in the foreign proceedings or in the extradition procedure.

2. Subparagraph (1) shall not apply where the extradition appears to be prima facie unlawful.'

25 Paragraph 24 of the IRG, headed 'Suspension of execution of the arrest warrant issued for the purposes of extradition', provides:

'1. An arrest warrant issued for the purposes of extradition must be suspended forthwith when the conditions for provisional detention pending extradition are no longer met or the extradition has been declared to be unlawful.

2. An arrest warrant issued for the purposes of extradition must also be suspended at the request of the Public Prosecutor at the Higher Regional Court. When that request is made, the Public Prosecutor shall order the release of the individual sought.'

26 Under Paragraph 29(1) of the IRG, the Higher Regional Court is to give a ruling, at the request of the Public Prosecutor, on the legality of the extradition where the individual sought has not consented to extradition. The decision is to be made by order, in accordance with Paragraph 32 of the IRG.

27 Paragraph 73 of the IRG states:

'In the absence of a request to that effect, mutual legal assistance and the transmission of information shall be unlawful if contrary to the essential principles of the German legal system. In the event of a request under Parts VIII, IX and X, mutual legal assistance shall be unlawful if contrary to the principles stated in Article 6 TEU.'

The main proceedings and the questions referred for a preliminary ruling

Case C-404/15

28 Mr Aranyosi is a Hungarian national born on 14 July 1996 in Szikszó (Hungary).

29 The examining magistrate at the Miskolci járásbíróság (Court of first instance, Miskolc) issued two European arrest warrants, on 4 November and 31 December 2014 respectively, with respect to Mr Aranyosi, seeking his surrender to the Hungarian judicial authorities for the purposes of prosecution.

30 According to the European arrest warrant of 4 November 2014, on 3 August 2014 Mr Aranyosi forced entry to a dwelling house in Sajohidveg (Hungary). Having done so, he stole, inter alia, EUR 2 500 and HUF 100 000 (Hungarian forints; approximately EUR 313) in cash, and various objects of value.

31 Further, according to the European arrest warrant of 31 December 2014, Mr Aranyosi was accused of entering by a window, on 19 January 2014, a school in Sajohidveg, and forcing open a number of doors within the building and stealing technical equipment and cash. The stated value of the theft was HUF 244 000 (approximately EUR 760) and the value of material damage was HUF 55 000 (approximately EUR 170).

32 Mr Aranyosi was temporarily arrested on 14 January 2015 in Bremen (Germany) as a result of an alert having been entered in the Schengen Information System. He was heard on the same day by the investigating magistrate of the Amtsgericht Bremen (District Court of Bremen, Germany).

33 Mr Aranyosi stated that he was a Hungarian national, that he lived in Bremerhaven (Germany) with his mother, that he was unmarried, that he had a girlfriend and an eight-month-old child. He denied the offences of which he was accused and declined to consent to the simplified surrender procedure.

34 The representative of the Public Prosecutor of Bremen ordered that Mr Aranyosi be released from custody because there was

no apparent risk that he would not cooperate with the surrender procedure. On 14 January 2015 the Generalstaatsanwaltschaft Bremen (Office of the Public Prosecutor of Bremen), referring to detention conditions in a number of Hungarian prisons that did not satisfy minimum European standards, asked the Miskolci járásbíróság (District Court of Miskolc) to state in which prison Mr Aranyosi would be held in the event that he was surrendered.

35 By letter of 20 February 2015, received by fax on 15 April 2015 via the Hungarian Minister of Justice, the Public Prosecutor of the district of Miskolc stated that, in this case, it was not inevitable that there would be an enforcement measure of preventive detention in criminal proceedings and that a custodial sentence would be requested.

36 The Public Prosecutor stated that, under Hungarian criminal law, there are a number of enforcement measures that are less onerous than detention and that a number of penalties other than a custodial sentence come into consideration. What form of enforcement measure would be requested prior to the decision to indict and what penalty would be requested in that decision are exclusively within the discretion of the Public Prosecutor, who is independent.

37 Further, the Public Prosecutor of the district of Miskolc said that the determination of the offence and the choice of penalties to be imposed fall within the competence of the Hungarian judicial authorities. In that regard, Hungarian legislation provides, in criminal proceedings, equivalent safeguards based on European values.

38 On 21 April 2015 the Public Prosecutor of Bremen requested that the surrender of Mr Aranyosi to the issuing judicial authority for the purposes of criminal prosecution should be declared to be lawful. He stated, inter alia, that, while the Public Prosecutor of the district of Miskolc had not stated in which prison Mr Aranyosi would be held in the event of his being surrendered to Hungary, there was however no specific evidence that, if he were surrendered, Mr Aranyosi might be the victim of torture or other cruel, inhuman or degrading treatment.

39 Mr Aranyosi's lawyer claimed that the request of the Public Prosecutor of Bremen should be rejected on the ground that the Public Prosecutor of the district of Miskolc had not stated in which prison Mr Aranyosi would be held. It was therefore impossible to ascertain the conditions of detention.

40 The Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen) states that the request submitted by Hungary satisfies the conditions to which requests for surrender are subject under the IRG.

41 In particular, what Mr Aranyosi is accused of constitutes a criminal offence both under Article 370(1) of the Hungarian Criminal Code and Paragraphs 242, 243(1) point 1, and 244(1) point 3, of the German Criminal Code. There is criminality in both Member States concerned and the penalty that can be imposed is a minimum of one year's imprisonment under Hungarian and German law.

42 Nonetheless, in the opinion of the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen), it would be necessary to declare the surrender to be unlawful if there were an impediment to surrender under Paragraph 73 of the IRG. Having regard to the information currently available, the referring court is satisfied that there is probative evidence that, in the event of surrender to the Hungarian judicial authority, Mr Aranyosi might be subject to conditions of detention that are in breach of Article 3 ECHR and the fundamental rights and general principles of law enshrined in Article 6 TEU.

43 The ECtHR has found Hungary to be in violation by reason of the overcrowding in its prisons (ECtHR, *Varga and Others v. Hungary*, Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, of 10 March 2015). The ECtHR held that it was established that Hungary was in violation of Article 3 ECHR by imprisoning the applicants in cells that were too small and that were overcrowded. The ECtHR treated those proceedings as a pilot case after 450 similar cases against Hungary were brought before it with respect to inhuman conditions of detention.

44 The Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen) states that specific evidence that the conditions of detention to which Mr Aranyosi would be subject, if he were surrendered to the Hungarian authorities, do not satisfy the minimum standards required by international law is also to be found in a report issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The findings in that report refer in particular to the significant prison overcrowding identified in the course of visits made between 2009 and 2013.

45 On the basis of that information, the referring court considers that it is not in a position to give a ruling on the lawfulness of the

surrender of Mr Aranyosi to the Hungarian authorities, having regard to the restrictions imposed in Paragraph 73 of the IRG and Article 1(3) of the Framework Decision. The decision of the referring court will depend essentially on whether or not the impediment to surrender can still be overcome, in accordance with the Framework Decision, by means of assurances given by the issuing Member State. If that impediment cannot be removed by such assurances, the surrender would then be unlawful.

46 In those circumstances, the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 1(3) of the Framework Decision to be interpreted as meaning that a request for surrender for the purposes of prosecution is inadmissible where there are strong indications that detention conditions in the issuing Member State infringe the fundamental rights of the person concerned and the fundamental legal principles as enshrined in Article 6 TEU, or is it to be interpreted as meaning that, in such circumstances, the executing Member State can or must make the decision on the admissibility of the request for surrender conditional upon assurances that detention conditions are compliant? To that end, can or must the executing Member State lay down specific minimum requirements applicable to the detention conditions in respect of which an assurance is sought?

2. Are Articles 5 and 6(1) of the Framework Decision to be interpreted as meaning that the issuing judicial authority is also entitled to give assurances that detention conditions are compliant, or do assurances in this regard remain subject to the domestic rules of competence in the issuing Member State?'

Case C-659/15 PPU

47 Mr Căldăraru is a Romanian national born on 7 December 1985 in Brașov (Romania).

48 By judgment of the Judecătoria Făgăraş (Court of First Instance of Făgăraş, Romania) of 16 April 2015, Mr Căldăraru was convicted and sentenced to an overall period of imprisonment of one year and eight months, for the offence of driving without a driving licence.

49 According to the grounds of that judgment, as set out by the referring court in its request for a preliminary ruling, that sentence included a period of imprisonment of one year, for the offence of driving without a driving licence, execution of which was suspended on 17 December 2013 by the Judecătoria Făgăraş (Court of First Instance of Făgăraş).

50 That conviction and sentence became final following a judgment of the Curtea de Apel Brașov (Court of Appeal of Brașov) of 15 October 2015.

51 On 29 October 2015 the Judecătoria Făgăraş (Court of First Instance of Fagaras) issued a European arrest warrant in respect of Mr Căldăraru and entered in the Schengen Information System an alert concerning him.

52 Mr Căldăraru was arrested in Bremen on 8 November 2015.

53 On the same date the Amtsgericht Bremen (District Court of Bremen) issued an arrest warrant with respect to Mr Căldăraru. At his hearing before that court, Mr Căldăraru stated that he would not consent to the simplified surrender procedure.

54 On 9 November 2015 the Public Prosecutor of Bremen applied to the court for Mr Căldăraru to be detained pending extradition.

55 By decision of 11 November 2015 the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen) granted that application. That court held that the fact of Mr Căldăraru being detained pending extradition did not appear to be 'prima face unlawful' under Paragraph 15(2) of the IRG, and found that there was a risk that Mr Căldăraru would not cooperate with the procedure of surrender to the Romanian authorities, and that his being detained pending extradition, in accordance with Paragraph 15(1) of the IRG, was therefore justified.

56 On 20 November 2015 the Public Prosecutor of Bremen applied to the court for Mr Căldăraru's surrender to the Romanian authorities to be declared to be lawful. In addition, that authority stated that the Judecătoria Făgăraş (Court of First Instance of Fagaras) was unable to provide information as to the prison in which Mr Căldăraru would be held in Romania.

57 The Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen) states that the application presented by Romania complies with the conditions in the IRG governing requests for surrender.

58 In particular, what Mr Căldăraru was convicted of constitutes a criminal offence under both Article 86 of the Romanian Law No 195 of 2002 and Paragraph 21 of the German Road Traffic law (Straßenverkehrsgesetz). There is criminality in both Member States concerned, the attached penalty being not less than four months imprisonment.

59 Nonetheless, in the opinion of the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen), it would be necessary to declare the surrender to be unlawful if there were an impediment to surrender under Paragraph 73 of the IRG. Having regard to the information currently available, the referring court states that there is probative evidence that, in the event of surrender to the Romanian judicial authority, Mr Căldăraru might be subject to conditions of detention that are in breach of Article 3 ECHR and the fundamental rights and general principles of law enshrined in Article 6 TEU.

60 In a number of judgments issued on 10 June 2014, the ECtHR found Romania to be in violation by reason of the overcrowding in its prisons (ECtHR, *Voicu v. Romania*, No 22015/10; *Bujorean v. Romania*, No 13054/12; *Mihai Laurenţiu Marin v. Romania*, No 79857/12, and *Constantin Aurelian Burlacu v. Romania*, No 51318/12). The ECtHR held it to be established that Romania was in violation of Article 3 ECHR by imprisoning the applicants in cells that were too small and overcrowded, that lacked adequate heating, that were dirty and lacking in hot water for showers.

61 The Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen) states that specific evidence that the conditions of detention to which Mr Căldăraru would be subject, if he were to be surrendered to the Romanian authorities, do not satisfy the minimum standards required by international law is also to be found in a report issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The findings in that report refer in particular to the significant prison overcrowding identified in visits made between 5 and 17 June 2014.

62 On the basis of that information, the referring court considers that it is not in a position to give a ruling on the lawfulness of the surrender of Mr Căldăraru to the Romanian authorities, having regard to the restrictions imposed in Paragraph 73 of the IRG and Article 1(3) of the Framework Decision. The decision of the referring court will depend essentially on whether or not the impediment to surrender can still be overcome, in accordance with the Framework Decision, by means of assurances given by the issuing Member State. If that impediment cannot be removed by such assurances, the surrender would then be unlawful.

63 In those circumstances, the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court of Bremen) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 1(3) of the Framework Decision to be interpreted as meaning that surrender for the purposes of execution of a criminal sentence is impermissible where there are strong indications that detention conditions in the issuing Member State infringe the fundamental rights of the person concerned and the fundamental legal principles as enshrined in Article 6 TEU, or is it to be interpreted as meaning that, in such circumstances, the executing Member State can or must make the decision on the permissibility of surrender conditional upon assurances that detention conditions are compliant? To that end, can or must the executing Member State lay down specific minimum requirements applicable to the detention conditions in respect of which an assurance is sought?

2. Are Articles 5 and 6(1) of the Framework Decision to be interpreted as meaning that the issuing judicial authorities are also entitled to give assurances that detention conditions are compliant, or do assurances in this regard remain subject to the domestic rules of competence in the issuing Member State?'

Procedure before the Court

Case C-404/15

64 The referring court requested that this request for a preliminary ruling be dealt with under the urgent procedure provided for in Article 107 of the Court's Rules of Procedure.

65 In support of its request, the referring court stated that Mr Aranyosi had been temporarily arrested on the basis of a European arrest warrant issued by the Hungarian authorities, but that he was not currently in custody, since the Public Prosecutor in Bremen

had ordered that he be released, on the ground that there was at that time no risk that the accused would abscond, given his social ties.

66 On 31 July 2015 the Fourth Chamber of the Court, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decided not to grant the request of the referring court that Case C-404/15 be dealt with under the urgent preliminary ruling procedure.

67 By decision of 4 August 2015, the President of the Court ordered that Case C-404/15 should be given priority over others.

Case C-659/15 PPU

68 The referring court requested that this request for a preliminary ruling be dealt with under the urgent procedure provided for in Article 107 of the Court's Rules of Procedure.

69 In support of its request, the referring court stated that Mr Căldăraru had been temporarily arrested on the basis of a European arrest warrant issued by the Romanian authorities and that he was currently held in custody on the basis of that arrest warrant for the purposes of his surrender to those authorities. The referring court added that whether Mr Căldăraru's detention was well founded depended on the answer of the Court to the questions referred by it for a preliminary ruling.

70 In that respect, it must be observed that the reference for a preliminary ruling in Case C-659/15 PPU concerns the interpretation of the Framework Decision, which is within the field covered by Part Three, Title V, of the FEU Treaty, relating to the area of freedom, security and justice. It may therefore be dealt with under the urgent preliminary ruling procedure. Further, Mr Căldăraru is currently held in custody and whether his detention should continue depends on the answer of the Court to the questions referred to it by the national court.

71 In those circumstances, on 16 December 2015 the Third Chamber of the Court decided, on the Judge-Rapporteur's proposal and after hearing the Advocate General, to grant the referring court's request that the reference for a preliminary ruling in Case C-659/15 PPU be dealt with under the urgent procedure.

72 It was also decided that Case C-659/15 PPU, and, because of the connection between the cases, Case C-404/15, should be referred to the Court for assignment to the Grand Chamber.

73 Given that connection, confirmed at the hearing of oral argument, the two cases C-404/15 and C-659/15 PPU are to be joined for the purposes of judgment.

Consideration of the questions referred for a preliminary ruling

74 By its questions, which can be examined together, the referring court seeks, in essence, to ascertain whether Article 1(3) of the Framework Decision must be interpreted as meaning that, where there is solid evidence that detention conditions in the issuing Member State are incompatible with fundamental rights, in particular with Article 4 of the Charter, the executing judicial authority may or must refuse to execute a European arrest warrant issued in respect of a person for the purposes of conducting a criminal prosecution or executing a custodial sentence, or whether it may or must make the surrender of that person conditional on there being obtained from the issuing Member State information enabling it to be satisfied that those detention conditions are compatible with fundamental rights. Further, the referring court seeks to ascertain whether Articles 5 and 6(1) of the Framework Decision must be interpreted as meaning that such information may be supplied by the judicial authority of the issuing Member State or whether the supply of that information is governed by the domestic rules of competence in that Member State.

75 It should be recalled, as a preliminary point, that the purpose of the Framework Decision, as is apparent in particular from Article 1(1) and (2) thereof and recitals 5 and 7 in the preamble thereto, is to replace the multilateral system of extradition based on the European Convention on Extradition of 13 December 1957 with a system of surrender between judicial authorities of convicted or suspected persons for the purpose of enforcing judgments or of conducting prosecutions, that system of surrender being based on the principle of mutual recognition (see judgments in *West*, C-192/12 PPU, EU:C:2012:404, paragraph 54; *Melloni*, C-399/11, EU:C:2013:107, paragraph 36; *F.*, C-168/13 PPU, EU:C:2013:358, paragraph 34; and *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 27).

76 The Framework Decision thus seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice, founded on the high level of confidence which should exist between the Member States (see judgments in *Melloni*, C-399/11, EU:C:2013:107, paragraph 37; *F.*, C-168/13 PPU, EU:C:2013:358, paragraph 35; and *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 28).

77 The principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter (see, to that effect, judgment in *F.*, C-168/13 PPU, EU:C:2013:358, paragraph 50, and, by analogy, with respect to judicial cooperation in civil matters, the judgment in *Aguirre Zarraga*, C-491/10 PPU, EU:C:2010:828, paragraph 70).

78 Both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, Opinion 2/13, EU:C:2014:2454, paragraph 191).

79 In the area governed by the Framework Decision, the principle of mutual recognition, which constitutes, as is stated notably in recital (6) of that Framework Decision, the 'cornerstone' of judicial cooperation in criminal matters, is given effect in Article 1(2) of the Framework Decision, pursuant to which Member States are in principle obliged to give effect to a European arrest warrant (see, to that effect, judgment in *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 36 and the case-law cited).

80 It follows that the executing judicial authority may refuse to execute such a warrant only in the cases, exhaustively listed, of obligatory non-execution, laid down in Article 3 of the Framework Decision, or of optional non-execution, laid down in Articles 4 and 4a of the Framework Decision. Moreover, the execution of the European arrest warrant may be made subject only to one of the conditions exhaustively laid down in Article 5 of that Framework Decision (see, to that effect, judgment in *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 36 and the case-law cited).

81 It must, in that context, be noted that recital 10 of the Framework Decision states that the implementation of the mechanism of the European arrest warrant as such may be suspended only in the event of serious and persistent breach by one of the Member States of the principles referred to in Article 2 TEU, and in accordance with the procedure provided for in Article 7 TEU.

82 However, first, the Court has recognised that limitations of the principles of mutual recognition and mutual trust between Member States can be made 'in exceptional circumstances' (see, to that effect, Opinion 2/13, EU:C:2014:2454, paragraph 191).

83 Second, as is stated in Article 1(3) thereof, the Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights as enshrined in, inter alia, the Charter.

84 In that regard, it must be stated that compliance with Article 4 of the Charter, concerning the prohibition of inhuman or degrading treatment or punishment, is binding, as is stated in Article 51(1) of the Charter, on the Member States and, consequently, on their courts, where they are implementing EU law, which is the case when the issuing judicial authority and the executing judicial authority are applying the provisions of national law adopted to transpose the Framework Decision (see, by analogy, judgments in *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 72, and *Peftiev and Others*, C-314/13, EU:C:2014:1645, paragraph 24).

85 As regards the prohibition of inhuman or degrading treatment or punishment, laid down in Article 4 of the Charter, that prohibition is absolute in that it is closely linked to respect for human dignity, the subject of Article 1 of the Charter (see, to that effect, judgment in *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 80).

86 That the right guaranteed by Article 4 of the Charter is absolute is confirmed by Article 3 ECHR, to which Article 4 of the Charter corresponds. As is stated in Article 15(2) ECHR, no derogation is possible from Article 3 ECHR.

87 Articles 1 and 4 of the Charter and Article 3 ECHR enshrine one of the fundamental values of the Union and its Member States. That is why, in any circumstances, including those of the fight against terrorism and organised crime, the ECHR prohibits in absolute

terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (see judgment of the ECtHR in *Bouyid v. Belgium*, No 23380/09 of 28 September 2015, § 81 and the case-law cited).

88 It follows that, where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter (see, to that effect, judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraphs 59 and 63, and Opinion 2/13, EU:C:2014:2454, paragraph 192), that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment.

89 To that end, the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.

90 In that regard, it follows from the case-law of the ECtHR that Article 3 ECHR imposes, on the authorities of the State on whose territory an individual is detained, a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected (see judgment of the ECtHR in *Torreggiani and Others v. Italy*, Nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, and 37818/10, of 8 January 2013, § 65).

91 Nonetheless, a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant.

92 Whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State.

93 The mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State.

94 Consequently, in order to ensure respect for Article 4 of the Charter in the individual circumstances of the person who is the subject of the European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4.

95 To that end, that authority must, pursuant to Article 15(2) of the Framework Decision, request of the judicial authority of the issuing Member State that there be provided as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State.

96 That request may also relate to the existence, in the issuing Member State, of any national or international procedures and mechanisms for monitoring detention conditions, linked, for example, to visits to prisons, which make it possible to assess the current state of detention conditions in those prisons.

97 In accordance with Article 15(2) of the Framework Decision, the executing judicial authority may fix a time limit for the receipt of the supplementary information requested from the issuing judicial authority. That time limit must be adjusted to the particular case, so as to allow to that authority the time required to collect the information, if necessary by seeking assistance to that end from the

central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision. Under Article 15(2) of the Framework Decision, that time limit must however take into account the need to observe the time limits set in Article 17 of that Framework Decision. The issuing judicial authority is obliged to provide that information to the executing judicial authority.

98 If, in the light of the information provided pursuant to Article 15(2) of the Framework Decision, and of any other information that may be available to the executing judicial authority, that authority finds that there exists, for the individual who is the subject of the European arrest warrant, a real risk of inhuman or degrading treatment, as referred to in paragraph 94 of this judgment, the execution of that warrant must be postponed but it cannot be abandoned (see, by analogy, judgment in *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 38).

99 Where the executing authority decides on such a postponement, the executing Member State is to inform Eurojust, in accordance with Article 17(7) of the Framework Decision, giving the reasons for the delay. In addition, pursuant to that provision, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants for the reasons referred to in the preceding paragraph, is to inform the Council with a view to an evaluation, at Member State level, of the implementation of the Framework Decision.

100 Further, in accordance with Article 6 of the Charter, the executing judicial authority may decide to hold the person concerned in custody only in so far as the procedure for the execution of the European arrest warrant has been carried out in a sufficiently diligent manner and in so far as, consequently, the duration of the detention is not excessive (see, to that effect, judgment in *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraphs 58 to 60). The executing judicial authority must give due regard, with respect to individuals who are the subject of a European arrest warrant for the purposes of prosecution, to the principle of the presumption of innocence guaranteed by Article 48 of the Charter.

101 In that regard, the executing judicial authority must respect the requirement of proportionality, laid down in Article 52(1) of the Charter, with respect to the limitation of any right or freedom recognised by the Charter. The issue of a European arrest warrant cannot justify the individual concerned remaining in custody without any limit in time.

102 In any event, if the executing judicial authority concludes, following the review referred to in paragraphs 100 and 101 of this judgment, that it is required to bring the requested person's detention to an end, it is then required, pursuant to Articles 12 and 17(5) of the Framework Decision, to attach to the provisional release of that person any measures it deems necessary so as to prevent him from absconding and to ensure that the material conditions necessary for his effective surrender remain fulfilled for as long as no final decision on the execution of the European arrest warrant has been taken (see judgment in *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 61).

103 In the event that the information received by the executing judicial authority from the issuing judicial authority is such as to permit it to discount the existence of a real risk that the individual concerned will be subject to inhuman and degrading treatment in the issuing Member State, the executing judicial authority must adopt, within the time limits prescribed by the Framework Decision, its decision on the execution of the European arrest warrant, without prejudice to the opportunity of the individual concerned, after surrender, to have recourse, within the legal system of the issuing Member State, to legal remedies that may enable him to challenge, where appropriate, the lawfulness of the conditions of his detention in a prison of that Member State (see, to that effect, judgment in *F.*, C-168/13 PPU, EU:C:2013:358, paragraph 50).

104 It follows from all the foregoing that the answer to the questions referred is that Article 1(3), Article 5 and Article 6(1) of the Framework Decision must be interpreted as meaning that where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the

existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

Costs

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

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

Article 1(3), Article 5 and Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that, where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to

Case C 13/16: Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA 'Rīgas satiksme'

JUDGMENT OF THE COURT (Second Chamber)
4 May 2017 (*)

(Reference for a preliminary ruling — Directive 95/46/EC — Article 7(f) — Personal data — Conditions for the lawful processing of personal data — Concept of 'necessity for the realisation of the legitimate interests of a third party' — Request for disclosure of personal data of a person responsible for a road accident in order to exercise a legal claim — Obligation on the controller to grant such a request — No such obligation)

In Case C-13/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Augstākās tiesas, Administratīvo lietu departaments (Supreme Court, Administrative Division, Latvia), made by decision of 30 December 2015, received at the Court on 8 January 2016, in the proceedings

Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde

v

Rīgas pašvaldības SIA 'Rīgas satiksme',

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Prechal, A. Rosas (Rapporteur), C. Toader and E. Jarašiūnas, Judges,
Advocate General : M. Bobek,

Registrar: M. Aleksejev, Administrator,
having regard to the written procedure and further to the hearing on 24 November 2016,
after considering the observations submitted on behalf of:
– Rīgas pašvaldības SIA 'Rīgas satiksme' by L. Bemhens, acting as Agent,
– the Latvian Government, by I. Kalniņš and by A. Bogdanova, acting as Agents,
– the Czech Government, by J. Vláčil and M. Smolek, acting as Agents,
– the Spanish Government, by M.J. García-Valdecasas Dorrego, acting as Agent,
– the Austrian Government, by G. Eberhard, acting as Agent,
– the Portuguese Government, by L. Inez Fernandes and M. Figueiredo and by C. Vieira Guerra, acting as Agents,
– the European Commission, by D. Nardi and H. Kranenborg and by I. Rubene, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 26 January 2017,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 7(f) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

2 The request has been made in proceedings between Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde (Office responsible for road traffic administrative infringements of the Security Police of the Region of Riga, Latvia) ('the national police') and Rīgas pašvaldības SIA 'Rīgas satiksme' ('Rīgas satiksme'), a trolleybus company in the city of Riga, relating to a request for disclosure of data identifying the perpetrator of an accident.

Legal context

EU law

3 Article 1 of Directive 95/46, entitled ‘Object of the Directive’, provides:

‘1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.’

4 Article 2 of that directive provides:

‘For the purpose of this Directive:

(a) “personal data” shall mean any information relating to an identified or identifiable natural person (“data subject”); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) “processing of personal data” (“processing”) shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

…

(d) “controller” shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law;

…’

5 Article 5 of Directive 95/46 states:

‘Member States shall, within the limits of the provisions of this Chapter, determine more precisely the conditions under which the processing of personal data is lawful.’

6 In Section II, entitled ‘Criteria for making data processing legitimate’, of Chapter II of Directive 95/46, Article 7 provides:

‘Member States shall provide that personal data may be processed only if:

(a) the data subject has unambiguously given his consent; or

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or

(c) processing is necessary for compliance with a legal obligation to which the controller is subject; or

(d) processing is necessary in order to protect the vital interests of the data subject; or

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection under Article 1(1).’

7 Article 8(2)(e) of Directive 95/46 provides that the prohibition on the processing of certain types of personal data, such as that

revealing racial origin or political opinions, is not to apply where the processing relates to data which is manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims.

Latvian law

8 Article 6 of the Fizisko personu datu aizsardzības likums (Law on the protection of personal data), of 23 March 2000 (*Latvijas Vēstnesis,* 2000*,* No 123/124), provides:

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

9 Article 7 of that law, which seeks to transpose Article 7 of Directive 95/46, provides that the processing of personal data is to be authorised only if that law does not provide otherwise and if at least one of the following requirements is met:

'(1) the data subject has given his consent;

(2) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(3) processing is necessary for compliance with a legal obligation to which the controller is subject;

(4) processing is necessary in order to protect the vital interests of the data subject, including his life and health;

(5) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed;

(6) processing is necessary for the purposes of the legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject.'

10 Article 12 of that Law provides that personal data relating to criminal offenses, criminal and administrative convictions, as well as judicial decisions or judicial case files, may be processed only by persons provided for by law and in the cases provided for by law.

11 According to Article 261 of the Latvijas Administratīvo pārkāpumu kodekss (Latvian Administrative Infringements Code), a person who has suffered harm caused by an infringement may be given the status of victim in the context of administrative proceedings leading to sanctions, by the body or official who is authorised to examine the case. That provision provides for the rights of victims, including the right to consult the case file and to use his procedural rights to obtain compensation.

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

12 In December 2012 a road accident occurred in Riga. A taxi driver had stopped his vehicle at the side of the road. As a trolleybus of Rīgas satiksme was passing alongside the taxi, a passenger sitting in the back seat of that taxi opened the door, which scraped against and damaged the trolleybus. Administrative proceedings leading to sanctions were initiated and a report was drawn up finding an administrative offence.

13 As the taxi driver was initially held responsible for that accident, Rīgas satiksme sought compensation from the insurance company covering the civil liability of the owner and lawful user of the taxi. However, that insurance company informed Rīgas satiksme that it would not pay Rīgas satiksme any compensation on the basis that the accident had occurred due to the conduct of the passenger in that taxi, rather than the driver. It stated that Rīgas satiksme could bring civil proceedings against that passenger.

14 Rīgas satiksme then applied to the national police asking it to provide information concerning the person on whom an administrative penalty had been imposed following the accident, to provide copies of the statements given by the taxi driver and the passenger on the circumstances of the accident, and to indicate the first name and surname, identity document number, and address of the taxi passenger. Rīgas satiksme indicated to the national police that the information requested would be used only for the

purpose of bringing civil proceedings.

15 The national police responded by granting Rīgas satiksme's request in part, namely by providing the first name and surname of the taxi passenger but refusing to provide the identity document number and address of that person. Nor did it send Rīgas satiksme the statements given by the persons involved in the accident.

16 The decision of the national police was based on the fact that documents in the case file in administrative proceedings leading to sanctions may be provided only to the parties to those proceedings. Rīgas satiksme is not a party to the case at issue. Under the Latvian Administrative Infringements Code, a person may at his express request be given the status of victim in administrative proceedings leading to sanctions by the body or official responsible for examining the case. In the present case Rīgas satiksme did not exercise that right.

17 Rīgas satiksme brought an administrative law action before the administratīvā rajona tiesa (District Administrative Court, Latvia) against the decision of the national police in so far as it refused to reveal the identity document number and address of the passenger involved in the accident. By judgment of 16 May 2014, that court upheld the action brought by Rīgas satiksme and ordered the national police to provide the information relating to the identity document number and place of residence of that passenger.

18 The national police brought an appeal in cassation before the referring court. That court sought an opinion from the Datu valsts inspekcija (National Data Protection Agency, Latvia) the Data Protection Agency which stated, in its response of 13 October 2015, that Article 7(6) of the Law on the Protection of Personal Data could not be used as a legal basis to provide personal data in the case in the main proceedings as the Latvian Administrative Infringements Code sets out the persons to which the national police may disclose the information relating to a case. Consequently, according to the National Data Protection Agency, the disclosure of personal data relating to administrative proceedings leading to sanctions may be carried out only in accordance with paragraphs 3 and 5 of that article in the situations laid down by the law. Article 7 of the law does not oblige the data controller, in this case, the national police, to process the data, but simply permits it.

19 The National Data Protection Agency also indicated that Rīgas satiksme had two other means of obtaining that information. It could either submit a reasoned request to the Civil Registry or apply to the courts pursuant to Articles 98 to 100 of the Latvian Law on Civil Procedure for the production of evidence, in order for the court in question to request from the national police the personal data so that Rīgas satiksme would be able to bring proceedings against the person concerned.

20 The referring court has doubts regarding the effectiveness of the means of obtaining the personal data referred to by the National Data Protection Agency. It states, in that regard, first, that if an application made to the Civil Registry mentions only the name of the taxi passenger, it may be that that passenger cannot be identified by his identity document number as the same surname and first name may be shared by several people. Second, the referring court takes the view that, in the light of the national law on the provision on evidence, in order to bring a civil action, the applicant would have to know at least the place of residence of the defendant.

21 In that regard, the referring court is of the opinion that there are doubts as to the interpretation of the concept of 'necessity' referred to in Article 7(f) of that directive.

22 In those circumstances, the Augstākās tiesas Administratīvo lietu departaments (Supreme Court, Administrative Division, Latvia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the phrase 'is necessary for the purposes of the legitimate interests pursued by the … third party or parties to whom the data are disclosed', in Article 7(f) of Directive 95/46/EC, be interpreted as meaning that the national police must disclose to Rīgas satiksme the personal data sought [by the latter] which are necessary in order for civil proceedings to be initiated?

(2) Is the fact that, as the documents in the case file indicate, the taxi passenger whose data is sought by Rīgas satiksme was a minor at the time of the accident relevant to the answer to that question?'

Consideration of the questions referred

23 By its questions, which it is appropriate to examine together, the referring court asks whether Article 7(f) of Directive 95/46

must be interpreted as imposing the obligation to disclose personal data to a third party in order to enable him to bring an action for damages before a civil court for harm caused by the person concerned by the protection of that data, and if the fact that that person is a minor has a bearing on the interpretation of that provision.

24 In the case in the main proceedings, it is common ground that the identity document number and the address of the taxi passenger, of which Rīgas satiksme requests communication, constitute information concerning an identified or identifiable natural person and, therefore, 'personal data' within the meaning of Article 2(a) of Directive 95/46. It is also common ground that the national police, to which that request was addressed, is responsible for processing that data and, in particular, for their possible communication within the meaning of Article 2(d) of that directive.

25 In accordance with Article 5 of Directive 95/46, it is for the Member States to specify, within the limits of the provisions of that directive, the conditions under which the processing of personal data is lawful. Article 7 of that directive, which lays down the principles relating to the legitimacy of such processing, provides in that regard that 'Member States shall provide that [it] may be processed only if' one of the situations listed exhaustively by that provision exists. Under Article 7(f), such processing may be carried out where it is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection under Article 1(1) of Directive 95/46.

26 It is accordingly clear from the scheme of Directive 95/46 and from the wording of Article 7 thereof that Article 7(f) of Directive 95/46 does not, in itself, set out an obligation, but expresses the possibility of processing data such as the communication to a third party of data necessary for the purposes of the legitimate interests pursued by that third party. As the Advocate General stated in points 43 to 46 of his Opinion, such an interpretation may also be deduced from other EU instruments touching upon personal data (see, to that effect, as regards the processing of personal data in the electronic communications sector, judgment of 29 January 2008, *Promusicae*, C-275/06, EU:C:2008:54, paragraphs 54 and 55).

27 However, it should be pointed out that Article 7(f) of Directive 95/46 does not preclude such communication, in the event that it is made on the basis of national law, in accordance with the conditions laid down in that provision.

28 In that regard, Article 7(f) of Directive 95/46 lays down three cumulative conditions so that the processing of personal data is lawful, namely, first, the pursuit of a legitimate interest by the data controller or by the third party or parties to whom the data are disclosed; second, the need to process personal data for the purposes of the legitimate interests pursued; and third, that the fundamental rights and freedoms of the person concerned by the data protection do not take precedence.

29 As regards the condition relating to the pursuit of a legitimate interest, as the Advocate General stated in points 65, 79 and 80 of his Opinion, there is no doubt that the interest of a third party in obtaining the personal information of a person who damaged their property in order to sue that person for damages can be qualified as a legitimate interest (see, to that effect, judgment of 29 January 2008, *Promusicae*, C-275/06, EU:C:2008:54, paragraph 53). That analysis is supported by Article 8(2)(e) of Directive 95/46, which provides that the prohibition on the processing of certain types of personal data, such as those revealing racial origin or political opinions, is not to apply, in particular, where the processing is necessary for the establishment, exercise or defence of legal claims.

30 As regards the condition relating to the necessity of processing personal data, it should be borne in mind that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary (judgments of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 86; of 7 November 2013, *IPI*, C-473/12, EU:C:2013:715, paragraph 39; and of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paragraph 28). In that regard, according to the information provided by the national court, communication of merely the first name and surname of the person who caused the damage does not make it possible to identify that person with sufficient precision in order to be able to bring an action against him. Accordingly, for that purpose, it is necessary to obtain also the address and/or the identification number of that person.

31 Finally, as regards the condition of balancing the opposing rights and interests at issue, it depends in principle on the specific circumstances of the particular case (see, to that effect, judgments of 24 November 2011, *Asociación Nacional de Establecimientos Financieros de Crédito*, C-468/10 and C-469/10, EU:C:2011:777, paragraph 40, and of 19 October 2016, *Breyer*, C-582/14, EU:C:2016:779, paragraph 62).

32 In that regard, the Court has held that it is possible to take into consideration the fact that the seriousness of the infringement

of the data subject's fundamental rights resulting from that processing can vary depending on the possibility of accessing the data at issue in public sources (see, to that effect, judgment of 24 November 2011, *Asociación Nacional de Establecimientos Financieros de Crédito*, C-468/10 and C-469/10, EU:C:2011:777, paragraph 44).

33 As regards the second part of the question referred for a preliminary ruling as set out in paragraph 23 of the present judgment, it should be noted that the age of the data subject may be one of the factors which should be taken into account in the context of that balancing of interests. However, as the Advocate General pointed out in points 82 to 84 of his Opinion and subject to the determination to be carried out in that respect by the national court, it does not appear to be justified, in circumstances such as those at issue in the main proceedings, to refuse to disclose to an injured party the personal data necessary for bringing an action for damages against the person who caused the harm, or, where appropriate, the persons exercising parental authority, on the ground that the person who caused the damage was a minor.

34 It follows from the foregoing considerations that Article 7(f) of Directive 95/46 must be interpreted as not imposing the obligation to disclose personal data to a third party in order to enable him to bring an action for damages before a civil court for harm caused by the person concerned by the protection of that data. However, Article 7(f) of that directive does not preclude such disclosure on the basis of national law.

Costs

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

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

Article 7(f) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data must be interpreted as not imposing the obligation to disclose personal data to a third party in order to enable him to bring an action for damages before a civil court for harm caused by the person concerned by the protection of that data. However, Article 7(f) of that directive does not preclude such disclosure on the basis of national law.

[Signatures]

---

* Language of the case: Latvian.

Case C 16/16 P - Kingdom of Belgium v European Commission

OPINION OF ADVOCATE GENERAL BOBEK

delivered on 12 December 2017(1)

Case C-16/16 P

Kingdom of Belgium

v

European Commission

(Appeal — Protection of consumers — Online gambling services — Protection of consumers and players of online gambling services and prevention of minors from gambling online — Recommendation of the Commission — Article 263 TFEU — Actionable act — Judicial review of soft law instruments — Non-binding acts producing legal effects — Acts that can reasonably be perceived as inducing compliance)

Table of contents

I. Introduction

1. One of the great debates that have shaped the (Anglo-American) legal philosophy over the last few decades is the exchange between Hart and Dworkin on the nature of the law and the structure of a legal system. In the late 1960s and 1970s, Dworkin's critique of Hart's *Concept of Law* (2) crystallised around several themes. One of Dworkin's key propositions was that Hart's understanding of a legal system is too narrow and too focused on legal *rules*, and omits another key element of any legal system: *principles*. (3)

2. It is perhaps safe to assume that, notwithstanding its title, when adopting the 'Recommendation on *principles* for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online' (the 'Recommendation'), (4) the Commission did not intend to take sides in that theoretical debate. However, following an action for annulment brought by the Kingdom of Belgium against that Recommendation before the General Court, a nominally similar, but substantively somewhat different type of debate has been triggered: in EU law, for the purpose of judicial review, how do such *principles* differ from (binding, legal) *rules*? Furthermore, can a Commission Recommendation, an EU instrument explicitly excluded from judicial review under Article 263(1) TFEU, nonetheless be subject to an action for annulment under that provision?

3. The General Court declared Belgium's action inadmissible, (5) holding that it was not intended that the Recommendation have binding legal effects. The Kingdom of Belgium appealed against that decision to this Court.

4. In this Opinion, my suggestion to the Court is essentially twofold: first, on the *general* level, in view of the changing legislative landscape of (not only) EU law, which is marked by a proliferation of various soft law instruments, access to the EU courts should be adapted in order to respond to those developments. In this sense, and as far as the theoretical pun permits, the approach should indeed become somewhat more Dworkinian, recognising the fact that there are norms generating significant legal effects that find themselves beyond the binary logic of binding/non-binding legal rules. Second, on the *concrete* level of the Recommendation at issue in the present case, a normative instrument that in the light of its logic, context, purpose and partially also language, can reasonably be seen as setting *rules* of behaviour, ought to be subject to judicial review, irrespective of the fact that it is somewhat disguised as a set of mere '*principles*' in a recommendation.

II. Legal framework

A. Primary law

5. By virtue of Article 4(3) TEU, the 'Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

6. Article 263(1) TFEU provides: 'The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.'

7. Pursuant to Article 288 TFEU:

'To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.'

8. Article 292 TFEU reads as follows: 'The Council shall adopt recommendations. It shall act on a proposal from the Commission in all cases where the Treaties provide that it shall adopt acts on a proposal from the Commission. It shall act unanimously in those areas in which unanimity is required for the adoption of a Union act. The Commission, and the European Central Bank in the specific cases provided for in the Treaties, shall adopt recommendations.'

9. Article 296 TFEU states that:

'Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality.

Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.

When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.'

B. The Commission Recommendation

10. Pursuant to Recital 5 of the Commission Recommendation 'in the absence of harmonisation at Union level, Member States are in principle free to set the objectives of their policy on games of chance and to define the level of protection sought for the purpose of protecting the health of consumers…'.

11. Recital 8 sets out that 'the rules and policies that Member States have introduced to pursue public interest objectives vary considerably. Action at Union level encourages Member States to provide a high level of protection throughout the Union.'.

12. The aim of the Commission Recommendation is stated in Recital 9 as: 'to safeguard the health of consumers and players and thus also to minimise eventual economic harm that may result from compulsive or excessive gambling. To that end, it recommends principles for a higher level of protection of consumers, players and minors as regards online gambling services. In preparing this Recommendation, the Commission has drawn from good practices in the Member States'.

13. Recital 15 indicates that 'it is appropriate to invite Member States to put forward rules providing consumers with information about online gambling…'.

14. Recital 16 states that 'where appropriate, the principles of this Recommendation should not only be addressed to operators but also to third parties, including so-called "affiliates", who are allowed to promote online gambling services on behalf of the operator'.

15. Recital 27 notes that 'effective supervision is necessary for the appropriate protection of public interest objectives. Member States should designate competent authorities, lay down clear guidance for operators and provide easily accessible information for consumers, players and vulnerable groups including minors'.

16. Recital 29 adds that 'this Recommendation does not interfere with Directive 2005/29/EC of the European Parliament and of the Council and Council Directive 93/113/EEC'.

17. Section I of the Recommendation sets out its purpose. Under paragraph 1, 'Member States are recommended to achieve a high level of protection for consumers, players and minors through the adoption of principles for online gambling services and for responsible commercial communications of those services, in order to safeguard health and to also minimise the eventual economic harm that may result from compulsory or excessive gambling'. Paragraph 2 states that 'this Recommendation does not interfere with the right of Member States to regulate gambling services'.

18. Section III of the Recommendation lays down rather specific and detailed information requirements for operators' gambling websites, notably as to the kind of information that should be displayed on their landing page and how many clicks it takes to access each piece of information. Section IV adds further requirements concerning minors.

19. Section V concerns player registration and accounts. In particular, Paragraph 15 states that 'Member States should ensure that a person is only permitted to participate in an online gambling service when registered as a player and holding an account with the operator'.

20. Section VI addresses player activity and support. Section VIII covers commercial communication, Section IX sponsorship.

21. Section XI deals with supervision. Paragraph 51 invites Member States 'to designate competent gambling regulatory authorities when applying the principles laid down in this Recommendation to ensure and monitor in an independent manner effective compliance with national measures taken in support of the principles set out in this recommendation'.

22. Section XII, the last section of the Recommendation, is on reporting. Its Paragraph 52 states that 'Member States are invited to notify the Commission of any measures taken pursuant to this Recommendation by 19 January 2016 in order for the Commission to be able to evaluate the implementation of this Recommendation'.

23. Under Paragraph 53, 'Member States are invited to collect reliable annual data for statistical purposes on:

(a) the applicable protection measures in particular the number of player accounts (opened and closed), the number of self-excluded players, those experiencing a gambling disorder and complaints by players;

(b) commercial communication by category and by type of breaches of the principles;

Member States are invited to communicate this information to the Commission, for the first time by 19 July 2016.'

24. Finally, Paragraph 54 states that 'the Commission should evaluate the implementation of the Recommendation by 19 January 2017'.

III. Facts and legal proceedings

25. In 2011, in a Green Paper 'on online gambling in the internal market', (6) the Commission identified the Member States' common objectives on regulation of online gambling services. It also identified the key priority areas for EU action.

26. In its Communication 'Towards a comprehensive European Framework for online gambling', adopted on 23 October 2012, (7) the Commission proposed a series of actions to respond to the regulatory, societal and technical challenges of online gambling. In particular, the Commission stated that, overall, it did not appear appropriate at this stage to propose sector-specific EU legislation for online gambling. In that Communication the Commission announced that it would present recommendations on the protection of consumers in the area of online gambling services, including the protection of minors, and on responsible commercial communication of online gambling services.

27. The European Parliament, in its Resolution of 10 September 2013 on online gambling in the internal market, (8) urged the Commission to explore the possibility of interoperability between national self-exclusion registers. This would raise awareness about the risks of addiction to gambling and to consider compulsory third-party identification checks. The Parliament also called for online gambling operators to be obliged to provide information on regulatory authorities and warnings to minors and the use of self-restrictions on the gambling website. In addition, the Parliament advocated the setting out of common principles for responsible commercial communications. It recommended that commercial communications should contain clear warnings as to the consequences of compulsive gambling and the risks of gambling addiction. Commercial communications should be neither excessive nor displayed on content specifically targeted at minors, nor where there is a higher risk of targeting minors.

28. The European Economic and Social Committee has also called on the Commission to intervene to improve consumer protection as regards online gambling, and to protect minors. (9)

29. Within such a context, the European Commission adopted the impugned Recommendation on 14 July 2014 on the basis of Article 292 TFEU. It was published in full in the L series of the *Official Journal of the European Union* from 19 July 2014.

30. The adoption of the Recommendation was accompanied by the Press Release (10) and a Memorandum. (11) That Memorandum presented a Commission Recommendation in the following terms: 'A Recommendation is a non-binding instrument used by the European Commission to send a clear message to Member States as to what actions are expected to remedy a situation, while leaving sufficient flexibility at national level as to how to achieve this. By setting the objectives to be attained, it should act as a catalyst for the development of consistent principles to be applied throughout the European Union.' As to the choice of the type of instrument, the Memorandum added that 'there is no sector specific EU legislation in the online gambling services sector and it was not considered appropriate to propose such specific legislation. Moreover, a Commission Recommendation can be adopted immediately whereas proposals for legislation would have to be adopted by the EU's Council of Ministers and the European Parliament which can take time'.

IV. The order under appeal

31. On 13 October 2014, the Kingdom of Belgium lodged an application for the annulment of the Recommendation in question before the General Court.

32. By order of 27 October 2015, the General Court dismissed the action as inadmissible. (12) It held that, in the light of its wording, content and context, the Recommendation did not have and was not intended to have binding legal effect. As a result, it could not be

classified as an act that can be reviewed as to its legality under Article 263 TFEU. (13)

33. In its reasoning, the General Court first noted that the Recommendation was worded mainly in non-mandatory terms, despite some minor divergences between the language versions. (14)

34. The General Court further held that the content of the Recommendation showed that the Commission had no intention to confer binding legal effects on it. (15) In particular, paragraphs 51 to 53 *invite*Member States to designate gambling regulatory authorities and to notify the Commission of any measures taken pursuant to the Recommendation. This does not impose an obligation on the Member States to apply the principles set out in that act. Furthermore, the Commission expressly stated that the Recommendation did not interfere with the Member States' regulatory powers in this field: it merely invited Member States to comply with the principles laid down therein. (16)

35. The General Court considered that the analysis of the wording and content of the Recommendation was confirmed by an analysis of its context. Discussions of the Council, the European Parliament and the Commission show that there was no intention to propose EU legislation in this field at that time. (17)

36. The General Court added that publication in the L Series of the Official Journal rather than in the C Series could not on its own invalidate the conclusion that the Recommendation was not intended to have binding legal effect. (18) It also said that it cannot be inferred from the mere fact that recommendations, although not binding, may have legal effect, that they can be judicially challenged. To hold otherwise would run counter to Article 263 TFEU, according to which an action for annulment cannot be brought against recommendations, which do not have binding legal effect. (19)

37. An alleged infringement by an EU institution of the principles of institutional balance, conferral of powers or of sincere cooperation cannot give rise to an exception to the admissibility rules governing actions for annulment laid down by the Treaty. (20) In particular, it does not follow from the fact that in infringement proceedings the Court may examine an act or action with no binding legal effect in the light of the Member States' duty of sincere cooperation that the same must apply in an annulment action. (21)

38. The General Court stated that the Recommendation does not lay down any rule or principle to harmonise the services market in the online gambling sector, contrary to the Appellant's argument. This was clear in the light of paragraph 2 which expressly confirms the Member States' regulatory powers in this area. (22) The Recommendation was not designed to limit the possibility for each Member State to determine, in accordance with its own preferences, what is required in order to ensure that moral, religious and cultural aspects are protected. (23)

V. Proceedings before the Court

39. By its appeal, the Kingdom of Belgium (the Appellant) asks this Court to set aside the General Court's order, to declare admissible the action for annulment, to decide this case on the merits, to declare admissible the applications for intervention of the Hellenic Republic and the Portuguese Republic, (24) and to order the Commission to pay the costs.

40. The Commission asks the Court to dismiss the appeal and to order the Appellant to pay the costs.

41. In its appeal, the Appellant raises three grounds of appeal: (i) infringement of the principles of conferred competences, loyalty and institutional balance; (ii) the violation of the principle of loyalty and the disregard for the position of Member States as privileged applicants; and; (iii) the incorrect interpretation of the legal effect of the Recommendation *vis-à-vis* Belgium.

42. In the first ground of appeal, the Appellant claims that the action should have been declared admissible because the General Court should have examined whether the Recommendation's drafter had competence, instead of only examining whether it produces binding legal effect. More precisely, the General Court did not respect the principles of conferred competences, loyalty and institutional balance, as it failed to examine whether there was a substantive legal basis justifying the adoption of the Recommendation. Article 292 TFEU does not serve as an autonomous legal basis: it empowers both the Council and Commission to adopt recommendations, but to know which of the two is competent the substantive competences conferred on each of those institutions by the Treaties must be examined.

43. Further, the Appellant claims that even a non-binding recommendation should still be amenable to judicial review to determine whether it complies with the abovementioned principles. By not allowing for judicial review, the General Court disregarded the principle of conferred competences. It also applied Article 263 TFEU in a manner that does not comply with established case-law:

any measure adopted by the institutions should clearly state its legal basis. (25)

44. According to the Appellant, the simple fact of the Commission adopting one of the legal instruments listed in Article 288 TFEU without such competence would in itself produce a legal effect because it would disturb the balance of competences between the EU and the Member States, and also between the EU's institutions. Consequently, it should be reviewable by the Court. Compliance with those principles should be ascertained before assessing whether it is a 'true' recommendation. The Appellant submits that the actual legislative EU act must be adopted in accordance with EU law and respect the prerogatives of the other EU institutions and of the Member States.

45. In its second ground of appeal, the Appellant criticises the fact that, basing itself on the difference between annulment proceedings and infringement proceedings, the General Court found the case-law setting out that acts with non-binding legal effects adopted in violation of the loyal cooperation requirement are amenable to judicial review in infringement proceedings to be irrelevant. (26) That goes fundamentally against the mutual character of the principle of loyalty. (27) This leads to the General Court preventing a Member State from accessing the Court in annulment actions whereas Member States are privileged applicants.

46. In its third ground of appeal, the Appellant argues that the General Court has not correctly applied *ERTA* (28) and subsequent case-law in its examination of the Recommendation. It concludes that the legality of the Recommendation can be reviewed under Article 263 TFEU because it produces legal effects, at least vis-à-vis Belgium and Portugal.

47. The Appellant claims that the General Court should have taken into consideration the fact that the Recommendation is worded in an imperative manner in several language versions, such as Portuguese, but also two out of the three official languages of Belgium, namely Dutch and German, in particular since recommendations must be taken into account by national courts. The General Court should not look at the Recommendation in a general way, but in a specific manner by determining whether it produces legal effects with regard to Belgium. Considering the imperative wording in Dutch and German, it is possible to conclude that there are 'stronger' legal effects vis-à-vis Belgium, compared to other language versions.

48. In its defence, the Commission dismisses the Appellant's arguments as to the conditions for admissibility of annulment proceedings against recommendations. It suggests that the Appellant's arguments concern the merits of the case (in raising the principles of conferral, loyal cooperation, institutional balance, and legal basis) whereas the pending procedure is limited to admissibility.

49. Turning to the mutual character of the principle of sincerity (second ground), the Commission states that it was wrong for the Kingdom of Belgium to assert that the General Court has created a procedural inequality in favour of the Commission in infringement proceedings and at the expense of the Member States in annulment proceedings. That conclusion of the General Court only implies that the legality of recommendations cannot be reviewed on the basis of Article 263 TFEU. Thus, there is no inequality in the application of Article 263 TFEU.

50. The Commission considers that it is irrelevant that slightly different wording appears in one of the Member State's official language versions. This is because an assessment of the legal effects produced by a recommendation, if any, should also be based on the instrument's aim and context. According to the Commission, EU acts should be interpreted in an autonomous manner, independently of the domestic law.

51. In its reply, the Appellant focused on the legal basis of the Recommendation, which it deems to be lacking. It insisted that a Commission Recommendation produces legal effects by virtue of its existence (albeit limited) which means it must be reviewable as to its legality. A Member State should be able to ask for a review of the validity of any EU act when it is not clear whether it was passed within the limits of the conferral principle, especially when there is no substantive legal basis. A mere reference to Article 292 TFEU is not enough. It does not fulfil the requirement for a substantive legal basis.

52. In its rejoinder, the Commission argued that there is no lacuna in the procedures provided for by the Treaties. Recommendations are excluded from the scope of Article 263 TFEU. The only question is whether this Recommendation is a 'true' recommendation. The issue of the legal basis belongs to an assessment of the merits and should therefore be assessed only if the claim is admissible. In any event, the Commission did not consider that the Appellant had proved why a legal basis other than Article 292 TFEU would be necessary.

53. In addition to their written submissions, the Kingdom of Belgium and the Commission presented oral argument at the hearing held on 26 June 2017.

VI. Assessment

54. In its appeal, the Appellant raised three grounds. I consider it appropriate to deal with the third ground of appeal first (by which the Appellant claims that the General Court erred in its assessment of the absence of legal effects of the contested Recommendation), essentially for two reasons. First, it is the thrust of the appeal before the Court. In one way or another, the third ground also touches on elements of the first and second ground. To some extent, in a case like the present one, elements of substantive assessment are already linked to and seep into the admissibility stage. Second, I am of the view that the Appellant's third ground of appeal is well-founded. The General Court erred in law: it incorrectly interpreted the effects of the Recommendation at issue, and thus it incorrectly assessed the admissibility of the application. (29)

55. A recommendation is a 'typical' act of EU law, listed in Article 288 TFEU. In contrast to a potentially vast array of 'atypical' acts of EU institutions and bodies, namely those not listed, Article 288 TFEU sets out the characteristics of a recommendation - it shall have no binding force. In addition, the first indent of Article 263 TFEU clearly excludes recommendations from actions for annulment.

56. In view of this legislative landscape in primary law, the extension of the *ERTA* (30) line of case-law, designed for 'atypical' acts, is perhaps not entirely automatic. Two approaches are therefore possible when dealing with potential actions for annulment against recommendations. First, there is the '*substance over form*' approach, meaning that even in the case of typical acts, it is the analysis of the substance of the contested act that shall determine the admissibility of an action for annulment. If, in contrast to its title, the act is in fact something else than it says (for example that it is not a 'true' recommendation), it ought to be reviewable, irrespective of its appellation. Second, there is the '*form determines substance*' approach, suggesting that a spade is a spade, even if it comes in a somewhat strange shape. But because and as long as there is 'spade' written on it, it shall be understood and interpreted as such.

57. This Opinion is structured as follows. Section A sets out the first approach: I start by going back to the roots of the test in *ERTA* (A.1.), before turning to the subsequent case-law and the understanding of the test by the General Court in the present case (A.2.). Next, I shall explain why, in case of recommendations, that test is problematic on a number of levels (A.3.), before turning to its suggested readjustment (A.4.). I then demonstrate how such a more nuanced test would apply to the Recommendation at issue (A.5.).

58. Section B starts by outlining the second approach (B.1.), before setting out further arguments why, in my view, that approach should not be embraced by the Court (B.2.). However, should the Court nevertheless wish to go down that road, I would invite it to provide at least several important clarifications as to the nature and effects of recommendations (B.3.).

A. Substance over form

1. ERTA

59. In its first version from 1957, Article 173 of the EEC Treaty (later Article 230 EC, today Article 263 TFEU) stated that the legality of 'legal acts of the Commission and Council, other than recommendations and opinions' could be reviewed before the Court. It did not give a positive definition of the legal acts that could be reviewed. It was therefore for the Court to decide which acts were amenable to review: whether it was only those acts of the Commission or Council that were explicitly referred to as binding acts in the then Article 189 EEC (now Article 288 TFEU), namely regulations, directives, and decisions, or whether they also included 'atypical acts' adopted by those institutions, but not expressly mentioned in the Treaties.

60. In its *ERTA* judgment, (31) which concerned minutes of the Council relating to the negotiation and conclusion of an international agreement, the Court laid down a test to determine whether or not an action for annulment of an act of the institutions is admissible ('the *ERTA* test'). The Court held that under Article 173 EEC an act 'open to review by the Court' includes 'all measures adopted by the institutions which are intended to have legal force … An action for annulment must therefore be available in the case of *all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects*'. (32)

61. Thus, the original *ERTA* test was concerned with two elements: was there an act of the EU which is *intended* to have *legal* effects?

62. In subsequent case-law, the Court has applied that test to a number of atypical acts such as internal Commission instructions or guidelines; (33) codes of conduct implementing a Council regulation; (34) communications; (35) information notes; (36) or letters. (37)

63. Inspecting those decisions closely, the language of the test has not always been exactly the same. There is, however, one clear common theme: in relation to all those atypical acts, the Court has clearly held that the substance of an EU act shall prevail over its form when deciding on the admissibility of an action for annulment. (38) The actual name and form of the act are not conclusive in determining whether its legality can be reviewed or not.

2. The ERTA test as applied by the General Court in the present case

64. In the contested order the General Court stated that: 'according to consistent case-law any measures adopted by the institutions, whatever their form, which are intended to have binding legal effects, are regarded as actionable measures within the meaning of Article 263 TFEU… Any act not producing *binding* legal effects, such as preparatory acts, confirmatory measures and implementing measures, *mere recommendations* and opinions and, in principle, internal instructions, falls outside the scope of the judicial review provided for in Article 263 TFEU… In the light of the case-law, in order to determine whether an act is capable of having legal effects and, therefore, whether an action for annulment under Article 263 TFEU can be brought against it, it is necessary to examine its wording and context, its substance and the intention of its author'. (39)

65. The General Court then went on and applied the *ERTA* test to a recommendation, at least to my knowledge, for the first time. The General Court examined the wording, the context, the substance and the intention of the drafter. It held that the Recommendation did not have binding legal effect on its addressees. The General Court admitted that the principles set out in the Recommendation were very detailed. It held nonetheless that they had no 'obligatory' nature, as notably seen through the 'invitation'-type wording of most language versions of the Recommendation. Consequently, by giving more weight to the wording than to the other factors, the General Court held that the application was inadmissible.

66. In sum, the determining elements in the General Court's analysis of the contested Recommendation appear to be the absence of *binding legal* effects of the Recommendation, which was determined by the*intent* of the Commission, as inferred primarily from the form of the act and its wording.

3. The problematic elements of the ERTA test

67. There are some problems that the *ERTA* test poses, if conceived of and applied in this way. They can be grouped in two categories: first, there are the issues *internal* to the test, its logic, conditions and their articulation, that come to the surface perhaps even more sharply when it is applied to a recommendation. Second, there are issues that could be called *external* ones. They relate to the fact that the *ERTA*test, over time effectively becoming narrower and narrower, is falling out of sync with the evolution of the EU's normative landscape. In a world where various instruments of soft law are, in fact, becoming much more numerous and significant than in 1971, the conditions for standing and judicial review should react to such developments.

(a) Internal issues

68. There are two elements that stand out in this regard: the necessarily *binding* nature of an EU act in order to be able to review its legality (1) and the drafter's *intent* as to its legal effects (2).

(1) Legal effects, binding force, or binding legal effect?

69. Paragraph 42 of the *ERTA* judgment (40) did not refer to measures intended to have *binding* legal effect, but only *legal* effects. The same appears to hold true of the expressions used in the other extant language versions of the time. (41)

70. The shift in terminology from mere legal effects to '*binding* legal effects' appeared in subsequent case-law. (42) That trend seems to be advancing further recently as the Court now conditions the possibility of judicial review of EU acts on whether they have *binding* legal effect. (43)

71. Admittedly, it could be suggested that in spite of the use of the term 'legal effects', what the Court in fact meant in *ERTA* was 'binding force', although that proposition is, in view of the type of document reviewed in that case (Council minutes), not entirely convincing. Such a suggestion could in particular rely on the wording of Article 189 EEC, which back then already distinguished between binding acts (regulations, directives and decisions) and non-binding acts (recommendations and opinions). (44) Thus, even if the Court did not clearly construe Article 173 EEC in the light of the nomenclature laid down in Article 189 EEC, it is likely that that latter provision had an impact on the test.

72. Be that as it may, it is also true that it is still a rather recent phenomenon that the Court seems to have become generally stricter by narrowing the scope of Article 263 TFEU to acts that have *binding* legal effect, adding to the wording of that provision, which limits itself to just *legal* effects (vis-à-vis third parties). However, in the absence of any clear discussion in the case-law on that distinction, and above all the evidence of an advised choice in one direction or the other, one may wonder whether the Court in fact wished to become stricter and narrower. It is nonetheless clear that neither the wording, nor the logic of *ERTA* necessarily implied *binding* in addition to just *legal* effects.

73. This is not just a game of words. There is a considerable practical impact, as is evident in the present case. What exactly constitutes *legal* effects may be open to debate. The notion is, however, clearly quite broad, accommodating all types of impact on/in the law, its interpretation and application. By contrast, binding effect, a fortiori binding *legal* effect, represents a much, much narrower category.

74. Traditionally, the *binding* force of the law connects with coercion. In case of failure to comply, enforcement and sanction may follow. In such a (pure positivist (45)) vision, the existence of a sanction is the defining element of binding force.

75. Theoretical discussions aside, it is quite clear that if the yardstick of *binding legal* force were to be embraced, a number of acts that are likely to have significant legal effects on the behaviour of the addressees, but which are not in the traditional sense binding because they contain no direct or independent coercion mechanism, will escape review under the *ERTA* test, and ultimately under Article 263(1) TFEU. As shall be seen in due course, that is notably the case with the Recommendation at hand.

(2) What role for the drafter's intent?

76. There is, second, a lack of internal clarity in the *ERTA* test as applied by the General Court: what is the precise role of the drafter's intent for the purposes of determining whether an act shall be deemed to produce (binding) legal effects?

77. *ERTA,* as well as the current wording of Article 263 TFEU, are based on the drafter's intent. The use of the past tense (was intended to) would further imply that what is relevant is the ascertaining of *past (historical) subjective* intent of the drafter as it stood at the moment of the adoption of the act in question. Such an understanding would be arguably also in line with the general rules applicable to annulment actions. In the course of such actions, the contested EU acts must be assessed on the basis of the elements of fact and law existing at the time when the measure was adopted. (46)

78. However, if intent of the drafter of the act is supposed always to be a subjective historical one, then in practice, no recommendation will ever be reviewable. The assessment of the nature and effects of a recommendation quickly falls into a loophole. Because the Commission had no intention of passing binding legislation, a recommendation was selected. Because the Commission selected a recommendation, its subjective intent was clearly for that instrument not to be binding. Because of such intent, effectively certified by the choice of the instrument, it can never be binding, irrespective of its content and wording, because the Commission had no intention of passing any binding legislation.

79. In this way, the choice of the instrument will always pre-determine the context and the purpose of the measure, which is then likely to override any content and wording of it.

(b) External problems

80. Besides these logical problems, inherent in the articulation of the *ERTA* test embraced by the General Court when applied to recommendations, the same test arguably faces broader, external challenges. Two will be outlined in this section: first, there is the rise of various forms of soft law that strictly speaking do not have binding force but at the same time generate legal effects (1). Second, recommendations are in practice likely to generate a number of legal effects, often quite significant ones, on both the EU level as well as the national level (2).

(1) The rise of soft law

81. There is a wide array of instruments in (not only) EU law, under various names and forms (guidelines, communications, codes of conduct, notices, recommendations, opinions, interinstitutional agreements, conclusions, statements, resolutions and so on), that are generically referred to as 'soft law'. They can be adopted in any field, at all possible stages of the decision-making process, whether that is early, upstream consultation of the stakeholders or downstream implementation of legislative acts. Thus, those instruments can equally be pre-legislative or post-legislative.

82. There are perhaps two elements on which there is a general agreement in the otherwise very different approaches to such soft law instruments: first, soft law does not easily fit within the binary, black and white distinction between binding and non-binding legal effects. Second, in the past decade or two, it has been on the rise, becoming increasingly more frequent than before. (47)

83. Consequently, the issue of soft law proliferation and (the absence of) the judicial review thereof have been discussed not only in scholarly literature, (48) but also by the institutions of the EU. (49)

84. In addition, a number of Member States' high jurisdictions have in the past years sought to address the same phenomenon on the national level. They have opened up judicial review so as to include acts that are not strictly speaking binding, thus effectively relaxing the admissibility criteria of annulment actions to ensure the right to an effective judicial protection. (50) That is for example the case when addressees can perceive the contested act as being binding on the basis of a set of elements, notably because they contain incentives, (51) or when their drafter disposes of the power to adopt sanctions, (52) or when it can have significant effects on the addressee. (53) The same, or in fact much more, is true of the common law courts which have been traditionally much more permissive than their Continental counterparts in admitting the judicial review of non-binding acts. In Ireland, for instance, the courts ensure the protection of fundamental rights even when the contested measure is not binding and has no concrete effect on the rights and obligations of the addressees. (54)

85. Finally, the approach and the practice of the French *Conseil d'Etat* are worth singling out in this regard. First, the *Conseil d'Etat* mapped the ground so to speak in a comprehensive report which offered, *inter alia*, a definition of soft law. (55) Second, last year it also built on that study by devising a new judicial test focusing on economic effects and the existence of significant influence on the behaviour of the addresses of the instrument. (56)

86. It appears that despite their diversity, both at the national as well as EU law levels, the various soft law instruments share the same key feature: they are not *binding* in the traditional sense. They are a type of *imperfect* norm: on the one hand, they clearly have the normative ambition of inducing compliance on the part of their addressees. On the other hand, no instruments of direct coercion are attached to them. Usually adopted in the wake of a process of consultation with the different stakeholders (a bottom-up approach), they may contain 'mild obligations' or 'robust exhortations' that are coined in terms of 'invitation'.

(2) Recommendations: no binding force but producing legal effects

87. Recommendations generally fit such a description. In the Treaties, recommendations are only defined negatively: they have no binding force (Article 288 TFEU). Apart from that, the use and practice of recommendations is varied. (57) They usually present invitations to adopt certain behaviour, follow a policy, or rules that are considered appropriate by their drafter(s) in view of the aim pursued.

88. However, while clearly described as not binding, recommendations can generate considerable legal effects, in the sense of inducing certain behaviour and modifying normative reality. They are likely to have an impact on the rights and obligations of their addressees and third parties. By way of illustration, a number of such effects shall be outlined in this section, on two distinct but interrelated levels: (i) the EU and (ii) the Member States.

(i) At the level of the EU

89. At the EU level, three types of legal effects of recommendations are worth highlighting: (i) reliance and legitimate expectations; (ii) their interpretative role; and (iii) the potential of recommendations to generate parallel sets of rules which pre-empt the legislative process and thus have an impact on the institutional balance.

90. First, if an EU institution adopts recommendations as to how others are supposed to behave, it is perhaps fair to assume that should it become relevant, that institution can be expected to follow that same recommendation as to its own practices and behaviour. From this point of view, the legitimate expectation thus created is effectively analogous to other types of soft law that EU institutions or bodies generate and which is perceived as the (auto)limitation of the exercise of their own discretion in the future. (58)

91. Second, recommendations are likely to be used in legal interpretation, in particular in order to give meaning to indeterminate legal notions contained in binding legislation. That is in particular (but certainly not exclusively) the case for post-legislative recommendations that are not adopted on the sole basis of Article 292 TFEU, but on the basis of a piece of secondary legislation, precisely in order to flesh out the legal notions set out therein. But pre-legislative recommendations may also fulfil the same function, with regard to either indeterminate legal notions in the Treaties, or for the purpose of the interpretation of another legal instrument,

which overlaps *rationae materiae* with that recommendation. In this way, both types of recommendation can complement binding legislation.

92. Third, in *Grimaldi,* the Court has already explained the circumstances in which recommendations may be taken: they 'are generally adopted by the institutions of the Community when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules'. (59)

93. What is perhaps the greatest strength of recommendations may also then be the greatest danger. They could be used as more than just tools for advancing policies that are politically (lack of consensus) or legally (no specific powers to that effect) gridlocked. They could also potentially be used as a tool to circumvent the same legislative processes.

94. That creates two types of pre-emption: a short and a long-term one. The immediate problem of circumvention of the other institutions normally participating in the legislative process has already been recognised and discussed. (60) It is therefore clear that a recommendation may have an impact on institutional balance, (61) and so also on the separation of powers within the EU. Yet, if recommendations were excluded from a review of legality on the sole ground that they are not binding, the principle of institutional balance could never be upheld. (62)

95. There is, however, another type of pre-emption that is likely to be present in particular for pre-legislative recommendations: the ability to articulate the norms before the actual legislative process takes place, which may even translate into unilateral pre-emption of the legislative process. It is not disputed that a recommendation has the ambition to induce compliance on the part of its addressees. Now if it is even partially successful, it will shape the range of conceivable (acceptable) normative solutions for the future. If, based on a recommendation, a number of EU institutions or Member States already comply, those actors will, in the legislative process that may potentially follow, naturally promote the legislative solution that they had already embraced. In this way, the soft law of today becomes the hard law of tomorrow.

(ii) At the level of the Member States

96. There are at least three types of legal effects that recommendations have on the level of the Member States. Their exact scope would depend on how far the principle of loyal and sincere cooperation is pushed with regard to recommendations.

97. The first and main type of obligations for recommendations that the Court has so far stated is the duty for national courts to take them into consideration in interpreting national law implementing those provisions. It is quite clear that recommendations cannot in themselves create rights upon which individuals may rely before a national court. (63) However, in *Grimaldi*, the Court also added that recommendations 'cannot be regarded as having no legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on national measures adopted in order to implement them or where they are designed to implement binding Community provisions'. (64)

98. It should be noted that, until now, such *interpretative legal effects* have been recognised by the Court only in the case of recommendations, thereby singling them out among other EU acts of non-binding nature. (65)

99. However, what exactly does the *obligation* to *take intoconsideration* mean? There are a range of possible interpretations. A potential extreme of the spectrum is whether it would amount to a *Von Colson* (66) type of obligation of conform interpretation? In view of the formulation adopted in the judgment, it appears that the Court did not perhaps have the intention of going as far as imposing a duty on domestic courts to interpret national law in conformity with recommendations. (67) On another, imaginary extreme, to 'take into consideration' could also mean 'have a look at' and then choose to completely disregard.

100. There could be, in theory, an intermediate position: a national authority shall at least be *required to state reasons* when departing from a recommendation, without having a firm duty to interpret national law in conformity. That proposition has been made with regard to another type of soft law in the past. (68) It is possible to understand why such a seemingly intermediate position might have some traction: although the Court has so far only imposed such a duty on the drafter itself of rules of conduct laid down in internal measures or guidelines that have external effects, (69) it cannot be ruled out that that line of case-law could equally apply to recommendations, which are admittedly a more advanced and refined form of soft law since they are one of the 'typical' acts mentioned in Article 288 TFEU and since they must be taken into account by national courts. (70)

101. Why call such a position seemingly intermediate? For the simple reason that the obligation of stating reasons why a judge departs from a certain source necessarily means that that source is of *binding* nature. It is only the departure from *mandatory* sources

which a judge is obliged to justify. (71) Thus, if the 'obligation to take into consideration' were to be interpreted as imposing a duty on national judges to justify and to explain why they did not follow a recommendation, that would *eo ipso* mean that such recommendations not only have 'some legal effects', but that they are in fact binding.

102. Second, what are the exact duties of national authorities vis-à-vis a recommendation? The wording of Article 4(3) TEU, in capturing the duty of loyal and sincere cooperation in the EU, is no doubt very comprehensive and potentially far-reaching. It could be suggested that since that provision refers only to 'obligations' and since recommendations are, as per Article 288 TFEU 'non-binding', they cannot by definition create any obligation and thus do not fall under Article 4(3) TEU at all.

103. I do not think that such an understanding of Article 4(3) TEU would truly reflect the interpretative approach the Court has, for quite some time, been taking to that provision. The duty of sincere and loyal cooperation tends to be applied on the level of principles, not necessarily always zooming in on a concrete and specific provision or a discrete legal obligation. (72)

104. Even if one were to assume that there is no *positive* obligation to implement a recommendation, can the same be said with regard to potential 'milder' obligations of the Member States, such as to take a recommendation into consideration when adopting legislation in the given field? That effect might perhaps be more visible for post-legislative recommendations, which are used to flesh out legal notions in binding legislation. Could it not be expected of a Member State, when implementing the original piece of EU legislation, to which the post-legislative recommendation is in a way 'attached', to implement it in the way further clarified in that recommendation? If not, what is the recommendation then for? If yes, then the considerable and real legal effects of a recommendation can hardly be disputed.

105. However, it could certainly be stated that there is no obligation to implement because there is no separate and distinct sanction for failing to do so. Even if one leaves aside the somewhat formalist understanding of '*direct'* sanction being the key and defining element of *binding* force, (73) what about potential *negative* obligations incumbent on the Member States with regard to recommendations? At this stage this is certainly in the arena of conjecture and not an element of valid law, but if the blocking effect of directives applies to the period before their transposition period has lapsed, and in this period, Member States cannot adopt a measure liable seriously to compromise the result prescribed by a directive, (74) could the same logic not be applicable to a recommendation?

106. Third and final, what types of legal effects could recommendations produce in the context of national rules and procedures? In *Grimaldi*, the Court made clear that a preliminary reference for interpretation of a recommendation could be made. (75) The question remains whether a national court could ask the Court to assess the validity of a recommendation. To my knowledge, such a case has so far never occurred, but it would appear that in *Grimaldi*, the Court confirmed that such a reference would be possible. (76)

107. It would thus appear that the Court has clearly foreseen that a recommendation will produce legal effects on the national level. After all, it is meant to be taken into consideration in the Member States, whatever exactly that may entail. It might be added that in the past, the case-law of the Court has acknowledged and in fact reviewed, via a preliminary ruling procedure, several non-binding EU acts that did have had repercussions on the national level, recently including a press release of the European Central Bank. (77)

108. Thus, a recommendation, as other acts of EU law of seemingly non-binding nature, may be made subject to a request for a preliminary ruling, both on interpretation as well as validity. To my mind, that could hardly be otherwise, in a complete system of legal remedies. (78) The point of recommendations is to induce compliance. Imagine a Member State which, having acted in good faith and in the spirit of sincere and loyal cooperation, has transposed a recommendation into the national law. By an act of national legislation, that Member State established obligations for individuals on the national level. Now, if that national legislation is challenged before the national courts, it would be somewhat peculiar to refuse the review of what constitutes the substantive basis of that national legislation, namely, the EU recommendation,(79) with the somewhat formalistic excuse that what created those obligations was national legislation, not an EU law instrument, and that the Member State did so purely of its own volition.

4. Back to the roots: ERTA and legal effects

109. The detailed discussion in the previous section had a twofold purpose: to demonstrate, first, the problems the *ERTA* test (as later gradually modified) faces when applied to recommendations (but, in my opinion, more broadly also when applied to other soft law instruments); and, second, that in spite of perhaps not being endowed with binding force in the traditional and rather narrow sense of the word, recommendations may produce significant legal effects, both on the EU as well as the national levels.

110. In my view therefore, the *ERTA* test as applied by the General Court is in need of some readjustment. My suggestion in this regard is quite simple: the test should move back to its origins, to the *ERTA*judgment, and also to the wording of Article 263(1) TFEU. Both of these refer to 'legal effects' and not to 'binding legal effect'. With river beds as well as with case-law, it is sometimes necessary to clean the stream by removing the (verbal) sediments assembled over the years that make the law impossible to navigate.

111. Such a readjustment is not the revolution it seems to be at first glance. The basis of the test for assessing whether or not an EU law act produces legal effects vis-à-vis its addresses and/or third parties would remain the same: what shall be assessed is the text, context and purpose of the contested act. However, two clarifications to the way in which that test is to be applied are needed: first, what is to be assessed is the existence of legal effects only, not binding legal effect. Second, within the test, the stress would be on the content and context of the measure, not the mere text.

112. As already explained in the previous section, the dichotomy of binding and non-binding legal effects is of little analytical use for soft law. If the precondition for the existence of binding effects is direct enforcement mechanism and coercion, then by definition, soft law will never be binding, irrespective of the provisions it contains.

113. Instead, the assessment of the ability to generate legal effects, that is, to have an impact on/in the legal situation of its addressees, should focus on a different issue: could I, as a reasonable addressee, infer from the content, aim, general scheme and the overall context of a recommendation or, more generally, of a soft law instrument that I am expected to do something? Would I be likely to modify my behaviour accordingly, or is that act likely to impact on my legal position?

114. Next, within the three classical tenets of any statutory interpretation, text, context, and purpose, in cases of the assessment of a recommendation or other soft law instruments, the wording (notably denomination and verbal form) of an act should not outweigh its content, context and purpose in the framework of its assessment. The wording should even, through its essence, be rather secondary compared to substantial elements in the context of admissibility. If it were to be otherwise, the 'inviting' wording would necessarily lead to the exclusion of judicial review. It would in fact mean that form prevails over substance and, therefore, that no recommendations using vocabulary of 'encouragement' could ever be reviewed. Thus, a more delicate emphasis should perhaps be put on the logic, content, context and purpose.

115. Within such an assessment of context and purpose, three factors appear to be relevant in order to determine whether an EU act is likely to produce legal effects and can reasonably be expected to be complied with.

116. The first factor that should be taken into consideration is the degree of *formalisation* (does the EU measure take on the form of a legal act?) and of *definitiveness* of the measure (has it been adopted at the end, as the culmination of a consultation or, more generally, in a 'soft-law making' process?). In other words and considering both together, does the EU act in question appear to be rather like a finalised piece of legislation?

117. Regarding the format of a potentially challengeable act, it must appear to be like a legal text so that it could be reasonably perceived as producing legal effects. In this respect, an act will appear to be a legal act if, for instance, it is divided into articles or at least sections, if it is published in the Official Journal (certainly in the L series, where legislation is supposed to be published).

118. Regarding the definitiveness aspect, preparatory acts are likely to fall short on this account. The same logic already applies to preparatory acts in the context of the EU decision-making process. (80) It should *a fortiori* also hold for soft law-making processes. Such an exclusion from judicial review of preparatory acts appears all the more important in the context of soft law where the consultation process can entail the adoption of several acts.

119. The second factor relates to the content and overall purpose of the contested act: how precise are the 'obligations' contained therein? What is the general aim pursued? The more general and abstract EU acts are, the less likely that they will induce concrete, specific compliance in their addressees. If, on the other hand, the EU act features a number of specific and precise commitments, that element is certainly relevant. In addition, if the text has a clear harmonising purpose, it is even more likely to be perceived as likely to induce legal effects.

120. The third factor pertains to enforcement. Does the measure contain any clear and specific compliance, enforcement, or sanction mechanisms? Naturally, this does not aim only at *direct* enforcement, which is very unlikely to be present, but at *indirect* mechanisms or enforcement, both structural and institutional.

121. Amongst the *structural* compliance mechanisms might be a number of indirect mechanisms, such as reporting, notification,

monitoring, and supervision. Elements of peer pressure might also be of relevance, such as the publishing of performance tables, reports involving public naming and shaming, and so on.

122. The *institutional* element is also of relevance: which institution adopted the instrument in question? Is it the same institution that in related or even the same fields of regulation is able to impose sanctions on the same addresses? (81) If that is indeed the case, then it is likely that the contested act will effectively induce compliance.

5. The application of the test to the present case

123. Looking at the contested Recommendation through such lens, I am bound to conclude that overall that Recommendation goes considerably beyond what might be expected from a document that simply recommends certain *principles*. In this specific case, it can indeed be argued that that Recommendation is bound to produce legal effects and that reasonable addressees are likely to modify their behaviour in order to comply, at least partially, with the Recommendation.

124. If substance is to prevail over formal designation of an act as to the assessment of its true nature, then the analysis to be carried out is, having removed the formal title of the document, what the document appears to be from its wording, content, context and purpose.

125. Starting with the overall purpose of the Recommendation, its recitals (82) and the documents accompanying its adoption (83) state rather explicitly that the Recommendation aims at reaching a minimum degree of harmonisation inasmuch as it recommends principles for a higher level of protection of consumers, players and minors regarding online gambling services. At the same time, it also clear that it does so in a rather sensitive subject-matter, certainly from the point of view of a number of Member States. (84)

126. Next, there are several elements of content and context which are worth highlighting. First, the contested act is a highly structured text, and in appearance, a legal text. It has no fewer than 30 recitals. The Recommendation itself is divided into 12 numbered sections. It has been published in the L series of the Official Journal of the European Union.

127. Accordingly, the actual form of the Recommendation offers an impression that it is bound to produce legal effects. That is also confirmed by the fact that the Recommendation is not a preparatory act. It already marks the culmination of a consultation process since it fleshes out a previous Green Paper and a Communication of the Commission. Therefore, it clearly crystallises the position of the latter on the topic of consumer protection in online gambling services by making some very concrete recommendations to the Member States.

128. Second, the level of detail and precision of concrete provisions of the Recommendation is striking. Far from setting out mere 'principles', the Recommendation lays down rather clear and precise rules.

129. To give a few examples: in section III, the Recommendation sets out the detailed content of the information that should be displayed on the landing page of the operator's gambling website and be accessible from all pages on the website. In section V, the Recommendation invites Member States to ensure that a person can only participate in an online gambling service when registered as a player and holding an account with the operator. The details of the player's identity should be verified by the latter. Also, section VIII aims at regulating commercial communication. It notably precludes Member States from making certain statements, such as portraying gambling as socially attractive or suggesting that gambling can resolve personal problems.

130. Third, the Recommendation contains very detailed and comprehensive supervision and reporting 'invitations'. Under section XI, Member States are 'invited to designate competent gambling regulatory authorities when applying the principles laid down in this Recommendation to ensure and monitor in an independent manner effective compliance with national measures taken in support of the principles set out in this Recommendation'. Section XII concerns reporting. Under its provisions, not only are Member States invited to *notify* the Commission of any implementing measures, but also to collect annual data for statistical purposes before certain deadlines.

131. With regard to such reporting and supervision 'invitations', two observations are called for. First, it would appear that in the past and in general, the Court demonstrated a particular sensitivity towards inserting compliance or monitoring mechanisms into various atypical instruments. On at least two occasions, it annulled atypical Commission acts because they regulated reporting requirements in detail and arguably went beyond what was appropriate for that type of act. (85) Second, in the context of this particular Recommendation, it is interesting to note that a non-binding Recommendation that Member States are not obliged to implement still expects those Member States (or even only those who decided to accept the 'invitation') to designate, to monitor, to notify, to evaluate,

to collect data, and to report back to the Commission by specific dates on all those (entirely voluntary) activities.

132. Paragraph 54 of the Recommendation then states that the Commission should evaluate the *implementation* (sic!) of the Recommendation by 19 January 2017. Yet, it was established at the hearing that the Commission has so far failed to do so *because* it still expects the reports of the Member States before drafting its own report. At this stage, it would seem to me that the degree of cognitive dissonance present in such propositions reaches the quality of an advanced Jedi mind trick.

133. Fourth, the Recommendation is designed to induce the Member States into adopting certain legislation and through that legislation to have an impact on gambling undertakings and players, which are its indirect addressees. Thus, of course it can be maintained that formally and in itself, it is not the Recommendation but the potential national legislation that will impact third party rights, but it is hard to deny that the effective source of the national legislation is to be found in that Recommendation. (86)

134. Fifth, perhaps in itself a marginal point but also highlighting the dissonance between the content and the title, it is interesting to note both Recital 29 and Paragraph 2 of the Recommendation. They state, respectively, that this Recommendation does not interfere with the (binding and valid) EU Directives and that it does not interfere with the right of Member States to regulate gambling services. Those statements simply beg the question that if the Recommendation were indeed a purely non-binding recommendation not intended to have any legal effects whatsoever, why any of this would be necessary to state explicitly. A true non-binding soft law instrument could never, by definition, interfere with binding and valid EU legislation, or with Member States' competences.

135. In sum, already on these elements of purpose, content and context, if a reader were to be given that document with its title removed and were invited to read the text without knowing its title, it is safe to assume that he might think that he is reading a directive or, at some stages, even a regulation, but certainly a legislative document that seeks to impose clear and precise obligations and induce compliance.

136. It is only now that I turn to the wording of the Recommendation, more concretely to the specific text of the individual provisions (having dealt already in the previous points of this section with the level of detail and concreteness of those provisions). In the reasoning of the General Court wording seems to play a decisive role. However, for the reasons that I sought to explain in general in the previous section, (87) to my mind, the wording is significant, but not decisive. Furthermore, it should certainly not be decisive if in and of itself, it is actually inconclusive.

137. In its written as well as oral submissions, the Appellant contested the linguistic assessment carried out by the General Court in its order. In particular, the Appellant maintained that in two out of the three official languages of the Kingdom of Belgium, namely in Dutch and German, the wording of the provisions appears to be 'stronger' than in other language versions. Thus, as a logical consequence, the Recommendation would produce 'stronger' legal effects in Belgium.

138. This particular argument of the Appellant is unconvincing. Admittedly, some language versions could be perceived 'more binding' than others. That is notably the case with the German, Spanish, Dutch and Portuguese versions. Contrary to the affirmations of the General Court, the Polish or Czech versions might perhaps also be open to debate.

139. However, it is of little relevance that the Dutch and German versions seem to use a more imperative wording than others. The fact that they are official languages in Belgium does not give them more weight than any other language versions. There is the well-known principle of equal authenticity of all language versions of EU sources that to my mind ought to be applicable to recommendations as it is to any other measures adopted under Article 288 TFEU. It is established case-law that when language versions diverge, the provision in question must be interpreted by reference to the purpose and the general scheme of the rules of which it forms part. (88)

140. It is precisely such debatable linguistic comparisons that demonstrate and underline why the amount of turns of the phrase 'are invited to' instead of 'shall' is of only limited significance in the assessment of such a measure. In general, all language versions go in the same direction and allow for a clear conclusion as to the nature of the text without having to dwell in depth on the context and purpose of a measure. Or, they are at odds with one another and the text of a recommendation should not outweigh its context and purpose. It is, however, incorrect to state that there are discrepancies amongst the various language versions but then still maintain that because the majority of them state X, that ought to be the correct interpretation. In the system of equal authenticity of all languages, no languages can be 'out-voted' in interpretation. (89)

141. At the end of the day however, the minutiae examination of (non-) imperative use of language in some languages of the EU will always be inconclusive, in particular in the examination of legal effects of soft law instruments. For that particular type of assessment,

context, system, and logic matter much more. There will inevitably be an enormous difference in the interpretation of the statement 'I invite you to send me your comments on this matter in writing before noon this Friday', depending on whether that statement is uttered by one's boss, one's research colleague, or one's partner. Naturally it depends on the actual relationship in question, but it is quite likely that in the first case, the 'invitation' is in fact a command, the second one just a suggestion, and the third one a joke.

142. In sum, each of the individual elements of content and context in isolation could perhaps lead it still to be seen as a recommendation that is not intended to generate any legal effects. However, when taken together, the *joint* operation of these different elements in the context of *this* specific Recommendation, in addition taking into account the fact that it was adopted by the institution that is entrusted with the policing of the rules in the same area (namely the regulation of the internal market), leads me to the conclusion that it clearly seeks to produce legal effects and to induce compliance beyond mere policy suggestions.

143. For all these reasons, I consider that the Appellants' third ground of appeal is well-founded. The General Court erred in law by incorrectly assessing the legal effects of the Recommendation in question, and consequently incorrectly declared the annulment action inadmissible.

B. Form determines substance

144. In contrast to 'atypical' acts issued by EU institutions or bodies, for which the *ERTA* test was originally designed, recommendations are 'typical' acts, listed in Article 288 TFEU, the judicial review of which is expressly excluded under Article 263(1) TFEU. Should this fact play any role in the review of recommendations and its admissibility?

145. The argument in Part A of this Opinion was based on the premise that the *ERTA* test, albeit perhaps somewhat revised, is applicable to recommendations, as it is to any other form of soft law. The first part of this section outlines an alternative approach, which would put greater stress on the fact that recommendations are 'typical' acts, for which form should determine the interpretation of the substance (1). However, for a number of reasons, I would recommend to the Court to stay with the (modified) substance over form approach outlined in Part A of this Opinion (2). Should the Court nonetheless be of the view that in the specific case of recommendations, form should indeed determine the interpretation of the substance, then I briefly outline several important clarifications that would be called for (3).

1. A (full) exclusion: recommendation means recommendation

146. The reasoning of the General Court started from the premise that the test that the Court coined in *ERTA* for 'atypical' acts of the EU institutions and bodies is also applicable to a 'typical' act, such as a recommendation. That starting point may be open to debate on two levels: normative and practical. *Normatively*, Article 288 TFEU clearly says that a recommendation is not binding. Then the first sentence of Article 263(1) TFEU explicitly excludes recommendations of the Commission from the scope of that provision and thereby from actions for annulment. Those two provisions read together clearly state that a recommendation cannot be binding and cannot be reviewed.

147. To that however add the statement of the Court in *Grimaldi,* (re)introducing the substantive assessment into the game: a recommendation is outside the review as long as it is 'true recommendation'. (90) So by implication, there could be a 'false recommendation' which could be caught and reviewed. In spite of the rather clear wording of the Treaties, there is thus some support in the case-law of the Court to subject recommendations, even though they are 'typical' acts (the absence of their binding force being clearly stated in the Treaty) to the *ERTA* test. (91)

148. What then nonetheless happens on the *practical* level is that in the assessment of whether a document is a 'true' or a 'false' recommendation, the fact that the document is called a recommendation then inevitably 'taints' the assessment of its context and purpose. Yet again, a test which was designed for 'atypical' acts must be carried out in a way which to a great extent is 'form-blind', disregarding the title/cover of the document. Otherwise, one inevitably ends up with a certain kind of circular reasoning, in which form eventually determines the interpretation of the substance. (92)

149. This brings me to the possible alternative approach. It would entail, instead of the form of a 'typical' act being allowed to silently taint the interpretation of the nature of an 'atypical' act, bringing that distinction to its full logical conclusions: a 'typical' form implies 'typical' consequences, *irrespective of* the content. A recommendation will never have any binding force and should produce no legal effects. Period. There would be no need to carry out any further assessment of whether it is a 'true' or a 'false' recommendation. Recommendation means recommendation.

150. A parallel may in this respect be drawn with opinions under the ECSC Treaty: acts that were also expressly non-binding and non-reviewable. The Court confirmed, back in 1957, that those acts could not be reviewed. It made clear in particular that opinions only give guidance. They were seen as 'merely advice given to undertakings. The latter thus remain free to pay regard to or ignore it but they must understand that in ignoring an adverse opinion, they accept the risks with which they are faced as the result of a situation which they themselves have helped to create (…). In other words, the freedom of decision and the responsibility of the undertakings remain, like those of the High Authority, unchanged'. (93) That very statement could actually be paraphrased *in extenso* in the case of recommendations.

2. Substance or form?

151. There are two arguments that favour the *formal* approach to 'typical' legal acts: (i) the argument of legal certainty and foreseeability, and (ii) the argument of the need for certain legislative flexibility.

152. First, the formal approach remains faithful to the wording of Article 263 TFEU which since 1957 has always consistently and explicitly excluded recommendations and opinions from the scope of annulment actions.

153. Connected to that is reliance and expectations. Although almost always portrayed as an evil, formalism has also positive dimensions. It fosters legal certainty and foreseeability. What is called a spade should really be a spade, without the constant need for a substantive, contextual re-assessment of it.

154. That is even more valid with regard to 'typical', formalised sources. How far could the 'substance over form' way go? Should then other typical sources of EU law, such as a regulation and directive, also be assessed as to their genuine, actual content? Could they then also be potentially 'reclassified', because their title is out of sync with their content? In extreme cases, could such a reclassification lead even to the exclusion of judicial review? Could the Court declare an action for annulment against, for example a regulation, inadmissible because that regulation is so badly drafted that it is in fact not able to produce any (binding) legal effects?

155. Second, recommendations can be valid points of reference, inspiration and good practice. They may allow different solutions and ideas to be tested in order to determine which ones should be taken further and which one should be discarded. In this way, they could be seen as a sort of legislative laboratory. It is perhaps fair to acknowledge that if any recommendation could be attacked and called into question, such flexibility of a legislative laboratory would be lost. In particular the Commission could be effectively prevented from pursuing more informal forms of action to advance its agenda in the interest of the EU.

156. The answer to both of these arguments from the point of view of the 'substance over form' approach is not complicated: first, that approach is called for exactly when the formal confines of a 'typical' act are not respected. Thus, far from calling all typical acts into question, that approach is by its nature reserved to extreme scenarios. Second, the attractions of a flexible legislative laboratory should find clear limits in the principle of legality of public power and the principle of attributed competence. Even well-meant legislative laboratories can quickly turn into 'legislation by stealth'.

157. By contrast, there are at least three arguments that militate in favour of the substantive approach, outlined in Part A: (i) substance over form being all around; (ii) the need to ensure effective judicial protection; and (iii) the overall coherence of legal remedies in EU law.

158. First, even if there are indeed some notable exceptions, the overall approach and mentality in EU law is simply a substantive one: in countless areas of EU law, what is being examined is the substance, the essence of a phenomenon, category or institution - not really its formal denomination or label. Form certainly has significance. However, in EU law, form constitutes a first approximation to the true nature of an act. It is not decisive.

159. Second, as already explained in detail above, (94) it is a hardly debatable fact that recommendations do produce a number of significant legal effects even if they may not strictly speaking be binding in the individual case. If that is indeed the case, effective legal protection must follow. It may be recalled that in the past, both originally in *ERTA* but then also in subsequent cases, the Court did not hesitate to acknowledge social and legal evolution and to close gaps thus generated in legal protection. (95) It has also been suggested that the advent of new and 'softer' modes of governance represents such a type of evolution. (96)

160. Third, the argument concerning the coherence of legal remedies in EU law is relevant at two levels: on the one hand the coherence between Article 263 TFEU (action for annulment) and Article 267 TFEU (the preliminary rulings procedure) and, on the other, the position of (non-)privileged applicants in those procedures.

161. It is established case-law that 'the review of the legality of acts of the Union that the Court is to ensure under the Treaties relies … on two complementary judicial procedures. The FEU Treaty has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union… It is inherent in that complete system of legal remedies and procedures that persons bringing proceedings must, when an action is brought before a national court or tribunal, have the right to challenge the legality of provisions contained in European Union acts on which a decision or national measure adopted in respect of them is based…'. (97)

162. I wish to highlight two adjectives contained in that quotation: 'complementary' and 'complete'. Somewhat paradoxically perhaps, that second adjective might be problematic for a privileged applicant, that is a Member State which is 'invited' to do something by a recommendation, and takes issues with that 'invitation', without there being, however, any case (yet) relating to that recommendation on the national level.

163. On the one hand, as already outlined, (98) a request for a preliminary ruling concerning the validity of a recommendation appears to be possible. If that is the case, it is difficult to understand why it should be more difficult for a privileged applicant to challenge an act directly before the Court on the basis of Article 263 TFEU than for a non-privileged applicant indirectly on the basis of Article 267 TFEU.

164. On the other hand, even if the overall logic of complementarity were to prevail, discouraging direct challenges to validity and seeking to channel them through the preliminary ruling procedure, the position of a Member State is not made much easier. Practically, how should a Member State go about it? Should it first implement the recommendation (which it did not want to in the first place) and then challenge it before its own national courts? Should it contrive a dispute?

165. Without wishing to re-open any of these issues,(99) suffice to underline that Member States are simply not individuals that, perhaps later on, might be obliged to comply with an EU measure after it has been applied to them by an individual decision, either on the national or EU law. It is the Member States that are invited to implement those rules in the first place. It would therefore be simply illogical to induce Member States to do something and, at the same time, to withdraw their possibility to bring an action before the Court. That would go against the interests of the good administration of justice as it would delay a possible action against a recommendation, but also against the interests of the drafter of the recommendation itself. Instead of being allowed to channel the potential conflict, solve it, and to move on, the Member State would simply be forced to refuse to cooperate and to wait until one of its own courts and possibly a court in another Member State makes a reference under Article 267 TFEU concerning the validity of the contested act. That makes very little practical sense to me.

3. The (potentially) necessary clarifications

166. In sum, I see many more cogent reasons for inviting the Court to extend the modified *ERTA* test to include the potential judicial review of recommendations.

167. However, were the Court to decide to follow the route in which the form of a 'typical' act determines the perception and interpretation of its substance, without a separate examination of it being necessary, it would appear essential to clarify several points. Those necessary clarifications would effectively relate to the elements previously identified under actual legal effects of recommendations. (100) I would in particular underline three key elements: (i) the scope of the duty of loyal and sincere cooperation incumbent upon the Member States in relation to recommendations; (ii) the absence of pre-emptive effect of recommendations on the potential future legislative process on the level of the EU; and (iii) clarification of the scope of the *Grimaldi* obligation incumbent on national courts.

168. First, recommendations are neither binding, nor are they allowed to produce any legal effects. They accordingly cannot create any rights or obligations, for the Member States or for individuals. As far as the Member States are concerned, the principle of loyal and sincere cooperation cannot be used to start eroding that proposition, in whatever way. The Member States are fully entitled to entirely disregard the content of a recommendation without there being any possibility of direct or indirect sanctions. That holds not only for the concrete 'obligations' that Member States are encouraged to implement, but also for any reporting 'invitations'. There can be neither any positive, nor negative obligations flowing from a recommendation. A recommendation also cannot be used to define a standard or an indeterminate legal notion that will then, after having been given content by that recommendation, be enforced against a Member State or an individual.

169. Second, a recommendation, certainly a pre-legislative one, is simply a unilateral, non-binding statement of the opinion of an

institution. If it is ever to be followed up by any binding legislation, the legislative process must start with a clean slate. In particular, a recommendation cannot create a legislative 'shortcut' or a 'pre-emption' by excluding certain actors from the later legislative process, or effectively penalising some actors in the subsequent process because they had not already submitted their views, observations, data or reports on the recommendation and/or in the process of its 'implementation'.

170. Last of all, there is *Grimaldi*. (101) If recommendations are non-binding, then they cannot by definition generate any *obligation* on the part of the national courts to take such non-binding guidance into consideration, *a fortiori* not to speak of any duty of conform interpretation. If the Court were to follow this line of a more formal approach to a 'typical' EU law act, it would be necessary to revisit *Grimaldi* in this regard and clearly state that there is no obligation to take a recommendation into consideration. The national courts *may* do so, if they consider it useful, but they are certainly *not obliged* to.

171. This would then mean that national courts should treat recommendations as any other *permissible* source of inspiration in the process of legal interpretation, such an academic commentary or a comparative argument. They may include it in their reasoning if they wish to, but they can also completely disregard it, with no duty to justify why.

VII. Conclusion

172. In the light of the foregoing, my conclusion is that the General Court erred in its assessment of the legal effects of the contested Recommendation. The Appellant's third ground of appeal is therefore well-founded, without the need for separate examination of the first and second grounds of appeal. Accordingly, to the extent that it declared the action inadmissible, the General Court's order should be set aside.

173. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court may also, after quashing the decision of the General Court, itself give judgment in the matter, where the state of proceedings so permits.

174. In the present case, the Court is not in a position, at this stage of the proceedings, to give judgment on the substance of the action brought before the General Court. As the General Court declared the action inadmissible, only a very limited and rather indirect discussion concerning the merits of the case took place before that jurisdiction. In addition, for the same reasons, no other interveners were allowed to present their observations. (102) If the Court were to declare the action for annulment admissible, it is likely that those interveners, and potentially also others, would be interested in submitting their observations.

175. I consider, however, that the Court has all the necessary material before it to be able to give a ruling rejecting the preliminary plea of inadmissibility raised by the Commission at first instance. In the interests of efficiency and economy of procedure, I propose that the Court take that route, declaring the action admissible and referring the case back to the General Court for a decision on merits.

176. I therefore propose that the Court:

– set aside the order of the General Court of the European Union in Case T–721/14 and find admissible the Appellant's action for annulment in that case;

– refer the case back to the General Court for a decision on the merits;

– order that costs be reserved.

1 Original language: English.

2 Hart, H. L. A., *The Concept of Law*, 2nd ed (with a postscript), Clarendon Press, Oxford, 1997 (first edition published 1961).

3 Dworkin, R., *Taking Rights Seriously* (New Impression with a Reply to Critics), London, Duckworth, 1987 (first edition published 1977), p. 22 and ff.

4 Commission Recommendation 2014/478/EU of 14 July 2014 (OJ 2014 L 214, p. 38). Emphasis added.

5 Order of 27 October 2015, *Belgium v Commission* (T-721/14, EU:T:2015:829).

6 COM (2011) 128 final.

7 COM (2012) 596 final.

8 P7_TA(2013)0348.

9 2012/2322(INI).

10 IP/14/828 of 14 July 2014, available online at: http://europa.eu/rapid/press-release_IP-14-828_en.htm.

11 MEMO/14/484 of 14 July 2014, online at: http://europa.eu/rapid/press-release_MEMO-14-484_en.htm.

12 Order of 27 October 2015, *Belgium* v *Commission* (T-721/14, EU:T:2015:829).

13 Paragraph 37 of the order under appeal.

14 Paragraph 21 et seq. of the order under appeal.

15 Paragraph 29 of the order under appeal.

16 Paragraphs 32 to 35 of the order under appeal.

17 Paragraph 36 of the order under appeal.

18 Paragraphs 38 to 40 of the order under appeal.

19 Paragraphs 42 to 48 of the order under appeal.

20 Paragraphs 51 to 52 of the order under appeal.

21 Paragraphs 54 to 55 of the order under appeal.

22 Paragraph 64 of the order under appeal.

23 Paragraph 68 of the order under appeal.

24 The Portuguese Republic and the Hellenic Republic applied to intervene in support of the Appellant before the General Court. However, as it was rejecting the action as inadmissible, the General Court stated that there was no need to rule on those applications to intervene (paragraph 86 of the order under appeal).

25 The Appellant relies on Opinion 2/00 to stress the constitutional importance of the choice of the appropriate legal basis (Opinion 2/00 (*Cartagena Protocol on Biosafety*) of 6 December 2001, EU:C:2001:664, paragraph 5). See also judgment of 1 October 2009, *Commission* v *Council* (C-370/07, EU:C:2009:590, paragraph 47).

26 Judgments of 12 February 2009, *Commission* v *Greece*(C-45/07, EU:C:2009:81), and of 20 April 2010, *Commission* v *Sweden* (C-246/07, EU:C:2010:203).

27 Judgment of 16 October 2003, *Ireland* v *Commission* (C-339/00, EU:C:2003:545, paragraph 71).

28 Judgment of 31 March 1971, *Commission* v *Council* (22/70, EU:C:1971:32).

29 To my mind, the interpretation of legal effects (or the absence thereof) of a (potential) source of EU law, such as a recommendation, is a pure point of law question, thus subject to full review on the appellate level. Iura (item 'ius mollis') novit Curia.

30 Judgment of 31 March 1971, *Commission* v *Council* (22/70, EU:C:1971:32).

31 Judgment of 31 March 1971, *Commission* v *Council* (22/70, EU:C:1971:32).

32 Paragraphs 39 and 42 of that judgment (emphasis added). That wording referring to 'acts producing legal effects', was then incorporated into Article 173 EEC by the Treaty of Maastricht.

33 See judgments of 9 October 1990, *France* v *Commission* (C-366/88, EU:C:1990:348), and of 6 April 2000, *Spain* v *Commission* (C-443/97, EU:C:2000:190).

34 See judgment of 13 November 1991, *France* v *Commission* (C-303/90, EU:C:1991:424).

35 See judgments of 16 June 1993, *France* v *Commission*(C-325/91, EU:C:1993:245) and of 20 March 1997, *France* v *Commission* (C-57/95, EU:C:1997:164).

36 See judgment of 1 December 2005, *Italy* v *Commission* (C-301/03, EU:C:2005:727), together with the elucidating Opinion of Advocate General Jacobs (C-301/03, EU:C:2005:550, points 70 seq.).

37 See judgment of 5 October 1999, *Netherlands* v *Commission* (C-308/95, EU:C:1999:477).

38 See already, regarding the acts of the High Authority, judgment of 10 December 1957, *Société des usines à tubes de la Sarre v High Authority* (1/57 and 14/57, EU:C:1957:13).

39 Paragraphs 16 to 18 of the order under appeal (emphasis added).

40 Above, footnote 31.

41 In French, 'qui visent à produire des effets de droit'; in German, „Rechtswirkungen zu erzeugen" ; in Italian, 'che miri a produrre effetti giuridici'; in Dutch, 'die beogen rechtsgevolgen teweeg te brengen'.

42 See for instance order of 17 May 1989, *Italy* v *Commission* (151/88, EU:C:1989:201, paragraph 21). See also judgment of 5 October 1999, *Netherlands* v *Commission* (C-308/95, EU:C:1999:477, paragraph 30). However, referring to mere 'legal effects', see for instance judgment of 1 December 2005, *Italy* v *Commission* (C-301/03, EU:C:2005:727, paragraphs 22 to 24).

43 See judgments of 13 October 2011, *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 36), and judgment of 13 February 2014, *Hungary* v *Commission*(C-31/13 P, EU:C:2014:70, paragraph 54).

44 See judgment of 31 March 1971, *Commission* v *Council* (22/70, EU:C:1971:32, paragraph 39), in the light of Opinion of Advocate General Dutheillet de Lamothe in *Commission* v *Council* (22/70, not published, EU:C:1971:23, p. 287) stating that 'Article 173 and Article 189 form a coherent whole'. See also judgment of 23 April 1986, *Les Verts* v *Parliament* (294/83, EU:C:1986:166, paragraph 24).

45 In this way much more Kelsenian than the already quoted Hartian tradition, since the latter is much more 'sociological'. Hart accepted that a legal rule may be binding not only because it was enacted in conformity with some secondary rule that states that the rule shall be binding, but also because a group of people accepts that norm as standard of their behaviour, generating internal social pressure within the group to comply – see Hart, H. L. A., *The Concept of Law*, 2nd ed (with a postscript), Clarendon Press, Oxford, 1997, Chapters V and VI.

46 See for instance judgments of 7 February 1979, *France* v *Commission*(15/76 and 16/76, EU:C:1979:29, paragraph 7), and of 29 April 2004, *Germany* v *Commission* (C-277/00, EU:C:2004:238, paragraph 39).

47 Judging from the amount of scholarly literature and attention dedicated to the topic.

48 Generally on soft law in the EU context, see for instance Wellens, K.C. and Borchardt, G.M., 'Soft Law in European Community law', *European Law Review* 14, 1989, p. 267; Klabbers, J., 'Informal Instruments before the European Court of Justice', *Common Market Law Review* 31, 1994, p. 997; Senden, L., *Soft Law in European Community Law*, Hart Publishing, Oxford and Portland Oregon, 2004; Schwarze, J., 'Soft Law im Recht der Europäischen Union', *Europarecht*, 2011, p. 3; Scott, J., 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law', *Common Market Law Review* 48, 2011, p. 329; Knauff, M., 'Europäisches Soft Law als Gegenstand des Vorabentscheidungsverfahrens', *Europarecht*, 2011, p. 735; Stefan, O., *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union*, Kluwer, Alphen aan den Rijn, 2013; Bertrand, B., 'Les enjeux de la soft law dans l'Union européenne', *Revue de l'Union européenne*, 2014, p. 73.

49 See notably European Parliament Study, 'Checks and Balances of soft EU rule-making', Directorate General for Internal Policies, Policy Department C, Citizens' rights and constitutional affairs, 2012 (PE 462.433), in particular pp. 54 to 58.

50 For instance, the German Bundesverwaltungsgericht, judgment of 15 November 2010 – 19 BV 10.871 (concerning administrative circulars setting emission rates in environmental matters).

51 See Swedish Supreme Administrative Court, 24 May 1996, case 2904-1994 (I) (RA 1996 ref 43).

52 See for instance in relation to administrative circulars the Belgian Conseil d'Etat, judgment of 237/674 of 16 March 2017; see also, about views (prises de position) or reports adopted by independent administrative authorities empowered to adopt sanctions, the French Conseil d'Etat, judgment of 17 November 2010, *Syndicat français des ostéopathes*, n° 332 771; and of 11 October 2012, *Société Casino Guichard-Perrachon*, n°357193.

53 For instance in Sweden public and private bodies may challenge the legality of an administrative act when they have perceived it as binding and have acted in accordance with it (Supreme Administrative Court, 10 February 2004, case 2696-03 (RA 2004 ref 8), about an 'information' likely to have real effects on the personal and economic situation of the addressee).

54 See for instance, about a legal action against an administrative report in the context of planning procedures, High Court, *De Burca v Wicklow County Manager* (2009) IEHE 54; also about guidelines of the Irish Competition Authority, see High Court, *Law Society of Ireland v Competition Authority* (2006) 2 IR 262.

55 In its annual report of 2013, it defined soft law as the set of instruments fulfilling the three following criteria: 1) they must have as an object to modify or guide the behaviour of their addressees by leading to their adherence; 2) they do not create in themselves rights or obligations for their addresses; 3) they represent, by their content and the way that they are structured, a degree of formalisation and structure which brings them closer to looking like rules of law (Conseil d'Etat, *Etude annuelle 2013 - Le droit souple*, La Documentation française, 2013, pp. 61 to 63).

56 Conseil d'Etat, judgments of 21 March 2016, Numericable, n° 390023 and of 21 March 2016, *Société Fairvesta International GmBH*, n° 368082, respectively about a prise de position of the French Competition Authority and press releases of the French Financial Market Authority.

57 For early, by now classic accounts see e.g. Morand, C., 'Les recommandations, les résolutions et les avis du droit communautaire', *Cahiers de droit européen*, 1970, p. 523; Soldatos, P., Vandersanden, G., 'La recommendation, source indirecte du rapprochement des legislations nationales dans le cadre de la Communauté économique européenne', in De Ripainsel-Landy, D. et al., *Les instruments de rapprochement des législations dans la Communauté économique européenne*, Editions de l'Université de Bruxelles, Bruxelles, 1976, p. 94.

58 See judgments of 29 September 2011, *Arkema*v *Commission* (C-520/09 P, EU:C:2011:619, paragraph 88), and of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*(C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 209 to 211). But see, for a more nuanced approach with regard to notices in competition law, judgment of 13 December 2012, *Expedia* (C-226/11, EU:C:2012:795, paragraph 29).

59 Judgment of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, paragraph 13).

60 The Better Lawmaking initiative has put emphasis on this problematic dimension of soft law. See notably Framework Agreement on relations between the European Parliament and the European Commission (OJ 2010, L 304, p. 47). Paragraph 43 states in particular: 'in areas where Parliament is usually involved in the legislative process, the Commission shall use soft law, where appropriate and on a duly justified basis after having given Parliament the opportunity to express its views. The Commission shall provide a detailed explanation to Parliament on how its views have been taken into account when it adopts its proposal'.

61 It might be recalled that it was the conferral of powers and institutional balance that also led the Court to its judgment of 23 April 1986, *Les Verts* v *Parliament* (294/83, EU:C:1986:166, paragraph 25).

62 That is incidentally the argument raised by the Appellant in its second ground of appeal. From a certain point of view, it is true that subjecting the admissibility of the annulment action to the existence of binding legal effects (as opposed to mere legal effects) prevents ensuring that the drafter of the contested act has acted within the realm of its competence. It then opens the issue of whether or not soft law instruments, including a recommendation, can only be adopted within the sphere of competence attributed to the Union and to the institution in question. But, not without a certain whiff of Catch-22, since such binding legal effects do not exist, their review via an action of annulment is not admissible.

63 See judgment of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, paragraph 16). See also judgments of 21 January 1993, *Deutsche Shell* (C-188/91, EU:C:1993:24,

paragraph 18); of 11 September 2003, *Altair Chimica* (C-207/01, EU:C:2003:451, paragraph 41) and of 18 March 2010, *Alassini and Others*(C-317/08 to C-320/08, EU:C:2010:146, paragraph 40).

64 Judgment of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, paragraph 18).

65 The Court has notably declined to recognise that legal effect for Commission notices (judgment of 13 December 2012, *Expedia* (C-226/11, EU:C:2012:795, paragraph 31).

66 Judgment of 10 April 1984, *von Colson and Kamann*(14/83, EU:C:1984:153).

67 As successively developed and consolidated in, for example, judgments of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraphs 114 to 115); of 4 July 2006, *Adenelerand Others* (C-212/04, EU:C:2006:443, paragraphs 108 to 109); and of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraphs 99 to 101).

68 See Opinion of Advocate General Kokott in *Expedia*(C-226/11, EU:C:2012:544, points 38 to 39), which considered that national authorities and courts must take due account of the Commission's competition policy notices. That notably entailed in that particular case that those authorities and courts must consider the Commission's assessment, as set out in those notices, of what constitutes an appreciable restriction of competition and *must give reasons which can be judicially reviewed for any divergences.*

69 See judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*(C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 209 to 211), and of 29 September 2011, *Arkema*v *Commission* (C-520/09 P, EU:C:2011:619, paragraph 88).

70 See judgment of 13 December 2012, *Expedia* (C-226/11, EU:C:2012:795, paragraph 26).

71 As opposed to permissible or persuasive sources - see for example Peczenik, A. *On Law and Reason*, Kluwer, Dordrecht, 1989, pp. 319 ff.

72 See, by analogy, how loyal cooperation has been used to create obligations in connection with direct effect, Member State liability for breaches of EU law or the adoption of sanctions (respectively, by way of illustration, judgments of 16 December 1976, *Comet* (45/76, EU:C:1976:191, paragraph 12); of 2 February 1977, *Amsterdam Bulb* (50/76, EU:C:1977:13, paragraph 32); and of 19 November 1991, *Francovichand Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 36).

73 As already suggested above (footnote 45), such narrow view does not even prevail in a number of streams of positivist legal theory. Besides, the same understanding is quite remote from reality of how 'non-binding wishes' expressed by *one and the same* regulator who can also, the next day, issue binding legislation and sanctions in the same or connected area, will be understood and perceived by their addressees. Thus, apart from direct sanctions, there can be also *indirect* sanctions, certainly in cases of repeat players on both sides (one and the same regulator and the same group of addressees). It might be recalled that similar logic led to some higher national jurisdictions to subject the 'non-binding' acts of such type of regulators to judicial review (above, footnote 52).

74 Starting with the judgment of 18 December 1997, *Inter-EnvironnementWallonie* (C-129/96, EU:C:1997:628).

75 'It is settled case-law that the fact that a measure of Community law has no binding effect does not preclude the Court from ruling on its interpretation in proceedings for a preliminary ruling under Article 177' (judgments of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, paragraph 9), and of 21 January 1993, *Deutsche Shell* (C-188/91, EU:C:1993:24, paragraph 18 and the case-law cited)).

76 '…unlike Article 173 of the EEC Treaty, which excludes review by the Court of acts in the nature of recommendations, Article 177 confers on the Court jurisdiction to give a preliminary *rulingon* the *validity* and interpretation *of all acts* of the institutions of the Community *without exception*' - judgment of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, paragraph 8) – emphasis added.

77 Judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400). The Court did not examine the admissibility of the action against a press release as such. But see Opinion of Advocate General Cruz Villalón in *Gauweiler and Others* (C-62/14, EU:C:2015:7, point 70 et seq.).

78 See for instance judgments of 23 April 1986, *Les Verts* v *Parliament* (294/83, EU:C:1986:166, paragraph 23), and of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 66).

79 In particular in cases in which the national challenge to the national transposition merely mirrors the same potential issue of the recommendation itself – see in this regard, by analogy, judgment of 22 June 2010, *Melki and Abdeli*(C-188/10 and C-189/10, EU:C:2010:363, paragraphs 54 to 55).

80 Judgment of 12 September 2006, *Reynolds Tobacco and Others* v *Commission* (C-131/03 P, EU:C:2006:541, paragraph 55 and the case-law cited).

81 See also above, footnote 73.

82 Recitals 8 and 9 quoted above in points 11 and 12 of this Opinion.

83 Above, point 30 of this Opinion.

84 See for instance judgment of 22 January 2015, *Stanley International Betting and Stanleybet Malta* (C-463/13, EU:C:2015:25, paragraph 51).

85 Judgment of 13 November 1991, *France* v *Commission* (C-303/90, EU:C:1991:424, paragraphs 20 to 25), where a code of conduct implementing a Council regulation requested information from Member States with a certain frequency and through certain means; judgment of 16 June 1993, *France v Commission* (C-325/91, EU:C:1993:245, paragraphs 22 to 23), where a Commission communication giving flesh to a directive imposed extra obligations, such as annual reporting of financial data to the Commission at a certain date.

86 See also above, point 102 to 105. See also points 97 to 98 and the potential of the Recommendation to shape the interpretation of existing national rules adopted in the same area and dealing with the same subject-matter.

87 Above, point 114.

88 See, for example, judgment of 26 April 2012, *DR and TV2 Danmark*(C-510/10, EU:C:2012:244, paragraph 45 and the case-law cited).

89 Including, for that matter, also the extreme situations in which it appears rather clearly that there is a mistake in translation in just one language version of the EU measure – see e.g. judgment of 19 April 2007, *Profisa* (C-63/06, EU:C:2007:233).

90 Judgment of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, paragraph 16).

91 Which then led the General Court to state that 'The mere fact that the contested recommendation is formally designated as a recommendation and was adopted on the basis of Article 292 TFEU cannot automatically rule out its classification as a challengeable act' (paragraph 20 of the order under appeal).

92 Outlined in detail above, points 77 to 79.

93 Judgment of 10 December 1957, *Société des usines à tubes de la Sarre v High Authority* (1/57 and 14/57, EU:C:1957:13) Rec. p. 115.

94 Above, points 87 to 108.

95 For a notable example, see e.g. judgment of 23 April 1986, *Les Verts*v *Parliament*(294/83, EU:C:1986:166, paragraph 24).

96 Above, points 81 to 86.

97 Judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraphs 66 to 67 and the case-law cited). See also Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011 (EU:C:2011:123, paragraph 70).

98 Above, points 106 to 108.

99 Settled by the judgment of 1 April 2004, *Commission* v *Jégo-Quéré* (C-263/02 P, EU:C:2004:210).

100 Above, points 87 to 108.

101 Above, points 97 to 101.

102 Above, footnote 24.

Case C 16/16 P - Kingdom of Belgium v European Commission

JUDGMENT OF THE COURT (Grand Chamber)

20 February 2018 (*)

(Appeal — Consumer protection — Online gambling services — Protection of consumers and players and prevention of minors from gambling online — Commission Recommendation 2014/478/EU — EU act which is not legally binding — Article 263 TFEU)

In Case C-16/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 6 January 2016,

Kingdom of Belgium, represented by L. Van den Broeck, M. Jacobs and J. Van Holm, acting as Agents, and by P. Vlaemminck, B. Van Vooren, R. Verbeke and J. Auwerx, advocaten,

appellant,

the other party to the proceedings being:

European Commission, represented by F. Wilman and H. Tserepa-Lacombe, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, J.L. da Cruz Vilaça, J. Malenovský and E. Levits, Presidents of Chambers, E. Juhász, A. Borg Barthet, J.-C. Bonichot, A. Arabadjiev, C. Toader (Rapporteur), C. Lycourgos and M. Vilaras, Judges,

Advocate General: M. Bobek,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 June 2017,

after hearing the Opinion of the Advocate General at the sitting on 12 December 2017,

gives the following

Judgment

1 By its appeal, the Kingdom of Belgium requests the Court to set aside the order of the General Court of the European Union of 27 October 2015, *Belgium* v *Commission* (T-721/14, 'the order under appeal', EU:T:2015:829), by which the General Court dismissed as inadmissible its action seeking annulment of Commission Recommendation 2014/478/EU of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online (OJ 2014 L 214, p. 38) ('the contested recommendation').

Legal context

2 The first paragraph of Article 263 TFEU states:

'The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council [of the European Union], of the [European] Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.'

3 Article 288 TFEU, which features in a section entitled 'The legal acts of the Union', provides:

'To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.'

4 Article 1 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 59), as amended by Council Regulation (EU) No 517/2013 of 13 May 2013 (OJ 2013 L 158, p. 1), provides:

'The official languages and the working languages of the institutions of the Union shall be Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.'

Background to the dispute

5 On 14 July 2014, the European Commission adopted, pursuant to Article 292 TFEU, the contested recommendation.

6 It is apparent from recital 9 of that recommendation that its objective is 'to safeguard the health of consumers and players and thus also to minimise eventual economic harm that may result from compulsive or excessive gambling'.

7 Section I of that recommendation, entitled 'Purpose', is worded as follows:

'1. Member States are recommended to achieve a high level of protection for consumers, players and minors through the adoption of principles for online gambling services and for responsible commercial communications of those services, in order to safeguard health and to also minimise the eventual economic harm that may result from compulsive or excessive gambling.

2. This Recommendation does not interfere with the right of Member States to regulate gambling services.'

8 Sections III to X of that recommendation relate, respectively, to 'Information requirements', 'Minors', 'Player registration and account', 'Player activity and support', 'Time out and self-exclusion', 'Commercial communication', 'Sponsorship' and 'Education and awareness'.

The proceedings before the General Court and the order under appeal

9 By application lodged at the Registry of the General Court on 13 October 2014, the Kingdom of Belgium brought an action seeking annulment of the contested recommendation.

10 By separate document lodged at the Registry of the General Court on 19 December 2014, the Commission raised a plea of

inadmissibility under Article 114(1) of the Rules of Procedure of the General Court of 2 May 1991. The Kingdom of Belgium lodged its observations on that plea on 20 February 2015.

11 The Commission claimed that the action brought before the General Court was inadmissible on the ground that the contested recommendation does not constitute an act open to challenge under Article 263 TFEU. In essence, it asserted that, both in its form and in its content, the contested recommendation is a 'genuine' recommendation within the meaning of Article 288 TFEU, which has no binding force and does not impose any binding obligations. That, it is submitted, is shown by the formal presentation of the recommendation based on Article 292 TFEU and by its non-binding and conditional wording. The Commission added that none of the arguments raised by the Kingdom of Belgium in the application could cast doubt on that classification of the contested recommendation as an act not open to challenge.

12 The Kingdom of Belgium considered the action to be admissible. In essence, relying in particular on the judgments of 31 March 1971, *Commission* v *Council*, '*AETR*' (22/70, EU:C:1971:32) and of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646) and on the principle of effective judicial protection, it claimed that the contested recommendation must be amenable to judicial review. First, it asserted that the recommendation produces 'negative legal effects' because, as was shown by the first, third and fourth pleas in law raised in its application, it infringes fundamental principles of EU law, namely the principle of conferral and the duty of sincere cooperation between EU institutions and between those institutions and the Member States. Second, it maintained, in connection with the second and fifth pleas in law raised in support of its action, that the contested recommendation stems from the intention to harmonise the application of the provisions of Articles 49 and 56 TFEU in the area of gambling and in fact constitutes a hidden directive, which must be reviewed by the EU Courts. It added that the contested recommendation produces indirect legal effects because, on the one hand, under their duty of sincere cooperation, the Member States are subject to an obligation to use their best endeavours to comply with it and, on the other, national courts and tribunals will also have to take the recommendation into consideration.

13 By documents lodged at the Registry of the General Court on 12 and 16 January 2015 respectively, the Hellenic Republic and the Portuguese Republic applied for leave to intervene in those proceedings in support of the form of order sought by the Kingdom of Belgium.

14 By the order under appeal, adopted pursuant to Article 130(1) of the Rules of Procedure of the General Court, the latter upheld the plea of inadmissibility without going to the substance of the case. The General Court, in effect, ruled that the contested recommendation does not have, and was not intended to have, binding legal effects, with the result that it cannot be classified as a 'challengeable act' for the purposes of Article 263 TFEU. Consequently, the General Court dismissed the action as inadmissible and found that there was therefore no need to rule on the applications to intervene.

Forms of order sought by the parties

15 By its appeal, the Kingdom of Belgium claims that the Court should:
– set aside the order under appeal in its entirety;
– declare the action for annulment to be admissible;
– rule on the substance of the case;
– declare the applications to intervene lodged by the Hellenic Republic and the Portuguese Republic to be admissible; and
– order the Commission to pay the costs.

16 The Commission contends that the Court should:
– dismiss the appeal; and
– order the Kingdom of Belgium to pay the costs.

The appeal

17 In support of its appeal, the Kingdom of Belgium relies on three grounds of appeal.

The first and second grounds of appeal

Arguments of the parties

18 In the first ground of appeal, the Kingdom of Belgium submits that the adoption of any legal act within the meaning of Article 288 TFEU is sufficient, by itself, to produce legal effects capable of justifying a review of legality under Article 263 TFEU. The exclusion of recommendations from the scope of that review must, it submits, be subject to strict interpretation. Consequently, contrary to the General Court's finding in the order under appeal, it should be possible to have recourse to the EU Courts in order for them to monitor the observance, by the institution which adopted the contested recommendation, of the principles of conferral, sincere cooperation and institutional balance, which are of fundamental importance in the division of powers between the European Union and its Member States as well as between the EU institutions. Even in a case involving a genuine recommendation, it submits, the General Court thus has jurisdiction to determine whether or not those principles had been infringed during the adoption of that recommendation, without requiring a full review of the material content thereof.

19 In that regard, the Kingdom of Belgium argues that Article 292 TFEU, which is indicated as being the legal basis on which the contested recommendation was adopted, is not a substantive legal basis but merely a procedural legal basis, granting not only the Commission but also the Council the power to adopt recommendations. Observance of the principle of institutional balance implies, as a consequence, that the EU Courts can verify whether the Commission had, in the present case, a substantive legal basis on which to adopt the contested recommendation.

20 The Kingdom of Belgium also submits that it follows from the judgment of 31 March 1971, *Commission* v *Council*, '*AETR*' (22/70, EU:C:1971:32), that the EU Courts must be able to check, at the stage of assessing the admissibility of the action for annulment, whether the contested act is capable of producing legal effects as regards the prerogatives of the other EU institutions and the Member States, without having to rule on the merits of the validity of that act.

21 In the second ground of appeal, the Kingdom of Belgium argues that the order under appeal, in particular paragraphs 53 to 55 thereof, leads to a procedural inequality in that it would not be allowed to seek review, by the EU Courts, of the Commission's compliance with the principle of sincere cooperation, even though that institution, for its part, has the possibility of submitting for judicial review the issue of whether legal acts respect that principle, even if they did not produce binding effects.

22 The Kingdom of Belgium also submits that the General Court's conclusion, in paragraph 52 of the order under appeal, cannot be reconciled with what has been held by the Court in the judgments of 23 April 1986, *Les Verts* v *Parliament* (294/83, EU:C:1986:166), and of 22 May 1990, *Parliament* v *Council* (C-70/88, EU:C:1990:217), according to which an action for annulment must be declared admissible, even in the absence of a provision to that effect in the Treaties, when it seeks to have the observance by an EU institution of the fundamental principles of the EU legal order made subject to review.

23 The Kingdom of Belgium also notes that, in the judgment of 6 October 2015, *Council* v *Commission* (C-73/14, EU:C:2015:663), the Court did not question the admissibility of an action for annulment even though the subject matter of that action related to the European Union's position in the context of advisory opinion proceedings which had no binding effects.

24 The Commission contends that these grounds of appeal should be rejected.

Findings of the Court

25 In the first place, in so far as the first two grounds of appeal, which it is appropriate to examine together, allege that the General Court erred in law in finding that the contested recommendation does not produce any legal effects capable of justifying a review of legality under Article 263 TFEU, it should be recalled that, according to the first paragraph of that article, the Court of Justice is to review the legality of, inter alia, acts of the Council, of the Commission and of the ECB 'other than recommendations'.

26 By establishing recommendations as a specific category of EU acts and by stating expressly that they 'have no binding force', Article 288 TFEU intended to confer on the institutions which usually adopt recommendations a power to exhort and to persuade, distinct from the power to adopt acts having binding force.

27 Against that background, the General Court was correct to find, in paragraph 17 of the order under appeal, by relying on well-established case-law of the Court of Justice, that 'any act not producing binding legal effects, such as … mere recommendations … falls outside the scope of the judicial review provided for in Article 263 TFEU'.

28 Contrary to what the Kingdom of Belgium submits, it is not therefore sufficient that an institution adopts a recommendation which allegedly disregards certain principles or procedural rules in order for that recommendation to be amenable to an action for annulment, although it does not produce binding legal effects.

29 However, in exceptional cases, the impossibility of bringing an action for annulment against a recommendation does not apply if the contested act, by reason of its content, does not constitute a genuine recommendation.

30 In that regard, during the analysis of the content of the contested act with a view to determining whether that act produces binding legal effects, account must be taken of the fact that, as was noted in paragraph 25 above, recommendations are, in accordance with Article 263 TFEU, excluded from the scope of that provision and that, pursuant to the fifth paragraph of Article 288 TFEU, they have no binding force.

31 That being said, it should be borne in mind that any provisions adopted by the institutions, whatever their form, which are intended to have binding legal effects are regarded as 'challengeable acts' for the purposes of Article 263 TFEU (see, to that effect, judgments of 31 March 1971, *Commission* v *Council*, '*AETR*',22/70, EU:C:1971:32, paragraphs 39 and 42, and of 25 October 2017, *Romania* v *Commission*, C-599/15 P, EU:C:2017:801, paragraph 47 and the case-law cited).

32 In order to determine whether the contested act produces binding legal effects, it is necessary to examine the substance of that act and to assess those effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act (see, to that effect, judgments of 13 February 2014, *Hungary* v *Commission*, C-31/13 P, EU:C:2014:70, paragraph 55 and the case-law cited, and of 25 October 2017, *Slovakia* v *Commission*, C-593/15 P and C-594/15 P, EU:C:2017:800, paragraph 47).

33 In the present case, in paragraph 18 of the order under appeal, for the purpose of establishing whether the contested recommendation was liable to produce such effects and, accordingly, was amenable to an action for annulment under Article 263 TFEU, the General Court examined its wording and the context in which it appears, its content, and the intention of the institution which adopted it.

34 More specifically, the General Court took the view, first, in paragraph 21 of the order under appeal, that 'the contested recommendation is worded mainly in non-mandatory terms', as is clear from the analysis which it carried out in paragraphs 22 and 23 of the order under appeal. In that regard, the General Court specified, in paragraphs 26 and 27 of that order, that certain language versions of that recommendation, although containing more mandatory terms in places, are nonetheless drafted in an essentially non-binding manner.

35 Secondly, the General Court noted, in paragraph 29 of that order, that 'the content of the contested recommendation also shows that that act is not intended to have any binding legal effects and that the Commission had no intention to confer such effects on it'. In particular, it is noted, in paragraph 31 of the order under appeal, that 'paragraph 2 of the contested recommendation expressly states that the recommendation does not interfere with the right of Member States to regulate gambling services'. Moreover, in paragraph 32 of that order it is pointed out that the contested recommendation does not include any explicit indication that the Member States were required to adopt and to apply the principles set out therein.

36 Thirdly, the General Court held, in paragraph 36 of the order under appeal, with regard to the context of which the contested recommendation forms part, that, 'without this being disputed by the Kingdom of Belgium', it follows from an extract from Communication COM(2012) 596 final of 23 October 2012 from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, entitled 'Towards a comprehensive European framework for online gambling', that 'overall, it does not appear appropriate at this stage to propose sector-specific EU legislation for online gambling'.

37 Accordingly, it was after an analysis, conducted to the requisite legal standard, of the wording, the content and the purpose of the contested recommendation, as well as of the context of which it forms part, that the General Court was able properly to conclude, in paragraph 37 of the order under appeal, that that recommendation 'does not have and is not intended to have binding legal effects, with the result that it cannot be classified as a challengeable act for the purposes of Article 263 TFEU'.

38 The foregoing analysis is not called into question, first, by the argument of the Kingdom of Belgium alleging that, in the judgment

of 6 October 2015, *Council* v *Commission* (C-73/14, EU:C:2015:663), the Court did not cast doubt on the admissibility of the Council's action for annulment even though that action related to the presentation of the European Union's position in the context of advisory opinion proceedings which had no binding effect. It suffices to note that that action was not directed against a recommendation within the meaning of the fifth paragraph of Article 288 TFEU, but rather against a decision of the Commission which, in accordance with the fourth paragraph of Article 288 TFEU, produces binding legal effects. Moreover, using as a pretext the fact that that decision was taken in the context of the European Union's involvement in such proceedings is, as the Commission has correctly pointed out, incorrectly to confuse the nature of the effects of that decision and the nature of the advisory opinion proceedings in question.

39 Second, in so far as the first ground of appeal alleges infringement by the General Court of the scope of the principles of conferral, sincere cooperation and institutional balance, it should be noted that the Kingdom of Belgium thereby criticises the General Court for not having inferred the challengeable nature of the contested recommendation from the Commission's alleged disregard of those principles. As has been pointed out in paragraph 28 above, such reasoning cannot be accepted.

40 Furthermore, in so far as the second ground of appeal alleges a disregard by the General Court of the alleged reciprocity of the principle of sincere cooperation, it should be noted, first, as the General Court pointed out, essentially, in paragraph 55 of the order under appeal, that infringement proceedings and an action for annulment are legal remedies which serve different purposes and have different conditions governing admissibility, and, second, that the principle of sincere cooperation cannot have the effect of setting aside the conditions governing admissibility expressly laid down in Article 263 TFEU.

41 Thirdly, the argument of the Kingdom of Belgium alleging that, in the judgment of 31 March 1971, *Commission* v *Council*, '*AETR*' (22/70, EU:C:1971:32), the Court, for the purpose of ruling on the admissibility of the action for annulment, examined whether the Council act at issue in the case giving rise to that judgment was capable of producing legal effects as regards the prerogatives of the other EU institutions and the Member States, is not such as to invalidate the finding made in paragraph 37 of the present judgment.

42 Suffice it to note, in this respect, that that act was a Council deliberation recorded in the minutes of a meeting, in regard to which the Court, in order to assess whether it could be challenged, examined whether it was intended to produce binding legal effects. The present case, by contrast, relates to a recommendation, which is expressly excluded under the first paragraph of Article 263 TFEU from the scope of the review of legality laid down by that article, as the Court, moreover, pointed out in paragraphs 38 and 39 of the judgment of 31 March 1971, *Commission* v *Council*, '*AETR*' (22/70, EU:C:1971:32) in the context of Article 173 of the EEC Treaty (subsequently Article 173 of the EC Treaty and then Article 230 EC). Moreover, as is clear from paragraphs 33 to 37 of the present judgment, the General Court examined whether the contested recommendation was intended to produce binding legal effects and correctly held that this was not the case.

43 In the second place, in so far as the first two grounds of appeal allege infringement of Article 263 TFEU on the ground that the General Court ruled out, by the order under appeal, the possibility that the contested recommendation might be amenable to judicial review under that article, which would be contrary to the requirements stemming from the judgments of 23 April 1986, *Les Verts* v *Parliament* (294/83, EU:C:1986:166), and of 22 May 1990, *Parliament* v *Council* (C-70/88, EU:C:1990:217), it should be pointed out that, unlike the cases which gave rise to those two judgments, the present case is characterised, not by the absence, in the Treaties, of a provision providing the right to bring an action for annulment such as that at issue in the present case, but by the existence of an express provision, namely, the first paragraph of Article 263 TFEU, which excludes recommendations from the scope of actions for annulment since those measures do not produce binding legal effects, a fact which the General Court correctly established in the present case.

44 Moreover, even though Article 263 TFEU excludes the review, by the Court, of acts which are in the form of recommendations, Article 267 TFEU confers on the Court jurisdiction to deliver a preliminary ruling on the validity and interpretation of all acts of the EU institutions without exception (see, to that effect, judgments of 13 December 1989, *Grimaldi*, C-322/88, EU:C:1989:646, paragraph 8, and of 13 June 2017, *Florescu and Others*, C-258/14, EU:C:2017:448, paragraph 30).

45 It follows that the first and second grounds of appeal must be rejected in their entirety.

The third ground of appeal

Arguments of the parties

46 By its third ground of appeal, the Kingdom of Belgium submits that the General Court, after finding that the contested

recommendation is drafted in mandatory terms in its German- and Dutch-language versions, ought to have recognised that that recommendation seeks to produce binding legal effects, at least with regard to it.

47 According to the Commission, this ground of appeal must be rejected in so far as, by basing itself on a textual criticism relating solely to certain language versions, that ground of appeal disregards the principle of uniform interpretation of the provisions of EU law.

Findings of the Court

48 Under Article 1 of Regulation No 1, as amended by Regulation No 517/2013, all the official languages of the European Union listed in that provision are the authentic languages of the acts in which they are drafted.

49 It follows that all language versions of an EU act must, in principle, be recognised as having the same value. In order to maintain the uniform interpretation of EU law, in the case of divergence between those versions, the provision in question must therefore be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, to that effect, judgments of 2 April 1998, *EMU Tabac and Others*, C-296/95, EU:C:1998:152, paragraph 36, and of 20 November 2003, *Kyocera*, C-152/01, EU:C:2003:623, paragraphs 32 and 33 and the case-law cited).

50 Thus, the wording used in one of the language versions of an act cannot serve as the sole basis for the interpretation of that act, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement of the uniform application of EU law (see, to that effect, judgments of 22 October 2009, *Zurita García and Choque Cabrera*, C-261/08 and C-348/08, EU:C:2009:648, paragraph 55 and the case-law cited, and of 9 March 2017, *GE Healthcare*, C-173/15, EU:C:2017:195, paragraph 65 and the case-law cited).

51 In the present case, as is clear from paragraph 34 above, the General Court, in the order under appeal, carried out a comparative assessment of the different language versions of the contested recommendation and concluded that that recommendation was worded mainly in non-binding terms.

52 Furthermore, as is evident from paragraph 37 above, it was after an analysis, conducted to the requisite legal standard, of the wording and the content of the contested recommendation, as well as of the context of which it forms part, that the General Court was able properly to conclude, in paragraph 37 of the order under appeal, that that recommendation 'does not have and is not intended to have binding legal effects, with the result that it cannot be classified as a challengeable act for the purposes of Article 263 TFEU'.

53 Accordingly, the third ground of appeal cannot succeed.

54 In the light of all of the foregoing, the appeal must be dismissed in its entirety.

Costs

55 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Kingdom of Belgium and since the latter has been unsuccessful, the Kingdom of Belgium must be ordered to pay the costs.

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

1. Dismisses the appeal;
2. Orders the Kingdom of Belgium to pay the costs.

Case C-64/16 - Associação Sindical dos Juízes Portugueses v Tribunal de Contas

JUDGMENT OF THE COURT (Grand Chamber)

27 February 2018 (*)

(Reference for a preliminary ruling — Article 19(1) TEU — Legal remedies — Effective judicial protection — Judicial independence — Charter of Fundamental Rights of the European Union — Article 47 — Reduction of remuneration in the national public administration — Budgetary austerity measures)

In Case C-64/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 7 January 2016, received at the Court on 5 February 2016, in the proceedings

Associação Sindical dos Juízes Portugueses

v

Tribunal de Contas,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, L. Bay Larsen, T. von Danwitz, J.L. da Cruz Vilaça, A. Rosas, E. Levits (Rapporteur) and C.G. Fernlund, Presidents of Chambers, C. Toader, M. Safjan, D. Šváby, M. Berger, A. Prechal, E. Jarašiūnas and E. Regan, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 February 2017,

after considering the observations submitted on behalf of:

– the Associação Sindical dos Juízes Portugueses, by M. Rodrigues, advogado,

– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo, M. Rebelo, F. Almeida and V. Silva, acting as Agents,

– the European Commission, by L. Flynn and M. França, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between the Associação Sindical dos Juízes Portugueses (Trade Union of Portuguese Judges, 'the ASJP') and the Tribunal de Contas (Court of Auditors, Portugal) concerning the temporary reduction in the amount of remuneration paid to that court's members, in the context of the Portuguese State's budgetary policy guidelines.

Legal context

EU law

3 Article 2 TEU reads as follows:

'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

4 Article 19(1) and (2) TEU provides:

'1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. ...

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt ...'

Portuguese law

5 Lei n.º 75/2014 — Estabelece os mecanismos das reduções remuneratórias temporárias e as condições da sua reversão (Law No 75/2014 putting in place the mechanisms for the temporary reduction of remuneration and the conditions governing their reversibility) of 12 September 2014 (*Diário da República*, 1st Series, No 176, of 12 September 2014, p. 4896, 'Law No 75/2014'), determines, in accordance with Article 1(1) thereof, the temporary application of the mechanism for reducing remuneration in the public sector.

6 Article 2 of Law No 75/2014 is worded as follows:

'1 — Gross monthly income greater than EUR 1 500 of persons referred to in paragraph 9, whether already employed on that date or taking up their functions thereafter, in any capacity, shall be reduced as follows:

(a) by 3.5% of the total amount of remuneration greater than EUR 1 500 and less than EUR 2 000;

(b) by 3.5% of the amount of EUR 2 000 plus 16% of the amount of the total remuneration greater than EUR 2 000, coming to an overall reduction of between 3.5% and 10% in respect of remuneration equal to or greater than EUR 2 000 and up to EUR 4 165;

(c) by 10% of the total amount of remuneration greater than EUR 4 165.

…

9 — This Law shall apply to the following office-holders and other employees:

(a) the President of the Republic;

(b) the President of the Assembleia da República [National Assembly];

(c) the Prime Minister;

(d) Deputies of the Assembleia da República;

(e) Members of the Government;

(f) Judges of the Tribunal Constitucional [Constitutional Court], Judges of the Tribunal de Contas [Court of Auditors], the Attorney General of the Republic, judges and public prosecutors, judges of administrative and tax tribunals and district judges;

(g) Representatives of the Republic for the Autonomous Regions;

(h) Deputies of the assembleias legislativas das regiões autónomas [Parliaments of the Autonomous Regions];

(i) Members of the Regional Governments;

(j) locally elected persons;

(k) members of other bodies provided for in the Constitution not referred to in the preceding paragraphs and members of bodies in charge of independent administrative bodies, namely those working for the Assembleia da República;

(l) members and employees of cabinets, management bodies and support offices, office-holders and bodies referred to in the preceding paragraphs, the President and Vice-President of the Supreme Council of the Judiciary, the President and Vice-President of the Supreme Council of Administrative and Tax Tribunals, the President of the Supremo Tribunal de Justiça [Supreme Court], the President and Judges of the Tribunal Constitucional [Constitutional Court], the President of the Supremo Tribunal Administrativo [Supreme Administrative Court], the President of the Tribunal de Contas [Court of Auditors], the Provedor de Justiça [Ombudsman] and the Attorney General of the Republic;

(m) soldiers of the armed forces and the National Republican Guard (GNR), including military judges and military experts in the Public Prosecutor's Office, and of other armed forces;

(n) managerial staff of the Presidency of the Republic and the Assembleia da República and other supporting staff of the constitutional bodies, other departments and bodies of the central, regional and local State administration and staff performing other duties which are treated as equivalent for the purposes of remuneration;

(o) public administrators or those treated as equivalent thereto, members of executive, deliberative, consultative or supervisory bodies or any other statutory body subject to general or special rules, legal persons governed by public law whose independence arises from their involvement in the regulation, supervision or control of public undertakings whose capital is wholly or mainly in public ownership, public undertakings the operation of which is entrusted to a third undertaking and entities forming part of the regional and municipal business sector, public foundations and any other public entity;

(p) employees performing public duties with the Presidency of the Republic, the Assembleia da República or in other constitutional bodies, and those performing public duties irrespective of the details of the employment relationship governed by public law, including employees undergoing retraining and on special leave;

(q) employees of public institutions subject to a special regime and legal persons governed by public law which are independent as a result of their involvement in regulatory, supervisory or monitoring activities, including employees of independent regulatory entities;

(r) employees of public undertakings whose capital is wholly or mainly in public ownership, public undertakings and entities forming part of the regional and municipal business sector;

(s) employees and management of public foundations governed by public law and public foundations governed by private law and public establishments not covered by the preceding paragraphs;

(t) reserve staff, staff who have taken early retirement or are on stand-by, who are not in service, who receive benefits indexed to the salaries of active staff.

…

15 — The rules laid down in this article shall be mandatory and take precedence over all other provisions, whether special or exceptional, or otherwise, and over collective regulatory agreements and contracts of employment, and may not be derogated from or amended by any of the above.'

7 Lei n.º 159-A/2015 — Extinção da redução remuneratória na Administração Pública (Law No 159-A/2015 abolishing the reduction of remuneration in the public administration) of 30 December 2015 (*Diário da República,* 1st Series, No 254, of 30 December 2015, p. 10006-(4), 'Law No 159-A/2015'), gradually brought to an end, as from 1 January 2016, the measures to reduce remuneration set out in Law No 75/2014.

8 Article 1 of Law No 159-A/2015 provides:

'This law shall bring to an end the reduction of remuneration provided for in Law [No 75/2014], in the terms set out in the following article.'

9 Article 2 of Law No 159-A/2015 states:

'The reduction of remuneration provided for in Law [No 75/2014] shall be progressively eliminated during 2016, at quarterly intervals, as follows:

(a) reversibility of 40% for remuneration paid as from 1 January 2016;

(b) reversibility of 60% for remuneration paid as from 1 April 2016;

(c) reversibility of 80% for remuneration paid as from 1 July 2016;

(d) total elimination of the reduction in remuneration as from 1 October 2016.'

10 According to the lei n.º 98/97 de Organização e Processo do Tribunal de Contas (Law No 98/97 on the organisation and procedure of the Court of Auditors), of 26 August 1997 (*Diário da República*, Series I-A, No 196, of 26 August 1997),that court monitors, in particular, the receipt of EU own resources and the use of financial resources from the European Union, and may act in that field, in accordance with Article 5(1)(h) of that law, in cooperation with the relevant EU bodies. As provided for in Articles 44 and 96 of that law, that court also rules on questions concerning the prior review *(visto)* of the validity of the measures, contracts or other instruments giving rise to public expenditure or debts, in particular in the context of public procurement procedures.

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

11 By Law No 75/2014, the Portuguese legislature temporarily reduced, as from October 2014, the remuneration of a series of office holders and employees performing duties in the public sector. In accordance with administrative 'salary management' measures adopted on the basis of that law, the remuneration of the judges of the Tribunal de Contas (Court of Auditors) was reduced.

12 The ASJP, acting on behalf of members of the Tribunal de Contas (Court of Auditors), brought a special administrative action before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) seeking the annulment of those administrative measures relating to the month of October 2014 and the months following, an order that the defendant repay the sums withheld from salaries, plus default interest at the statutory rate, and a declaration that the persons concerned were entitled to receive their salaries in full.

13 In support of that action, the ASJP argues that the salary-reduction measures infringe 'the principle of judicial independence' enshrined not only in the Portuguese Constitution but also in EU law, in the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

14 According to the referring court, the measures for the temporary reduction in the amount of public sector remuneration are based on mandatory requirements for reducing the Portuguese State's excessive budget deficit during the year 2011. It considers that those measures were adopted in the framework of EU law or, at least, are European in origin, on the ground that those

requirements were imposed on the Portuguese Government by EU decisions granting, in particular, financial assistance to that Member State.

15 In that regard, the referring court observes that the discretion which the Portuguese State has in implementing its budgetary policy guidelines, acknowledged by the EU institutions, does not relieve it, however, of its obligation to respect the general principles of EU law, which include the principle of judicial independence, applicable both to Courts of the European Union and national courts.

16 According to the referring court, the effective judicial protection of the rights stemming from the EU legal order is ensured, under the second subparagraph of Article 19(1) TEU, primarily by the national courts. The latter must implement that protection in accordance with the principles of independence and impartiality set out in Article 47 of the Charter.

17 The referring court states, in that regard, that the independence of judicial bodies depends on the guarantees that attach to their members' status, including in terms of remuneration.

18 In those circumstances the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In view of the mandatory requirements of eliminating the excessive budget deficit and of financial assistance regulated by … rules [of EU law], must the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, in Article 47 of the [Charter] and in the case-law of the Court of Justice, be interpreted as meaning that it precludes the measures to reduce remuneration that are applied to the judiciary in Portugal, where they are imposed unilaterally and on an ongoing basis by other constitutional authorities and bodies, as is the consequence of Article 2 of Law [No 75/2014]?'

Consideration of the question referred

Admissibility

19 The European Commission contends that the referring court has not set out, in its order, the reasons for choosing the provisions of EU law which it seeks to have interpreted.

20 In that regard, it should be borne in mind that it follows from the spirit of cooperation which must prevail in the operation of the preliminary reference procedure that it is essential that the national court sets out in its order for reference the precise reasons why it considers that a reply to its questions concerning the interpretation of certain provisions of EU law is necessary to enable it to give judgment (see, to that effect, judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 47 and the case-law cited).

21 In the present case, the order for reference contains sufficient information to enable the Court to understand the reasons why the referring court seeks an interpretation of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter for the needs of the main proceedings.

22 The Portuguese Government, for its part, contends that the request for a preliminary ruling is inadmissible, on the ground that on 1 October 2016 Law No 159-A/2015 totally abolished the salary reduction which from 1 October 2014 had affected persons performing duties in the public sector. It argues, therefore, that any claim that there was an alleged infringement of the principle of judicial independence on account of that salary reduction has become devoid of purpose.

23 In that regard, it should be noted that the Court may refuse to rule on a question referred by a national court in particular where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose or where the problem is hypothetical (see, in particular, judgment of 21 December 2016, *Associazione Italia Nostra Onlus*, C-444/15, EU:C:2016:978, paragraph 36 and the case-law cited).

24 In the present case, as the Advocate General observed in point 32 of his Opinion, the dispute before the referring court in the main proceedings concerns the annulment of the administrative measures under which the remuneration of members of the Tribunal de Contas (Court of Auditors) was reduced and the reinstatement of the sums withheld pursuant to Law No 75/2014.

25 It is apparent from the file submitted to the Court that the amounts withheld from the remuneration of the persons concerned during the period from October 2014 to October 2016 have not been repaid to them. Consequently, since the main proceedings have not become devoid of purpose, that plea of inadmissibility must be rejected.

26 It follows from the foregoing that the request for a preliminary ruling is admissible.

Substance

27 By its question, the referring court seeks, in essence, to ascertain whether the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence precludes general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of a Member State's judiciary.

28 Since the applicant in the main proceedings is acting solely on behalf of the members of the Tribunal de Contas (Court of Auditors), in order to answer that question it is necessary to take into account only the situation of that court's members.

29 First of all, the Court of Justice points out that as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision relates to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter.

30 According to Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU (see, to that effect, Opinion 2/13 (Accession of the European Union to the ECHR), of 18 December 2014, EU:C:2014:2454, paragraph 168).

31 The European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 91 and 94 and the case-law cited).

32 Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 66; judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 90, and of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, paragraph 45).

33 Consequently, national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 69, and judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 99).

34 The Member States are therefore obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 68). In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 100 and 101 and the case-law cited).

35 The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,

signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (see, to that effect, judgments of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraph 37, and of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraphs 29 to 33).

36 The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law (see, to that effect, judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 73 and the case-law cited).

37 It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection.

38 In that regard, the Court notes that the factors to be taken into account in assessing whether a body is a 'court or tribunal' include, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgment of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 27 and the case-law cited).

39 In the present case, it must be noted that, according to the information before the Court which it is for the referring court to verify, questions relating to EU own resources and the use of financial resources from the European Union may be brought before the Tribunal de Contas (Court of Auditors), pursuant to Law No 98/97 cited in paragraph 10 above. Such questions may concern the application or interpretation of EU law (see, in particular, judgment of 26 May 2016, *Județul Neamț and JudețulBacău*, C-260/14 and C-261/14, EU:C:2016:360). The same is also true of questions concerning the prior review *(visto)* of the validity of the measures, contracts or other instruments giving rise to public expenditure or debts, inter alia, in the context of public procurement procedures, which may also be brought before that court pursuant to Law No 98/97.

40 Consequently, to the extent that the Tribunal de Contas (Court of Auditors) may rule, as a 'court or tribunal', within the meaning referred to in paragraph 38 above, on questions concerning the application or interpretation of EU law, which it is for the referring court to verify, the Member State concerned must ensure that that court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU.

41 In order for that protection to be ensured, maintaining such a court or tribunal's independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy.

42 The guarantee of independence, which is inherent in the task of adjudication (see, to that effect, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 49; of 14 June 2017, *Online Games and Others*, C-685/15, EU:C:2017:452, paragraph 60; and of 13 December 2017, *El Hassani*, C-403/16, EU:C:2017:960, paragraph 40), is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, as provided for in the third subparagraph of Article 19(2) TEU, but also at the level of the Member States as regards national courts.

43 The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, in accordance with the settled case-law referred to in paragraph 38 above, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence.

44 The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (see, to that effect, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 51, and of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 37 and the case-law cited).

45 Like the protection against removal from office of the members of the body concerned (see, in particular, judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 51), the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence.

46 In the present case, it should be noted that, as is apparent from the information provided by the referring court, the salary-reduction measures at issue in the main proceedings were adopted because of mandatory requirements linked to eliminating the Portuguese State's excessive budget deficit and in the context of an EU programme of financial assistance to Portugal.

47 Those salary-reduction measures provided for a limited reduction of the amount of remuneration, up to a percentage varying in accordance with the level of remuneration.

48 The measures were applied not only to the members of the Tribunal de Contas (Court of Auditors), but, more widely, to various public office holders and employees performing duties in the public sector, including the representatives of the legislature, the executive and the judiciary.

49 Those measures cannot, therefore, be perceived as being specifically adopted in respect of the members of the Tribunal de Contas (Court of Auditors). They are, on the contrary, in the nature of general measures seeking a contribution from all members of the national public administration to the austerity effort dictated by the mandatory requirements for reducing the Portuguese State's excessive budget deficit.

50 Lastly, as is apparent from the title of Law No 75/2014 and the actual wording of Article 1(1) thereof, the salary-reduction measures introduced by that Law, and that entered into force on 1 October 2014, were temporary in nature. In accordance with a process for the gradual abolition of those measures which took place during 2016, Law No 159-A/2015 brought the reduction of remuneration definitively to an end on 1 October 2016.

51 In those circumstances, the salary-reduction measures at issue in the main proceedings cannot be considered to impair the independence of the members of the Tribunal de Contas (Court of Auditors).

52 In the light of all the foregoing considerations, the answer to the question raised is that the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Tribunal de Contas (Court of Auditors).

Costs

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

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

The second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Tribunal de Contas (Court of Auditors, Portugal).

Case C 210/16 - Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH

JUDGMENT OF THE COURT (Grand Chamber)

5 June 2018 (*)

(Reference for a preliminary ruling — Directive 95/46/EC — Personal data — Protection of natural persons with respect to the processing of that data — Order to deactivate a Facebook page (fan page) enabling the collection and processing of certain data of visitors to that page — Article 2(d) — Controller responsible for the processing of personal data — Article 4 — Applicable national law — Article 28 — National supervisory authorities — Powers of intervention of those authorities)

In Case C-210/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Germany), made by decision of 25 February 2016, received at the Court on 14 April 2016, in the proceedings

Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein

v

Wirtschaftsakademie Schleswig-Holstein GmbH,

interveners:

Facebook Ireland Ltd,

Vertreter des Bundesinteresses beim Bundesverwaltungsgericht,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano (Rapporteur), Vice-President, M. Ilešič, L. Bay Larsen, T. von Danwitz, A. Rosas, J. Malenovský and E. Levits, Presidents of Chambers, E. Juhász, A. Borg Barthet, F. Biltgen, K. Jürimäe, C. Lycourgos, M. Vilaras and E. Regan, Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 27 June 2017,

after considering the observations submitted on behalf of **[the parties and interveners]**:::

after hearing the Opinion of the Advocate General at the sitting on 24 October 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

2 The request has been made in proceedings between the Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein (Independent Data Protection Centre for the *Land* of Schleswig-Holstein, Germany) ('the ULD') and Wirtschaftsakademie Schleswig-Holstein GmbH, a private-law company operating in the field of education ('Wirtschaftsakademie'), concerning the lawfulness of ULD's order to Wirtschaftsakademie to deactivate its fan page on the Facebook social network site ('Facebook').

Legal context

EU law

3 Recitals 10, 18, 19 and 26 of Directive 95/46 state:

'(10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of [EU] law; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the [European Union];

...

(18) Whereas, in order to ensure that individuals are not deprived of the protection to which they are entitled under this Directive, any processing of personal data in the [European Union] must be carried out in accordance with the law of one of the Member States; whereas, in this connection, processing carried out under the responsibility of a controller who is established in a Member State should be governed by the law of that State;

(19) Whereas establishment on the territory of a Member State implies the effective and real exercise of activity through stable arrangements; whereas the legal form of such an establishment, whether simply branch or a subsidiary with a legal personality, is not the determining factor in this respect; whereas, when a single controller is established on the territory of several Member States, particularly by means of subsidiaries, he must ensure, in order to avoid any circumvention of national rules, that each of the establishments fulfils the obligations imposed by the national law applicable to its activities;

…

(26) Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; …'

4 Article 1 of Directive 95/46, 'Object of the Directive', provides:

'1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.'

5 Article 2 of Directive 95/46, 'Definitions', reads as follows:

'For the purposes of this Directive:

…

(b) "processing of personal data" ("processing") shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

...

(d) “controller” shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or [EU] laws or regulations, the controller or the specific criteria for his nomination may be designated by national or [EU] law;

(e) “processor” shall mean a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller;

(f) “third party” shall mean any natural or legal person, public authority, agency or any other body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorised to process the data;

...’

6 Article 4 of that directive, ‘National law applicable’, provides in paragraph 1:

‘Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:

(a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;

(b) the controller is not established on the Member State’s territory, but in a place where its national law applies by virtue of international public law;

(c) the controller is not established on [EU] territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the [European Union].’

7 Article 17 of the directive, ‘Security of processing’, provides in paragraphs 1 and 2:

‘1. Member States shall provide that the controller must implement appropriate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.

2. The Member States shall provide that the controller must, where processing is carried out on his behalf, choose a processor providing sufficient guarantees in respect of the technical security measures and organisational measures governing the processing to be carried out, and must ensure compliance with those measures.’

8 Article 24 of the directive, ‘Sanctions’, provides:

‘The Member States shall adopt suitable measures to ensure the full implementation of the provisions of this Directive and shall in particular lay down the sanctions to be imposed in case of infringement of the provisions adopted pursuant to this Directive.’

9 Article 28 of the directive, ‘Supervisory authority’, reads as follows:

‘1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.

These authorities shall act with complete independence in exercising the functions entrusted to them.

2. Each Member State shall provide that the supervisory authorities are consulted when drawing up administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data.

3. Each authority shall in particular be endowed with:

– investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties,

– effective powers of intervention, such as, for example, that of delivering opinions before processing operations are carried out, in accordance with Article 20, and ensuring appropriate publication of such opinions, of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions,

– the power to engage in legal proceedings where the national provisions adopted pursuant to this Directive have been violated or to bring these violations to the attention of the judicial authorities.

Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.

...

6. Each supervisory authority is competent, whatever the national law applicable to the processing in question, to exercise, on the territory of its own Member State, the powers conferred on it in accordance with paragraph 3. Each authority may be requested to exercise its powers by an authority of another Member State.

The supervisory authorities shall cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information.

...'

German law

10 Paragraph 3(7) of the Bundesdatenschutzgesetz (Federal Law on data protection), in the version applicable to the main proceedings ('the BDSG'), reads as follows:

'A responsible entity is any person or entity which collects, processes or uses personal data on its own behalf, or commissions others to do this.'

11 Paragraph 11 of the BDSG, 'Collection, processing or use of personal data by entities commissioned', reads:

'(1) If personal data is collected, processed or used by other entities commissioned to do so, the commissioning entity is responsible for compliance with the provisions of this law and with other provisions on data protection. …

(2) The entity commissioned must be selected carefully with particular account being taken of the suitability of the technical and organisational measures taken by it. The commission must be given in writing, with the following in particular being determined in detail: …

The commissioning entity must satisfy itself, before the start of the data processing and regularly thereafter, that the technical and organisational measures taken by the entity commissioned are complied with. The results must be documented.

…'

12 Paragraph 38(5) of the BDSG provides:

'To ensure compliance with this law and with other provisions on data protection, the supervisory authority may order measures to eliminate breaches that have been ascertained in the collection, processing or use of personal data or technical or organisational

defects. In the case of serious breaches or defects, in particular those which are associated with a particular threat to the right to protection of personality, it can prohibit the collection, processing or use or the application of specific procedures if the breaches or defects are not eliminated within a reasonable time, contrary to an order in accordance with the first sentence and despite the imposition of a penalty payment. It can require the data protection officer to be removed if he does not possess the expert knowledge and reliability needed to perform his duties.'

13 Paragraph 12 of the Telemediengesetz (Law on electronic media) of 26 February 2007 (BGBl. 2007 I, p. 179, 'the TMG') reads as follows:

'(1) The service provider may collect and use personal data for the provision of electronic media only where this law or another provision of law expressly relating to electronic media permits it or the user has consented.

...

(3) Except as provided otherwise, the provisions in force for the protection of personal data are to be applied even if the data is not processed automatically.'

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

14 Wirtschaftsakademie offers educational services by means of a fan page hosted on Facebook.

15 Fan pages are user accounts that can be set up on Facebook by individuals or businesses. To do so, the author of the fan page, after registering with Facebook, can use the platform designed by Facebook to introduce himself to the users of that social network and to persons visiting the fan page, and to post any kind of communication in the media and opinion market. Administrators of fan pages can obtain anonymous statistical information on visitors to the fan pages via a function called 'Facebook Insights' which Facebook makes available to them free of charge under non-negotiable conditions of use. That information is collected by means of evidence files ('cookies'), each containing a unique user code, which are active for two years and are stored by Facebook on the hard disk of the computer or on other media of visitors to fan pages. The user code, which can be matched with the connection data of users registered on Facebook, is collected and processed when the fan pages are opened. According to the order for reference, neither Wirtschaftsakademie nor Facebook Ireland Ltd notified the storage and functioning of the cookie or the subsequent processing of the data, at least during the material period for the main proceedings.

16 By decision of 3 November 2011 ('the contested decision'), the ULD, as supervisory authority within the meaning of Article 28 of Directive 95/46, with the task of supervising the application in the *Land* of Schleswig-Holstein (Germany) of the provisions adopted by the Federal Republic of Germany pursuant to that directive, ordered Wirtschaftsakademie, in accordance with the first sentence of Paragraph 38(5) of the BDSG, to deactivate the fan page it had set up on Facebook at the address www.facebook.com/wirtschaftsakademie, on pain of a penalty payment if it failed to comply within the prescribed period, on the ground that neither Wirtschaftsakademie nor Facebook informed visitors to the fan page that Facebook, by means of cookies, collected personal data concerning them and then processed the data. Wirtschaftsakademie brought a complaint against that decision, arguing essentially that it was not responsible under data protection law for the processing of the data by Facebook or the cookies which Facebook installed.

17 By decision of 16 December 2011, the ULD dismissed the complaint, finding that Wirtschaftsakademie as a service provider was liable under Paragraph 3(3)(4) and Paragraph 12(1) of the TMG in conjunction with Paragraph 3(7) of the BDSG. The ULD stated that, by setting up its fan page, Wirtschaftsakademie had made an active and deliberate contribution to the collection by Facebook of personal data relating to visitors to the fan page, from which it profited by means of the statistics provided to it by Facebook.

18 Wirtschaftsakademie brought an action against that decision in the Verwaltungsgericht (Administrative Court, Germany), submitting that the processing of personal data by Facebook could not be attributed to it and that it had not commissioned Facebook within the meaning of Paragraph 11 of the BDSG to process data that it controlled or was able to influence. Wirtschaftsakademie concluded that the ULD should have acted directly against Facebook instead of adopting the contested decision against it.

19 By judgment of 9 October 2013, the Verwaltungsgericht (Administrative Court) annulled the contested decision, essentially on the ground that, since the administrator of a fan page on Facebook is not a responsible entity within the meaning of Paragraph 3(7)

of the BDSG, Wirtschaftsakademie could not be the addressee of a measure taken under Paragraph 38(5) of the BDSG.

20 The Oberverwaltungsgericht (Higher Administrative Court, Germany) dismissed the ULD's appeal against that judgment as unfounded. It found essentially that the prohibition of the processing of data in the contested decision was unlawful, in that the second sentence of Paragraph 38(5) of the BDSG lays down a step-by-step procedure whose first step allows only the adoption of measures for the elimination of infringements that have been ascertained in the processing of data. An immediate prohibition of the processing of data comes into consideration only if a data processing procedure is unlawful in its entirety and the only possible remedy is to terminate it. According to the Oberverwaltungsgericht (Higher Administrative Court), that was not the case here, since it would have been possible for Facebook to put an end to the infringements alleged by the ULD.

21 The Oberverwaltungsgericht (Higher Administrative Court) further stated that the contested decision was also unlawful on the ground that an order under Paragraph 38(5) of the BDSG may only be made against the responsible entity within the meaning of Paragraph 3(7) of the BDSG, and that Wirtschaftsakademie was not such an entity in relation to the data collected by Facebook. Facebook alone decided on the purpose and means of collecting and processing personal data used for the Facebook Insights function, Wirtschaftsakademie receiving only anonymised statistical information.

22 The ULD appealed on a point of law to the Bundesverwaltungsgericht (Federal Administrative Court, Germany), relying inter alia on an infringement of Paragraph 38(5) of the BDSG and on a number of procedural errors vitiating the appellate court's decision. It considers that the infringement committed by Wirtschaftsakademie consisted in commissioning an inappropriate supplier — inappropriate because it did not comply with the applicable data protection law — namely Facebook Ireland, to create, host and maintain a website. The order to Wirtschaftsakademie to deactivate its fan page, imposed by the contested decision, was thus intended to remedy that breach, since it prohibited it from continuing to make use of Facebook infrastructure as the technical basis of its website.

23 Like the Oberverwaltungsgericht (Higher Administrative Court), the Bundesverwaltungsgericht (Federal Administrative Court) takes the view that Wirtschaftsakademie cannot itself be regarded as responsible for the data processing within the meaning Paragraph 3(7) of the BDSG or Article 2(d) of Directive 95/46. It considers nevertheless that the concept of controller should in principle be interpreted broadly, in the interests of effective protection of the right of privacy, as the Court has held in its recent case-law on the point. It further entertains doubts as to the powers of the ULD with respect to Facebook Germany in the present case, given that it is Facebook Ireland that is responsible, at EU level, for the collection and processing of personal data within the Facebook group. Finally, it is uncertain as to the effect, for the purpose of the exercise of the ULD's powers of intervention, of the assessments made by the supervisory authority to which Facebook Ireland is subject concerning the lawfulness of the processing of personal data at issue.

24 In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 2(d) of Directive [95/46] to be interpreted as definitively and exhaustively defining the liability and responsibility for data protection infringements, or does scope remain, under the "suitable measures" pursuant to Article 24 of Directive [95/46] and the "effective powers of intervention" pursuant to the second indent of Article 28(3) of Directive [95/46], in multi-tiered information provider relationships, for responsibility of an entity that does not control the data processing within the meaning of Article 2(d) of Directive [95/46] when it chooses the operator of its information offering?

(2) Does it follow *a contrario* from the obligation of Member States under Article 17(2) of Directive [95/46] to provide, where data processing is carried out on the controller's behalf, that the controller must "choose a processor providing sufficient guarantees in respect of the technical security measures and organisational measures governing the processing to be carried out", that, where there are other user relationships not linked to data processing on the controller's behalf within the meaning of Article 2(e) of Directive [95/46], there is no obligation to make a careful selection and no such obligation can be based on national law?

(3) In cases in which a parent company based outside the European Union has legally independent establishments (subsidiaries) in various Member States, is the supervisory authority of a Member State (in this case, Germany) entitled under Article 4 and Article 28(6) of Directive [95/46] to exercise the powers conferred under Article 28(3) of Directive [95/46] against the establishment located in its territory even when this establishment is responsible solely for promoting the sale of advertising and other marketing measures aimed at the inhabitants of that Member State, whereas the independent establishment (subsidiary) located in another Member State (in this case, Ireland) is exclusively responsible within the group's internal division of tasks for collecting and processing

personal data throughout the entire territory of the European Union and hence in the other Member State as well (in this case, Germany), if the decision on the data processing is in fact taken by the parent company?

(4) Are Article 4(1)(a) and Article 28(3) of Directive [95/46] to be interpreted as meaning that, in cases in which the controller has an establishment in the territory of one Member State (in this case, Ireland) and there is another, legally independent establishment in the territory of another Member State (in this case, Germany), whose responsibilities include the sale of advertising space and whose activity is aimed at the inhabitants of that State, the competent supervisory authority in this other Member State (in this case, Germany) may direct measures and orders implementing data protection legislation also against the other establishment (in this case, in Germany) not responsible for data processing under the group's internal division of tasks and responsibilities, or are measures and orders only possible by the supervisory body of the Member State (in this case, Ireland) in whose territory the entity with internal responsibility within the group has its registered office?

(5) Are Article 4(1)(a) and Article 28(3) and (6) of Directive [95/46] to be interpreted as meaning that, in cases in which the supervisory authority in one Member State (in this case, Germany) takes action against a person or entity in its territory pursuant to Article 28(3) of Directive [95/46] on the grounds of failure carefully to select a third party involved in the data processing process (in this case, Facebook), because that third party infringes data protection legislation, the active supervisory authority (in this case, Germany) is bound by the appraisal made under data protection legislation by the supervisory authority of the Member State in which the third party responsible for the data processing has its establishment (in this case, Ireland) meaning that it may not arrive at a different legal appraisal, or may the active supervisory authority (in this case, Germany) conduct its own examination of the lawfulness of the data processing by the third party established in another Member State (in this case, Ireland) as a preliminary question prior to its own action?

(6) If the possibility of conducting an independent examination is available to the active supervisory authority (in this case, Germany), is the second sentence of Article 28(6) of Directive [95/46] to be interpreted as meaning that this supervisory authority may exercise the effective powers of intervention conferred on it under Article 28(3) of Directive [95/46] against a person or entity established in its territory on the grounds of their joint responsibility for data protection infringements by a third party established in another Member State only if and not until it has first requested the supervisory authority in this other Member State (in this case, Ireland) to exercise its powers?'

Consideration of the questions referred

Questions 1 and 2

25 By its first and second questions, which should be considered together, the referring court essentially wishes to know whether Article 2(d), Article 17(2), Article 24 and the second indent of Article 28(3) of Directive 95/46 must be interpreted as allowing an entity to be held liable in its capacity as administrator of a fan page on a social network where the rules on the protection of personal data are infringed, because it has chosen to make use of that social network to distribute the information it offers.

26 To answer those questions, it must be recalled that, as is apparent from Article 1(1) and recital 10 of Directive 95/46, the directive aims to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy, with respect to the processing of personal data (judgment of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paragraph 27 and the case-law cited).

27 In accordance with that aim, Article 2(d) of the directive defines the concept of 'controller' broadly as the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data.

28 As the Court has previously held, the objective of that provision is to ensure, through a broad definition of the concept of 'controller', effective and complete protection of the persons concerned (judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 34).

29 Furthermore, since, as Article 2(d) of Directive 95/46 expressly provides, the concept of 'controller' relates to the entity which 'alone or jointly with others' determines the purposes and means of the processing of personal data, that concept does not necessarily refer to a single entity and may concern several actors taking part in that processing, with each of them then being subject to the

applicable data protection provisions.

30 In the present case, Facebook Inc. and, for the European Union, Facebook Ireland must be regarded as primarily determining the purposes and means of processing the personal data of users of Facebook and persons visiting the fan pages hosted on Facebook, and therefore fall within the concept of 'controller' within the meaning of Article 2(d) of Directive 95/46, which is not challenged in the present case.

31 That being so, and in order to answer the questions referred, it must be examined whether and to what extent the administrator of a fan page hosted on Facebook, such as Wirtschaftsakademie, contributes in the context of that fan page to determining, jointly with Facebook Ireland and Facebook Inc., the purposes and means of processing the personal data of the visitors to the fan page and may therefore also be regarded as a 'controller' within the meaning of Article 2(d) of Directive 95/46.

32 It appears that any person wishing to create a fan page on Facebook concludes a specific contract with Facebook Ireland for the opening of such a page, and thereby subscribes to the conditions of use of the page, including the policy on cookies, which is for the national court to ascertain.

33 According to the documents before the Court, the data processing at issue in the main proceedings is essentially carried out by Facebook placing cookies on the computer or other device of persons visiting the fan page, whose purpose is to store information on the browsers, those cookies remaining active for two years if not deleted. It also appears that in practice Facebook receives, registers and processes the information stored in the cookies in particular when a person visits 'the Facebook services, services provided by other members of the Facebook family of companies, and services provided by other companies that use the Facebook services'. Moreover, other entities such as Facebook partners or even third parties 'may use cookies on the Facebook services to provide services [directly to that social network] and the businesses that advertise on Facebook'.

34 That processing of personal data is intended in particular to enable Facebook to improve its system of advertising transmitted via its network, and to enable the fan page administrator to obtain statistics produced by Facebook from the visits to the page, for the purposes of managing the promotion of its activity, making it aware, for example, of the profile of the visitors who like its fan page or use its applications, so that it can offer them more relevant content and develop functionalities likely to be of more interest to them.

35 While the mere fact of making use of a social network such as Facebook does not make a Facebook user a controller jointly responsible for the processing of personal data by that network, it must be stated, on the other hand, that the administrator of a fan page hosted on Facebook, by creating such a page, gives Facebook the opportunity to place cookies on the computer or other device of a person visiting its fan page, whether or not that person has a Facebook account.

36 In this context, according to the submissions made to the Court, the creation of a fan page on Facebook involves the definition of parameters by the administrator, depending inter alia on the target audience and the objectives of managing and promoting its activities, which has an influence on the processing of personal data for the purpose of producing statistics based on visits to the fan page. The administrator may, with the help of filters made available by Facebook, define the criteria in accordance with which the statistics are to be drawn up and even designate the categories of persons whose personal data is to be made use of by Facebook. Consequently, the administrator of a fan page hosted on Facebook contributes to the processing of the personal data of visitors to its page.

37 In particular, the administrator of the fan page can ask for — and thereby request the processing of — demographic data relating to its target audience, including trends in terms of age, sex, relationship and occupation, information on the lifestyles and centres of interest of the target audience and information on the purchases and online purchasing habits of visitors to its page, the categories of goods and services that appeal the most, and geographical data which tell the fan page administrator where to make special offers and where to organise events, and more generally enable it to target best the information it offers.

38 While the audience statistics compiled by Facebook are indeed transmitted to the fan page administrator only in anonymised form, it remains the case that the production of those statistics is based on the prior collection, by means of cookies installed by Facebook on the computers or other devices of visitors to that page, and the processing of the personal data of those visitors for such statistical purposes. In any event, Directive 95/46 does not, where several operators are jointly responsible for the same processing, require each of them to have access to the personal data concerned.

39 In those circumstances, the administrator of a fan page hosted on Facebook, such as Wirtschaftsakademie, must be regarded as taking part, by its definition of parameters depending in particular on its target audience and the objectives of managing and promoting its activities, in the determination of the purposes and means of processing the personal data of the visitors to its fan page. The administrator must therefore be categorised, in the present case, as a controller responsible for that processing within the European Union, jointly with Facebook Ireland, within the meaning of Article 2(d) of Directive 95/46.

40 The fact that an administrator of a fan page uses the platform provided by Facebook in order to benefit from the associated services cannot exempt it from compliance with its obligations concerning the protection of personal data.

41 It must be emphasised, moreover, that fan pages hosted on Facebook can also be visited by persons who are not Facebook users and so do not have a user account on that social network. In that case, the fan page administrator's responsibility for the processing of the personal data of those persons appears to be even greater, as the mere consultation of the home page by visitors automatically starts the processing of their personal data.

42 In those circumstances, the recognition of joint responsibility of the operator of the social network and the administrator of a fan page hosted on that network in relation to the processing of the personal data of visitors to that page contributes to ensuring more complete protection of the rights of persons visiting a fan page, in accordance with the requirements of Directive 95/46.

43 However, it should be pointed out, as the Advocate General observes in points 75 and 76 of his Opinion, that the existence of joint responsibility does not necessarily imply equal responsibility of the various operators involved in the processing of personal data. On the contrary, those operators may be involved at different stages of that processing of personal data and to different degrees, so that the level of responsibility of each of them must be assessed with regard to all the relevant circumstances of the particular case.

44 In the light of the above considerations, the answer to Questions 1 and 2 is that Article 2(d) of Directive 95/46 must be interpreted as meaning that the concept of 'controller' within the meaning of that provision encompasses the administrator of a fan page hosted on a social network.

Questions 3 and 4

45 By its third and fourth questions, which should be considered together, the referring court essentially wishes to know whether Articles 4 and 28 of Directive 95/46 must be interpreted as meaning that, where an undertaking established outside the European Union has several establishments in different Member States, the supervisory authority of a Member State is entitled to exercise the powers conferred on it by Article 28(3) of that directive with respect to an establishment situated in the territory of that Member State even if, as a result of the division of tasks within the group, first, that establishment is responsible solely for the sale of advertising space and other marketing activities in the territory of that Member State and, second, exclusive responsibility for collecting and processing personal data belongs, for the entire territory of the European Union, to an establishment situated in another Member State, or whether it is for the supervisory authority of that other Member State to exercise those powers with respect to the second establishment.

46 The ULD and the Italian Government express doubts as to the admissibility of those questions, on the ground that they are not relevant to the outcome of the main proceedings. They submit that the contested decision is addressed to Wirtschaftsakademie and does not therefore concern Facebook Inc. or any of its subsidiaries established in EU territory.

47 On this point, it must be recalled that, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraph 19 and the case-law cited).

48 In the present case, it should be noted that the referring court states that an answer by the Court to its third and fourth questions is necessary for it to rule on the main proceedings. It explains that, should it be found in the light of that answer that the ULD could remedy the alleged infringements of the right to protection of personal data by taking a measure against Facebook Germany, such a finding could indicate that the contested decision was vitiated by an error of assessment, in that it was wrongly taken against Wirtschaftsakademie.

49 In those circumstances, Questions 3 and 4 are admissible.

50 To answer those questions, it must be recalled as a preliminary point that, in accordance with Article 28(1) and (3) of Directive 95/46, each supervisory authority is to exercise all the powers conferred on it by national law in the territory of its own Member State, in order to ensure compliance with the data protection rules in that territory (see, to that effect, judgment of 1 October 2015, *Weltimmo*, C-230/14, EU:C:2015:639, paragraph 51).

51 The question of which national law applies to the processing of personal data is governed by Article 4 of Directive 95/46. As stated in Article 4(1)(a), each Member State is to apply the national provisions it adopts pursuant to the directive to the processing of personal data, where the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State. That provision states that, where the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of those establishments complies with the obligations laid down by the national law applicable.

52 It thus follows from a reading of that provision in conjunction with Article 28(1) and (3) of Directive 95/46 that, where the national law of the Member State of the supervisory authority is applicable under Article 4(1)(a) of the directive because the processing in question is carried out in the context of the activities of an establishment of the controller in the territory of that Member State, that supervisory authority can exercise all the powers conferred on it by that law in respect of that establishment, regardless of whether the controller also has establishments in other Member States.

53 In order, therefore, to determine whether, in circumstances such as those of the main proceedings, a supervisory authority is entitled to exercise the powers conferred on it by national law against an establishment situated in the territory of its own Member State, it must be ascertained whether the two conditions laid down by Article 4(1)(a) of Directive 95/46 are satisfied, in other words, whether there is an 'establishment of the controller' within the meaning of that provision and whether the processing is carried out 'in the context of the activities' of the establishment, also within the meaning of that provision.

54 As regards, first, the condition that the controller responsible for the processing of personal data must have an establishment in the territory of the Member State of the supervisory authority, it must be recalled that, according to recital 19 of Directive 95/46, establishment in the territory of a Member State implies the effective and real exercise of activity through stable arrangements, and the legal form of such an establishment, whether simply a branch or a subsidiary with a legal personality, is not the determining factor (judgment of 1 October 2015, *Weltimmo*, C-230/14, EU:C:2015:639, paragraph 28 and the case-law cited).

55 In the present case, it is common ground that Facebook Inc., as controller jointly responsible with Facebook Ireland for processing personal data, has a permanent establishment in Germany, namely Facebook Germany, situated in Hamburg, and that Facebook Germany effectively and genuinely exercises activities in that Member State. It is therefore an establishment within the meaning of Article 4(1)(a) of Directive 95/46.

56 As regards, second, the condition that the processing of personal data must be carried out 'in the context of the activities' of the establishment in question, it must be recalled, to begin with, that in view of the objective pursued by Directive 95/46 of ensuring effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data, the expression 'in the context of the activities of an establishment' cannot be interpreted restrictively (judgment of 1 October 2015, *Weltimmo*, C-230/14, EU:C:2015:639, paragraph 25 and the case-law cited).

57 Next, it must be pointed out that Article 4(1)(a) of Directive 95/46 does not require that such processing be carried out 'by' the establishment concerned itself, but only that it be carried out 'in the context of the activities of' the establishment (judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 52).

58 In the present case, the order for reference and the written observations submitted by Facebook Ireland show that Facebook Germany is responsible for promoting and selling advertising space and carries on activities addressed to persons residing in Germany.

59 As noted in paragraphs 33 and 34 above, the processing of personal data at issue in the main proceedings, carried out by Facebook Inc. jointly with Facebook Ireland, consisting in collecting personal data by means of cookies installed on the computers or other devices of visitors to fan pages hosted on Facebook, is intended, in particular, to enable Facebook to improve its system of

advertising, in order better to target its communications.

60 As the Advocate General observes in point 94 of his Opinion, given that a social network such as Facebook generates a substantial part of its income from advertisements posted on the web pages set up and accessed by users, and given that Facebook's establishment in Germany is intended to ensure the promotion and sale in Germany of advertising space that makes Facebook's services profitable, the activities of that establishment must be regarded as inextricably linked to the processing of personal data at issue in the main proceedings, for which Facebook Inc. is jointly responsible with Facebook Ireland. Consequently, such treatment must be regarded as being carried out in the context of the activities of an establishment of the controller within the meaning of Article 4(1)(a) of Directive 95/46 (see, to that effect, judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraphs 55 and 56).

61 It follows that, since German law is applicable to the processing of personal data at issue in the main proceedings in accordance with Article 4(1)(a) of Directive 95/46, the German supervisory authority was competent under Article 28(1) of that directive to apply that law to that processing.

62 That supervisory authority was therefore competent, for the purpose of ensuring compliance in German territory with the rules on the protection of personal data, to exercise with respect to Facebook Germany all the powers conferred on it under the national provisions transposing Article 28(3) of Directive 95/46.

63 It should also be stated that the circumstance, emphasised by the referring court in its third question, that the strategic decisions on the collection and processing of personal data relating to persons resident in EU territory are taken by a parent company established in a third country, such as Facebook Inc. in the present case, is not capable of calling in question the competence of the supervisory authority operating under the law of a Member State with respect to an establishment in the territory of that State belonging to the controller responsible for the processing of that data.

64 In the light of the foregoing, the answer to Questions 3 and 4 is that Articles 4 and 28 of Directive 95/46 must be interpreted as meaning that, where an undertaking established outside the European Union has several establishments in different Member States, the supervisory authority of a Member State is entitled to exercise the powers conferred on it by Article 28(3) of that directive with respect to an establishment of that undertaking situated in the territory of that Member State even if, as a result of the division of tasks within the group, first, that establishment is responsible solely for the sale of advertising space and other marketing activities in the territory of that Member State and, second, exclusive responsibility for collecting and processing personal data belongs, for the entire territory of the European Union, to an establishment situated in another Member State.

Questions 5 and 6

65 By its fifth and sixth questions, which should be considered together, the referring court asks essentially whether Article 4(1)(a) and Article 28(3) and (6) of Directive 95/46 must be interpreted as meaning that, where the supervisory authority of a Member State intends to exercise with respect to an entity established in the territory of that Member State the powers of intervention referred to in Article 28(3) of that directive, on the ground of infringements of the rules on the protection of personal data committed by a third party responsible for the processing of that data whose seat is in another Member State, that supervisory authority is competent to assess, independently of the supervisory authority of the other Member State, the lawfulness of such data processing and may exercise its powers of intervention with respect to the entity established in its territory without first calling on the supervisory authority of the other Member State to intervene.

66 To answer those questions, it must be recalled, as may be seen from the answer to the first and second questions referred for a preliminary ruling, that Article 2(d) of Directive 95/46 must be interpreted as allowing, in circumstances such as those of the main proceedings, an entity such as Wirtschaftsakademie to be held responsible, as the administrator of a fan page hosted on Facebook, in the event of an infringement of the rules on the protection of personal data.

67 It follows that, by virtue of Article 4(1)(a) and Article 28(1) and (3) of Directive 95/46, the supervisory authority of the Member State in whose territory that entity is established is competent to apply its national law, and thus to make use against that entity of all the powers conferred on it by its national law, in accordance with Article 28(3) of that directive.

68 As provided for by the second subparagraph of Article 28(1) of that directive, the supervisory authorities whose task it is to supervise the application, in the territory of their own Member States, of the provisions adopted by those States pursuant to the

directive are to act with complete independence in exercising the functions entrusted to them. That requirement also follows from EU primary law, in particular Article 8(3) of the Charter of Fundamental Rights of the European Union and Article 16(2) TFEU (see, to that effect, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 40).

69 Furthermore, while under the second subparagraph of Article 28(6) of Directive 95/46 the supervisory authorities are to cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information, that directive does not lay down any criterion of priority governing the intervention of one supervisory authority as against another, nor does it lay down an obligation for a supervisory authority of one Member State to comply with a position which may have been expressed by the supervisory authority of another Member State.

70 A supervisory authority which is competent under its national law is not therefore obliged to adopt the conclusion reached by another supervisory authority in an analogous situation.

71 It must be recalled that, as the national supervisory authorities are responsible, in accordance with Article 8(3) of the Charter of Fundamental Rights and Article 28 of Directive 95/46, for monitoring compliance with the EU rules concerning the protection of individuals with regard to the processing of personal data, each of them is therefore vested with the power to check whether the processing of personal data in the territory of its own Member State complies with the requirements laid down by Directive 95/46 (see, to that effect, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 47).

72 Since Article 28 of Directive 95/46 applies by its very nature to any processing of personal data, even where there is a decision of a supervisory authority of another Member State, a supervisory authority hearing a claim lodged by a person concerning the protection of his rights and freedoms with regard to the processing of personal data relating to him must examine, with complete independence, whether the processing of that data complies with the requirements laid down by that directive (see, to that effect, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 57).

73 It follows that, in the present case, under the system established by Directive 95/46, the ULD was entitled to assess, independently of the assessments made by the Irish supervisory authority, the lawfulness of the data processing at issue in the main proceedings.

74 Consequently, the answer to Questions 5 and 6 is that Article 4(1)(a) and Article 28(3) and (6) of Directive 95/46 must be interpreted as meaning that, where the supervisory authority of a Member State intends to exercise with respect to an entity established in the territory of that Member State the powers of intervention referred to in Article 28(3) of that directive, on the ground of infringements of the rules on the protection of personal data committed by a third party responsible for the processing of that data whose seat is in another Member State, that supervisory authority is competent to assess, independently of the supervisory authority of the other Member State, the lawfulness of such data processing and may exercise its powers of intervention with respect to the entity established in its territory without first calling on the supervisory authority of the other Member State to intervene.

Costs

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

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

1. Article 2(d) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data must be interpreted as meaning that the concept of 'controller' within the meaning of that provision encompasses the administrator of a fan page hosted on a social network.

2. Articles 4 and 28 of Directive 95/46 must be interpreted as meaning that, where an undertaking established outside the European Union has several establishments in different Member States, the supervisory authority of a Member State is entitled to exercise the powers conferred on it by Article 28(3) of that directive with respect to an establishment of that

undertaking situated in the territory of that Member State even if, as a result of the division of tasks within the group, first, that establishment is responsible solely for the sale of advertising space and other marketing activities in the territory of that Member State and, second, exclusive responsibility for collecting and processing personal data belongs, for the entire territory of the European Union, to an establishment situated in another Member State.

3. Article 4(1)(a) and Article 28(3) and (6) of Directive 95/46 must be interpreted as meaning that, where the supervisory authority of a Member State intends to exercise with respect to an entity established in the territory of that Member State the powers of intervention referred to in Article 28(3) of that directive, on the ground of infringements of the rules on the protection of personal data committed by a third party responsible for the processing of that data whose seat is in another Member State, that supervisory authority is competent to assess, independently of the supervisory authority of the other Member State, the lawfulness of such data processing and may exercise its powers of intervention with respect to the entity established in its territory without first calling on the supervisory authority of the other Member State to intervene.

Case C-254/16 - Glencore Agriculture Hungary Kft v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság

JUDGMENT OF THE COURT (Seventh Chamber)

6 July 2017 (*)

(Reference for a preliminary ruling — Common system of value added tax (VAT) — Directive 2006/112/EC — Article 183 — Principle of fiscal neutrality — Deduction of input tax — Refund of overpaid VAT — Investigation procedure — Fine imposed on the taxable person in the course of such a procedure — Extension of the period within which the refund must be made — Exclusion of payment of default interest)

In Case C-254/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest, Hungary), made by decision of 24 March 2016, received at the Court on 3 May 2016, in the proceedings

Glencore Agriculture Hungary Kft., formerly Glencore Grain Hungary Kft.,

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság

THE COURT (Seventh Chamber),

composed of A. Prechal, President of the Chamber, A. Rosas and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of **[the parties and interveners]**:::

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, 'the VAT Directive').

2 The request has been made in proceedings between Glencore Agriculture Hungary Kft., formerly Glencore Grain Hungary Kft. ('Glencore'), and Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság (Appeals Directorate of the National Tax and Customs Administration, Hungary) ('the tax authority') concerning the payment of default interest relating to the refund of overpaid value added tax (VAT).

Legal context

EU law

3 Article 183 of the VAT Directive provides:

'Where, for a given tax period, the amount of deductions exceeds the amount of VAT due, the Member States may, in accordance with conditions which they shall determine, either make a refund or carry the overpayment forward to the following period.

…'

Hungarian law

4 As stated in the order for reference, Article 37(4) of the adózás rendjéről szóló 2003. évi XCII. törvény (Law No XCII of 2003 on the Code of fiscal procedure, *Magyar Közlöny* 2003/131 (XI. 14.), 'Code of fiscal procedure') provides that the disbursement of budgetary aid due to a taxpayer is to be governed by the schedules to that law or by separate legislation. Budgetary aid and the VAT claimed must be disbursed after the date on which the application or the tax return was received, no earlier than 30 days following the date for the payment of budgetary aid and within 75 days of the date for the payment of the VAT. If budgetary aid is confirmed by the tax authority, that aid is to be granted within 30 days following the entry into force of the relevant decision taken in that regard.

5 Article 37(4)(c) of the Code of fiscal procedure provides that if an investigation concerning the legality of a disbursement claim commences within 30 days of the application (tax return) being received and if a fine is imposed for obstructing the investigation or the person concerned has received a warrant to appear before a court, the period for disbursement is to be calculated as of the date on which the formal report on the findings of the investigation was delivered.

6 Under Article 37(6) of that code, if the tax authority is late in paying a refund, it is to pay interest on such an amount for each day of delay calculated in accordance with the rate of default interest. However, no interest is to be paid for late payment if a refund was delayed as a result of negligence on the part of the taxpayer or the person subject to compulsory data disclosure.

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

7 Glencore is an undertaking subject to VAT operating in the grain trade. It lodged an application for a refund with the tax authority for overpaid VAT in the amount of HUF 4 485 975 000 (Hungarian forint) (approximately EUR 12.4 million) in respect of input VAT paid in September 2011.

8 Following that application and prior to the refund claimed, the tax authority initiated an investigation procedure concerning the legality of the claim. In connection with that investigation, the tax authority sent Glencore numerous requests for data disclosure and imposed three fines on the ground of delay in responding to some of its requests, since the delay in its replies was, according to that authority, found to have obstructed the conduct of the investigation.

9 On 13 November 2013, the tax authority paid Glencore HUF 1 858 301 000 (approximately EUR 5.9 million) as a partial refund of the overpaid VAT. Glencore requested that authority to pay it HUF 411 910 990 (approximately EUR 1.3 million) as default interest for the period from 4 December 2011, the date on which, according to Glencore, the period for refunding the overpaid VAT expired, to 13 November 2013.

10 The tax authority rejected the request on the ground that Glencore was fined for obstruction of the investigation of the legality of the claim for a refund and that, consequently, under the applicable Hungarian legislation, the period for a refund of the overpaid VAT and, if applicable, any default interest were to be calculated from the date of the delivery of the formal report containing the findings of the investigation. Accordingly, that authority took the view that there had not been any late payment and, since it was as a result of failure to disclose the data requested that the conduct of the investigation and the refund of overpaid VAT had been obstructed, Glencore was not entitled to default interest.

11 On 5 November 2015, Glencore brought an action before the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest, Hungary) challenging the decision of the tax authority refusing its application.

12 Glencore submitted before that court that the Hungarian legislation, under which the payment of default interest is calculated

from the delivery of the formal report closing the investigation procedure relating to the refund of overpaid VAT, is contrary to EU law, in particular, to the principles of proportionality, legal certainty and fiscal neutrality. According to Glencore, the investigation procedure at issue in the main proceedings took more than two years for reasons which were not connected with the late disclosure of the documents requested, but principally with the actions of the tax authority. In addition, the tax authority compelled Glencore to disclose to it a large quantity of data within the first two weeks of that investigation procedure and, upon each request, gave it only three working days in which to disclose the data. According to Glencore, the tax authority should have refunded the VAT claimed within the 45 day period laid down in Article 37 of the Code of fiscal procedure for claims exceeding HUF 500 000 (approximately EUR 1 600). Failing such a refund, that authority was required to pay it default interest. The principle of fiscal neutrality requires that a taxable person may obtain a refund of overpaid VAT within a reasonable period and that the time of that refund cannot be influenced by procedural acts of a tax authority.

13 The tax authority maintained that Glencore's action should be dismissed on the ground that the imposition of the fines for the late disclosure of documents necessary to a tax investigation was a result of the wrongful conduct of Glencore and that it is due to Glencore's negligence that the period for the refund of the overpaid VAT was extended.

14 The referring court notes that the Court has previously held that the principle of neutrality precludes Member States from making refunds of overpaid VAT subject to conditions which impose an additional burden on taxable persons by affecting their financial situation, that the Member States must ensure that a refund is made within a reasonable period of time and that the conditions governing the refund do not themselves give rise to any financial risk for the taxable person. According to the referring court, the Court has also held that taxable persons who were refunded overpaid VAT after a period which could not be described as reasonable are entitled to default interest and that it is for the legal order of each Member State to lay down the conditions under which such interest must be paid, whilst adhering to the principles of equivalence and effectiveness.

15 However, the referring court takes the view that the Court's case-law does not contain sufficiently clear indications, in particular, as to the consequences of fines imposed by a tax authority, such as that at issue in the main proceedings. It considers that to refund Glencore the overpaid VAT within an approximately two-year period, rather than within the normal period of 45 days, infringes the principle of proportionality and, consequently, that Glencore's claim for default interest must be upheld. The referring court also considers that the fact that the tax authority, by an abusive literal interpretation of the relevant national law, may, by imposing a fine on a taxable person for non-compliance with a duty of disclosure, continue tax investigations without any time limit and without being required to pay default interest amounts to an infringement of that principle.

16 In those circumstances, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 183 of [the VAT Directive] be interpreted as precluding national legislation under which the period within which overpaid VAT must be refunded is to be extended up to the date on which the report drawn up following an investigation is delivered in the case where, in the course of a tax investigation procedure initiated within 30 days from the receipt of the application for a refund, a fine is imposed on the taxable person for non-compliance with an obligation?

(2) Having regard to the principles of fiscal neutrality and proportionality, does Article 183 of [the VAT Directive] preclude national legislation under which, in the event of late payment of a sum, payment of default interest is excluded in the case where, in the context of an investigation concerning the refund of that sum, the taxable person was fined by the authority in connection with the obligation to cooperate, even though the investigation, which lasted several years, was significantly delayed for reasons which cannot principally be attributed to the taxable person?

(3) Must Article 183 of [the VAT Directive] and the principle of effectiveness be interpreted as meaning that a claim for payment of interest in connection with tax withheld or not allocated contrary to EU law is a substantive right which flows directly from EU law itself, such that an infringement of EU law is sufficient for a right to interest to be claimed before the courts and other authorities of the Member States?

(4) If, in the light of the answers given to the preceding questions, the referring court should conclude that the domestic legislation of the Member State is incompatible with Article 183 of the VAT Directive, would it be acting in accordance with EU law if it were to take the view that the refusal, in the decisions of the Member State's authorities, to pay default interest was incompatible with Article 183 of the VAT Directive?'

Consideration of the questions referred

17 By its questions,which it is appropriate to consider together, the referring court asks, in essence, whether EU law must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, where a tax investigation procedure is initiated by a tax authority and where a taxable person is fined for failure to cooperate, the date of the refund of overpaid VAT may be delayed until the formal report on that investigation is delivered to the taxable person and the payment of default interest may be refused, even where the duration of the tax investigation procedure is excessive and cannot be attributed entirely to the conduct of the taxable person. If so, the referring court asks what are its obligations, as regards EU law, in disposing of the case in the main proceedings.

18 As a preliminary point, it should be noted that although Article 183 of the VAT Directive does not lay down any obligation to pay interest on a refund of overpaid VAT or the date from which such interest is payable, it cannot be concluded from that fact alone that that article must be interpreted as meaning that no control may be exercised under EU law over the procedures established by Member States for the refund of overpaid VAT (judgments of 12 May 2011, *Enel Maritsa Iztok 3*, C-107/10, EU:C:2011:298, paragraphs 27 and 28, and of 24 October 2013, *Rafinăria Steaua Română*, C-431/12, EU:C:2013:686, paragraph 19).

19 It follows from the Court's case-law that some specific rules must be complied with by the Member States in implementing the right to a refund of overpaid VAT arising from Article 183 of the VAT Directive, interpreted in the light of the general context and principles governing VAT (see judgment of 24 October 2013, *Rafinăria Steaua Română*, C-431/12, EU:C:2013:686, paragraph 21 and the case-law cited).

20 The Court has thus held that the conditions for the refund of overpaid VAT laid down by a Member State must not undermine the principle of fiscal neutrality by making the taxable person bear the burden of the VAT in whole or in part. In particular, such conditions must enable the taxable person, in appropriate circumstances, to recover the entirety of the credit arising from that overpayment of VAT. This implies that the refund be made within a reasonable period of time and that, in any event, the method of refund adopted must not entail any financial risk for the taxable person (judgments of 12 May 2011, *Enel Maritsa Iztok 3*, C-107/10, EU:C:2011:298, paragraph 33; of 28 July 2011, *Commission* v *Hungary*, C-274/10, EU:C:2011:530, paragraph 45; and order of 17 July 2014, *Delphi Hungary Autóalkatrész Gyártó*, C-654/13, not published, EU:C:2014:2127, paragraph 31).

21 That period of time may, as a general rule, be extended in order to carry out a tax investigation and there is no need for such an extended period to be regarded as unreasonable provided that the extension does not go beyond what is necessary for the successful completion of the investigation (judgment of 12 May 2011, *Enel Maritsa Iztok 3*, C-107/10, EU:C:2011:298, paragraph 53).

22 Where the refund of the overpaid VAT to the taxable person is not made within a reasonable period, the principle of fiscal neutrality of the VAT system requires that the financial losses incurred by the taxable person owing to the unavailability of the sums of money at issue should be compensated through the payment of default interest (judgment of 24 October 2013, *Rafinăria Steaua Română*, C-431/12, EU:C:2013:686, paragraph 23).

23 It also follows from the Court's case-law that the calculation of the interest payable by the Treasury which does not take as its starting point the date on which the overpaid VAT would have had to be repaid in the normal course of events in accordance with the VAT Directive is, in principle, contrary to the requirements of Article 183 of that directive (judgments of 12 May 2011, *Enel Maritsa Iztok 3*, C-107/10, EU:C:2011:298, paragraph 51, and of 24 October 2013, *Rafinăria Steaua Română*, C-431/12, EU:C:2013:686, paragraph 24).

24 In addition, legislation which empowers the tax authorities to instigate a tax investigation at any time, including at a date close to that on which the period for refunding overpaid VAT expires, thus making it possible to extend considerably the period in which the refund is to be made, not only exposes the taxable person to financial disadvantages, but also places the taxable person in a position in which he is unable to predict the date from which funds corresponding to the overpaid VAT will be available to him, which entails an additional burden for that person (see order of 21 October 2015, *Kovozber*, C-120/15, not published, EU:C:2015:730, paragraph 27).

25 It follows from the foregoing that, in a situation such as that at issue in the main proceedings, although the period for the refund of overpaid VAT may be delayed until the delivery to the taxable person of the formal report closing the tax investigation procedure to which he has been subject, it is on the condition that that procedure does not result in an extension of that period beyond what is necessary for the successful completion of the procedure. If the duration of the procedure is excessive, the taxable person may not

be deprived of default interest.

26 Since the referring court raises, in that regard, the issue of the implications of the conduct of a taxable person whose negligence during a tax investigation procedure was penalised by several fines, it should be noted that, indeed, as the Hungarian Government claims, it cannot be accepted that a taxable person who, by refusing to cooperate with a tax authority and by thus impeding the conduct of the investigation procedure, caused the delay in the refund of overpaid VAT, may claim default interest for that delay.

27 Nevertheless, national legislation or practices according to which the mere fact that a taxable person has been fined due to his negligence during a tax investigation to which he was subject allows the tax authority to extend that investigation over a period not justified by that negligence, without having to pay him default interest, cannot be considered to be compatible with the requirements arising from the principle of fiscal neutrality.

28 Accordingly, in a situation such as that at issue in the main proceedings, for the purposes of determining whether default interest is due and, where relevant, the point in time from which the right to such interest arises, the proportion of the duration of the tax investigation procedure which can be attributed to the conduct of the taxable person must be ascertained.

29 In the present case, according to the documents in the case-file before the Court, the first partial refund of the overpaid VAT, corresponding to September 2011, took place only on 13 November 2013, that is to say almost two years after the expiry of the period of time ordinarily laid down for the payment in the Hungarian legislation.

30 Glencore states, in its written observations, that the tax authority initiated the investigation procedure concerning the legality of its application for a refund of overpaid VAT at a date very close to the expiry of the time period laid down in the Hungarian legislation for that refund. Glencore also notes that the tax authority imposed on it an initial fine 41 days after it had lodged its VAT return, whereas the first partial payment, at issue before the referring court, was made 755 days after that tax return had been lodged and that the formal report containing the findings of the tax investigation conducted was delivered 539 days after the last request of the tax authority for the taxable person to disclose certain documents to it.

31 The referring court states that the Hungarian legislation does not provide for the actual impact on the duration of the tax investigation procedure of the conduct of a taxable person who has been fined to be taken into account for the purposes of determining whether default interest is payable. It also states that the tax authority may, where relevant, continue such a procedure for a long time without being required to pay the taxable person default interest.

32 It is clear that such national legislation may, in the event of initiation of an investigation procedure and the imposition of a fine on a taxable person, have the effect, during that procedure, of depriving the taxable person of funds corresponding to the overpaid VAT for a long time, preventing him from predicting the date at which those funds will be available to him and precluding his right to default interest.

33 Such legislation is not in conformity with the requirements arising from the principle of fiscal neutrality, set out in paragraphs 20 to 22 above, according to which overpaid VAT must be refunded within a reasonable period and, if that is not the case, the financial loss thereby caused to the detriment of the taxable person must be compensated by the payment of default interest.

34 As regards the obligations of the referring court, it should be noted that when national courts apply domestic law they are bound to interpret that law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and, consequently, to comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with EU law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them (see, inter alia, judgment of 11 April 2013, *Rusedespred*, C-138/12, EU:C:2013:233, paragraph 37 and the case-law cited).

35 In accordance with equally settled case-law, being called upon, within the exercise of its jurisdiction, to apply provisions of EU law, a national court must give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national law, and it is not necessary for that court to request or to await the prior setting aside of that provision of national law by legislative or other constitutional means (judgment of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 34 and the case-law cited).

36 Having regard to all of the foregoing considerations, the answer to the questions referred is that EU law must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, where a tax investigation procedure is initiated by a tax authority and where a taxable person is fined for failure to cooperate, the date of the refund of overpaid VAT may be delayed until the formal report on that investigation is delivered to the taxable person and the payment of default interest may be refused, even where the duration of the tax investigation procedure is excessive and cannot be attributed entirely to the conduct of the taxable person.

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 (Seventh Chamber) hereby rules:

EU law must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, where a tax investigation procedure is initiated by a tax authority and where a taxable person is fined for failure to cooperate, the date of the refund of overpaid value added tax may be delayed until the formal report on that investigation is delivered to the taxable person and the payment of default interest may be refused, even where the duration of the tax investigation procedure is excessive and cannot be attributed entirely to the conduct of the taxable person.

Case C 585/16 - Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite

JUDGMENT OF THE COURT (Grand Chamber)
25 July 2018 (*)

(Reference for a preliminary ruling — Common policy on asylum and subsidiary protection — Standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection — Directive 2011/95/EU — Article 12 — Exclusion from refugee status — Persons registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) — Existence of a 'first country of asylum', for a refugee from Palestine, in the UNRWA area of operations — Common procedures for granting international protection — Directive 2013/32/EU — Article 46 — Right to an effective remedy — Full and ex nunc examination — Scope of the powers of the court of first instance — Examination by the courts of international protection needs — Examination of grounds of inadmissibility)

In Case C-585/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Sofia Administrative Court, Bulgaria), made by decision of 8 November 2016, received at the Court on 18 November 2016, in the proceedings

Serin Alheto

v

Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite,

THE COURT (Grand Chamber),

Composed of K. Lenaerts, President, M. Ilešič (Rapporteur), L. Bay Larsen, T. von Danwitz, A. Rosas, J. Malenovský and E. Levits, Presidents of Chambers, E. Juhász, A. Borg Barthet, F. Biltgen, K. Jürimäe, C. Lycourgos and M. Vilaras, Judges,
Advocate General: P. Mengozzi,
Registrar: M. Aleksejev, Administrator,
having regard to the written procedure and further to the hearing on 23 January 2018,
after considering the observations submitted on behalf of **[the parties and interveners]**::
after hearing the Opinion of the Advocate General at the sitting on 17 May 2018,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 12(1) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9), and Article 35 and Article 46(3) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

2 The request has been made in proceedings between Ms Serin Alheto and the zamestnik-predsedatel na Darzhavna agentsia za bezhantsite (Deputy Chairperson of the State Agency for Refugees, Bulgaria, 'the DAB') concerning the latter's refusal to grant the application for international protection made by Ms Alheto.

Legal context

International law

The Geneva Convention

3 The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954. It was supplemented and amended by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967 ('the Geneva

Convention').

4 Article 1(A) of the Geneva Convention, in the definition it provides of the term 'refugee', refers inter alia to the risk of persecution.

5 Article 1(D) of that convention states:

'This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.'

United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)

6 United Nations General Assembly resolution No 302 (IV) of 8 December 1949, concerning assistance to Palestine refugees, established the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Its task is to serve the well-being and human development of Palestine refugees.

7 UNRWA's area of operations covers the Gaza Strip, the West Bank, Jordan, Lebanon and Syria.

EU law

Directive 2011/95

8 Directive 2011/95 was adopted on the basis of Article 78(2)(a) and (b) TFEU, which provides as follows:

'for the purposes of [developing a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement], the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;

(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection'.

9 Article 2 of that directive provides as follows:

'For the purposes of this Directive the following definitions shall apply:

(a) "international protection" means refugee status and subsidiary protection status as defined in points (e) and (g);

…

(c) "Geneva Convention" means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967;

(d) "refugee" means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(e) "refugee status" means the recognition by a Member State of a third-country national or a stateless person as a refugee;

(f) “person eligible for subsidiary protection” means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

(g) “subsidiary protection status” means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection;

…’

10 Article 4(3) of that directive provides as follows:

‘The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant’s activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.’

11 Article 5(1) of that directive states:

‘A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.’

12 Article 7 of Directive 2011/95, entitled ‘Actors of protection’, provides in paragraphs 1 and 2:

‘1. Protection against persecution or serious harm can only be provided by:

(a) the State; or

(b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State;

provided they are willing and able to offer protection in accordance with paragraph 2.

2. Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.’

13 Articles 9 and 10 of that directive, which are contained in Chapter III, entitled ‘Qualification for being a refugee’ set out the factors to be taken into account in order to evaluate whether the applicant has been or may be subject to persecution.

14 Article 12 of that directive, which is also contained in Chapter III, is entitled 'Exclusion' and provides as follows:

'1. A third-country national or a stateless person is excluded from being a refugee if:

(a) he or she falls within the scope of Article 1(D) of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, those persons shall *ipso facto* be entitled to the benefits of this Directive'.

…'

15 Article 15 of that directive is contained in Chapter V, entitled 'Qualification for subsidiary protection'. It states as follows:

'Serious harm consists of:

(a) the death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.'

16 Article 17 of Directive 2011/95, which is also contained in Chapter V, defines the circumstances in which eligibility for subsidiary protection is excluded.

17 Article 21 of that directive, entitled 'Protection from refoulement', provides in paragraph 1:

'Member States shall respect the principle of non-refoulement in accordance with their international obligations.'

18 Chapter IX of that directive, entitled 'Final provisions', contains Articles 38 to 42. The first paragraph of Article 39(1) of that directive provides as follows:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1, 2, 4, 7, 8, 9, 10, 11, 16, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 by 21 December 2013. They shall forthwith communicate to the Commission the text of those provisions.'

19 Article 40 of that directive provides:

'[Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12)] is repealed for the Member States bound by this Directive with effect from 21 December 2013, …

For the Member States bound by this Directive, references to the repealed Directive shall be construed as references to this Directive …'

20 Article 41 of Directive 2011/95 provides as follows:

'This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Articles 1, 2, 4, 7, 8, 9, 10, 11, 16, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 shall apply from 22 December 2013.'

21 The wording of Articles 12 and 15 of Directive 2011/95 corresponds to that of Articles 12 and 15 of Directive 2004/83.

Directive 2013/32

22 Directive 2013/32 was adopted on the basis of Article 78(2)(d) TFEU, which provides for common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status.

23 Recitals 4, 13, 16, 18 and 22 of that directive state:

‘(4) ... A Common European Asylum System should include, in the short term, common standards for fair and efficient asylum procedures in the Member States and, in the longer term, Union rules leading to a common asylum procedure in the Union.

…

(13) The approximation of rules on the procedures for granting and withdrawing international protection should help to limit the secondary movements of applicants for international protection between Member States, where such movements would be caused by differences in legal frameworks, and to create equivalent conditions for the application of Directive [2011/95] in Member States.

…

(16) It is essential that decisions on all applications for international protection be taken on the basis of the facts and, in the first instance, by authorities whose personnel has the appropriate knowledge or has received the necessary training in the field of international protection.

…

(18) It is in the interests of both Member States and applicants for international protection that a decision is made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out.

…

(22) It is also in the interests of both Member States and applicants to ensure a correct recognition of international protection needs already at first instance. To that end, applicants should be provided at first instance, free of charge, with legal and procedural information, taking into account their particular circumstances. The provision of such information should, inter alia, enable the applicants to better understand the procedure, thus helping them to comply with the relevant obligations. …’

24 Article 1 of Directive 2013/32 provides as follows:

‘The purpose of this Directive is to establish common procedures for granting and withdrawing international protection pursuant to Directive [2011/95].’

25 Article 2 of Directive 2013/32 provides as follows:

‘For the purposes of this Directive:

…

(f) “determining authority” means any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases;

…’

26 According to Article 4(1) of Directive 2013/32:

‘1. Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of applications in accordance with this Directive. Member States shall ensure that such authority is provided with appropriate means, including sufficient competent personnel, to carry out its tasks in accordance with this Directive.

…

3. Member States shall ensure that the personnel of the determining authority referred to in paragraph 1 are properly trained. … Persons interviewing applicants pursuant to this Directive shall also have acquired general knowledge of problems which could adversely affect the applicants' ability to be interviewed, such as indications that the applicant may have been tortured in the past.

…'

27 Article 10(2) of that directive states:

'When examining applications for international protection, the determining authority shall first determine whether the applicants qualify as refugees and, if not, determine whether the applicants are eligible for subsidiary protection.'

28 Under Article 12 of that directive:

'1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants enjoy the following guarantees:

(a) they shall be informed, in a language which they understand or are reasonably supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities. They shall be informed of the time-frame, the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive [2011/95], as well as of the consequences of an explicit or implicit withdrawal of the application. That information shall be given in time to enable them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Article 13;

(b) they shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary. Member States shall consider it necessary to provide those services at least when the applicant is to be interviewed as referred to in Articles 14 to 17 and 34 and appropriate communication cannot be ensured without such services. …

…'

29 Article 13(1) of the same directive provides as follows:

'Member States shall impose upon applicants the obligation to cooperate with the competent authorities with a view to establishing their identity and other elements referred to in Article 4(2) of Directive [2011/95]. …'

30 Article 33(2) of Directive 2013/32 provides as follows:

'Member States may consider an application for international protection as inadmissible only if:

…

(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38;

…'

31 Under the first paragraph of Article 34(1) of Directive 2001/29:

'Member States shall allow applicants to present their views with regard to the application of the grounds referred to in Article 33 in their particular circumstances before the determining authority decides on the admissibility of an application for international protection. To that end, Member States shall conduct a personal interview on the admissibility of the application ...'

32 Article 35 of that directive states:

'A country can be considered to be a first country of asylum for a particular applicant if:

(a) he or she has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection; or

(b) he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement,

provided that he or she will be readmitted to that country.

In applying the concept of first country of asylum to the particular circumstances of an applicant, Member States may take into account Article 38(1). The applicant shall be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances.'

33 Under Article 36(1) of that directive:

'A third country designated as a safe country of origin in accordance with this Directive may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant only if:

(a) he or she has the nationality of that country; or

(b) he or she is a stateless person and was formerly habitually resident in that country,

and he or she has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her qualification as a beneficiary of international protection in accordance with Directive [2011/95].'

34 Article 38 of Directive 2013/32 provides as follows:

'1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

(b) there is no risk of serious harm as defined in Directive [2011/95];

(c) the principle of non-refoulement in accordance with the Geneva Convention is respected;

(d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

(e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

2. The application of the safe third country concept shall be subject to rules laid down in national law, including:

(a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;

…'

35 Under Article 46 of Directive 2013/32:

'1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:

(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;

(ii) considering an application to be inadmissible pursuant to Article 33(2);

…

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive [2011/95], at least in appeals procedures before a court or tribunal of first instance.

…'

36 Article 51(1) of Directive 2013/32 provides as follows:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 30, Article 31(1), (2) and (6) to (9), Articles 32 to 46, Articles 49 and 50 and Annex I by 20 July 2015 at the latest. They shall forthwith communicate the text of those measures to the Commission.'

37 Under the first paragraph of Article 52 of that directive:

'Member States shall apply the laws, regulations and administrative provisions referred to in Article 51(1) to applications for international protection lodged and to procedures for the withdrawal of international protection started after 20 July 2015 or an earlier date. Applications lodged before 20 July 2015 and procedures for the withdrawal of refugee status started before that date shall be governed by the laws, regulations and administrative provisions adopted pursuant to [Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13)].'

38 The first paragraph of Article 53 of Directive 2013/32 provides as follows:

'Directive [2005/85] is repealed for the Member States bound by this Directive with effect from 21 July 2015 ...'

39 The first paragraph of Article 54 of Directive 2013/32 states:

'This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.'

40 Since the publication referred to in Article 54 took place on 29 June 2013, Directive 2013/32 entered into force on 19 July 2013.

41 Articles 33, 35 and 38, and Article 46(1) of Directive 2013/32 correspond, respectively, to Articles 25, 26 and 27 and Article 39(1) of Directive 2005/85. By contrast, Article 10(2), Article 34 and Article 46(3) of Directive 2013/32 set out rules which are not contained in Directive 2005/85.

Bulgarian law

42 In Bulgaria, applications for international protection are examined in accordance with the Zakon za ubezhishteto i bezhantsite (Law on asylum and refugees, 'the ZUB'). For the purposes of the transposition into Bulgarian law of Directives 2011/95 and 2013/32, the ZUB was amended by laws which entered into force in October 2015 and December 2015 respectively.

43 Articles 8 and 9 of the ZUB essentially include the criteria set out in Articles 9, 10 and 15 of Directive 2011/95.

44 Article 12(1) of the ZUB provides as follows:

'The status of refugee shall not be granted to foreign nationals:

…

4. who are receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees; when such protection or assistance has not ceased, without the position of such persons being definitively settled in accordance with a relevant resolution adopted by the United Nations, those persons shall *ipso facto* be entitled

to the benefits of the [Geneva Convention];

…'

45 The ZUB, in the version preceding the transposition into Bulgarian law of Directives 2011/95 and 2013/32, provided, in Article 12(1) thereof:

'The status of refugee shall not be granted to foreign nationals:

…

4. who are receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees and such protection or assistance has not ceased, without the position of such persons being definitively settled in accordance with a relevant resolution adopted by the United Nations;

…'

46 Article 13(2) of the ZUB provides:

'Procedures for the grant of international protection shall not be initiated, or shall be terminated where the foreign national:

…

2. has been granted refugee status by a third country or another form of effective protection which includes observance of the principle of non-refoulement and that status or protection has not been withdrawn, provided that the person will be re-admitted into that country;

3. comes from a safe third country, provided that the person will be re-admitted into that country.'

47 The ZUB, in the version preceding the transposition into Bulgarian law of Directives 2011/95 and 2013/32, provided, in Article 13(2) thereof:

'The procedure for the grant of refugee status or humanitarian status shall not be initiated or shall be terminated where the refugee has:

…

2. the status of refugee granted by a safe third country, provided that the person will be re-admitted into that country.'

48 Under Article 75(2) of the ZUB:

'… In the course of the examination of an application for international protection, all the relevant facts, … concerning the personal situation of the applicant shall be assessed ...'

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

49 It is apparent from the file lodged before the Court that Ms Alheto, born on 29 November 1972 in Gaza, holds a passport issued by the Palestinian National Authority and is registered with UNRWA.

50 On 15 July 2014, Ms Alheto left the Gaza Strip via underground tunnels linking that territory to Egypt. From that country, she went on to Jordan by boat.

51 On 7 August 2014, the consular service of the Republic of Bulgaria in Jordan issued Ms Alheto with a tourist visa for travel to Bulgaria, valid until 1 September 2014.

52 On 10 August 2014, Ms Alheto entered Bulgaria, having flown from Amman to Varna. On 28 August 2014, the validity of that visa was extended to 17 November 2014.

53 On 11 November 2014, Ms Alheto lodged an application for international protection with the DAB, which she repeated on 25 November 2014. In support of that application, she claimed that to return to the Gaza Strip would expose her to a serious threat to her life since she would risk experiencing torture and persecution there.

54 That threat is linked to the fact that she carries out work in the social sphere informing women of their rights and that that activity is not accepted by Hamas, the organisation which controls the Gaza Strip.

55 Moreover, Ms Alheto claims that, in the light of armed conflict between Hamas and Israel, the situation in the Gaza Strip is one of indiscriminate violence.

56 Between December 2014 and March 2015, the DAB conducted several personal interviews with Ms Alheto.

57 On 12 May 2015, the Deputy Director of the DAB refused the application for international protection lodged by Ms Alheto, on the basis of Article 75 of the ZUB, read in conjunction with Articles 8 and 9 of that law ('the contested decision'), on the ground that Ms Alheto's statements lacked credibility.

58 The Deputy Director of the DAB explained, inter alia, that, although doubts concerning respect for fundamental rights in the Gaza Strip were justified, the mere fact that Ms Alheto is a woman who informs other women residing in the Gaza Strip of their rights is not sufficient to find that there is a real risk of persecution within the meaning of Article 8 of the ZUB or of serious harm within the meaning of Article 9 of that law. In that regard, an international report drawn up in 2014 shows that, in the Gaza Strip, policewomen play a role in important work such as the prevention of drug-related crime, criminal prosecutions and monitoring freedom of movement. In those circumstances, it is difficult to believe that Ms Alheto's activity exposes her to serious and individual threats

59 The Deputy Director of the DAB added that Ms Alheto was not driven to make an application for international protection on account of indiscriminate violence caused by an armed conflict.

60 Ms Alheto brought an action before the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria) for annulment of the contested decision. She maintained that some of the evidence put forward during individual interviews had not been examined, in breach of Article 75 of the ZUB, and that the evidence that had been examined had, itself, been incorrectly assessed, in breach of Articles 8 and 9 of the ZUB.

61 That court considers that the DAB should, in principle, have examined the application for international protection lodged by Ms Alheto on the basis of Article 12(1)(4) of the ZUB and not on the basis of Articles 8 and 9 of that law. The contested decision does not therefore comply with the ZUB or with the corresponding rules laid down in Directive 2011/95, in particular Article 12(1)(a) of that directive.

62 However, that court observes that Article 12(1)(4) of the ZUB fails correctly to transpose Article 12(1)(a) of Directive 2011/95 which, it says, complicates the handling of the application for international protection at issue in the main proceedings.

63 Furthermore, having regard to the obligation to ensure an effective remedy, and in particular to the requirement for a full and *ex nunc* examination, set out in Article 46(3) of Directive 2013/32, it is necessary to determine, inter alia in the light of Articles 18, 19 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), the scope of the jurisdiction laid down by the EU legislature. It is important, inter alia, to ascertain, in the context of such a full and *ex nunc* examination, whether the court may factor into its assessment matters, including grounds of inadmissibility, which could not be taken into account when the contested decision rejecting the application for international protection was adopted.

64 In that context, the referring court wishes, in particular, to know whether, in circumstances such as those at issue in the main proceedings, a person registered with UNRWA who has fled the Gaza Strip and stayed in Jordan before travelling to the European Union must be considered to be sufficiently protected in Jordan, with the result that the application for international protection lodged in the European Union must be declared inadmissible.

65 Finally, the question arises whether, after the annulment of a decision rejecting an application for international protection, the court may, or must, itself adopt a decision on the application for international protection.

66 In those circumstances, the Administrativen sad Sofia-grad (Administrative Court, Sofia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does it follow from Article 12(1)(a) of Directive 2011/95, read in conjunction with Article 10(2) of Directive 2013/32 and Article 78(2)(a) of the Treaty on the Functioning of the European Union, that:

(a) it is permissible for an application for international protection made by a stateless person of Palestinian origin who is registered as a refugee with [UNRWA] and who, before making that application, was resident in that agency's area of operations (the Gaza Strip) to be examined as an application under Article 1(A) of the [Geneva Convention] rather than as an application for international protection under the second [paragraph] of Article 1(D) of that convention, where responsibility for examining the application has been assumed on grounds other than compassionate or humanitarian grounds and the examination of the application is governed by Directive 2011/95;

(b) it is permissible for such an application to be examined without taking into account the conditions laid down in Article 12(1)(a) of Directive 2011/95, with the result that the interpretation of that provision by the Court of Justice … is not applied?

(2) Is Article 12(1)(a) of Directive 2011/95, read in conjunction with Article 5 thereof, to be interpreted as precluding provisions of national law such as Article 12(1)(4) of the ZUB, at issue in the main proceedings, which, in the version currently in force, does not contain any express clause on *ipso facto* protection for Palestinian refugees and does not lay down the condition that the assistance must have ceased for some reason, and as meaning that Article 12(1)(a) of Directive 2011/95, being sufficiently precise and unconditional and therefore directly effective, is applicable even if the person seeking international protection does not expressly rely on it, where the application is of a kind that must be examined in accordance with the second sentence of Article 1(D) of the Geneva Convention relating to the Status of Refugees?

(3) Does it follow from Article 46(3) of Directive 2013/32, read in conjunction with Article 12(1)(a) of Directive 2011/95, that, in an appeal before a court or tribunal against a decision refusing international protection adopted in accordance with Article 10(2) of Directive 2013/32, it is permissible, taking into account the facts in the main proceedings, for the court or tribunal of first instance to treat the application for international protection as an application under the second sentence of Article 1(D) of the Geneva Convention relating to the Status of Refugees and to carry out the assessment provided for in Article 12(1)(a) of Directive 2011/95 where the application for international protection has been made by a stateless person of Palestinian origin who is registered as a refugee with the UNRWA and who, before making that application, was resident within that agency's area of operations (the Gaza Strip) and where, in the decision refusing international protection, that application was not examined in the light of the abovementioned provisions?

(4) Does it follow from the provisions of Article 46(3) of Directive 2013/32, concerning the right to an effective remedy incorporating the requirement of a "full and *ex nunc* examination of both facts and points of law", interpreted in conjunction with Article 33, Article 34 and the second paragraph of Article 35 of that directive, Article 21(1) of Directive 2011/95 and Articles 18, 19 and 47 of the [Charter], that, in an appeal before a court or tribunal against a decision refusing international protection adopted in accordance with Article 10(2) of Directive 2013/32, those provisions permit the court or tribunal of first instance:

(a) to decide for the first time on the admissibility of the application for international protection and on the refoulement of the stateless person to the country in which he or she was resident before making the application for international protection, after requiring the determining authority to produce the evidence necessary for that purpose and after giving the person in question the opportunity to present his or her views on the admissibility of the application; or

(b) to annul the decision for breach of an essential procedural requirement and to require the determining authority, following directions on the interpretation and application of the law, to re-examine the application for international protection, inter alia, by conducting the admissibility interview provided for in Article 34 of Directive 2013/32 and deciding whether it is possible to return the stateless person to the country in which he or she was resident before making the application for international protection;

(c) to assess the security status of the country in which the person had been resident, at the time of the hearing or, where there have been fundamental changes in the situation that must be taken into account in the person's favour in the decision to be taken, at the time when judgment is given?

(5) Does the assistance provided by [UNRWA] constitute 'sufficient protection' otherwise enjoyed, within the meaning of point (b) of the first paragraph of Article 35 of Directive 2013/32, in the relevant country within the agency's area of operations where that country applies the principle of non-refoulement, within the meaning of the 1951 Geneva Convention …, to persons assisted by the agency?

(6) Does it follow from Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, that the right to an effective remedy incorporating the requirement, "where applicable, [for] an examination of the international protection needs pursuant to Directive 2011/95" compels the court or tribunal of first instance, in an appeal against a decision examining the substance of an application for international protection and refusing to grant such protection, to give a judgment:

(a) which has the force of *res judicata* in relation not only to the question of the lawfulness of the refusal but also to the applicant's need for international protection pursuant to Directive 2011/95, including in cases where, under the national law of the Member State concerned, international protection may be granted only by decision of an administrative authority;

(b) on the necessity of granting international protection, by carrying out a proper examination of the application for international protection, irrespective of any breaches of procedural requirements committed by the determining authority when assessing the application?'

Consideration of the questions referred

Preliminary observations

67 Since the temporal applicability of the provisions of Directive 2013/32 to which the third to sixth questions relate is not clear and was the subject of debate before the Court, it is necessary to provide clarification in that regard at the outset.

68 It is not in dispute that that directive replaced Directive 2005/85 with effect from 21 July 2015, that is to say after the date on which the application for international protection at issue in the main proceedings was lodged.

69 In that context, it must be noted, first, that the second sentence of the first paragraph of Article 52 of Directive 2013/32 states that applications for international protection lodged before 20 July 2015 are to be governed by the national provisions adopted pursuant to Directive 2005/85.

70 Second, the first sentence of the first paragraph of Article 52 of Directive 2013/32 allows national provisions implementing the rules introduced by that directive to be applied to applications lodged before 20 July 2015. That sentence provides that the Member States are to apply those provisions 'to applications for international protection lodged … after 20 July 2015 or an earlier date'.

71 It is apparent from the examination of the *travaux préparatoires* of Directive 2013/32, in particular a comparison of Position (EU) No 7/2013 of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, adopted by the Council on 6 June 2013 (OJ 2013 C 179 E, p. 27), with the Commission Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009) 554 final), that the words 'or an earlier date' were added during the legislative process.

72 Consequently, notwithstanding the tension between the first and second sentences of the first paragraph of Article 52 of Directive 2013/32, it follows from those preparatory documents that the EU legislature intended to allow the Member States to choose whether to apply their provisions implementing that directive with immediate effect to applications for international protection lodged before 20 July 2015.

73 The fact remains that, while the first paragraph of Article 52 of Directive 2013/32 authorised Member States to apply those provisions to applications for international protection lodged before 20 July 2015, it did not require them to do so. Since that provision, by using the words 'started after 20 July 2015 or an earlier date', offers various possibilities as regards temporal applicability, it is important, in order for the principles of legal certainty and equality before the law to be observed in the implementation of EU law and for applicants for international protection to be protected from arbitrariness and to have a right to an effective remedy in the context of procedures for granting and withdrawing international protection, that each Member State bound by that directive should process

applications for international protection lodged within the same period on its territory in a predictable and uniform manner.

74 In reply to a request for clarification in that regard, the referring court noted that the requirement for a full and *ex nunc* examination, laid down in Article 46(3) of Directive 2013/32, which was to be implemented, by virtue of Article 51(1) of that directive, by 20 July 2015 at the latest, has existed in Bulgaria since 1 March 2007, so that the Bulgarian legislature did not consider it necessary, when transposing that directive, to take measures to implement Article 46(3).

75 In that regard, that court cited several national provisions concerning administrative actions and provided information concerning the scope of those provisions, the accuracy of which it is not for the Court to determine.

76 In the light of that reply, it appears that the third, fourth and sixth questions, which concern the interpretation of Article 46(3) of Directive 2013/32, are relevant for the purposes of resolving the dispute in the main proceedings.

77 Not only the national provisions specifically intended to transpose a directive but also, from the date of that directive's entry into force, pre-existing national provisions capable of ensuring that the national law is transposed must be considered as falling within the scope of that directive (see, to that effect, judgments of 7 September 2006, *Cordero Alonso*, C-81/05, EU:C:2006:529, paragraph 29, and of 23 April 2009, *VTB-VAB and Galatea*, C-261/07 and C-299/07, EU:C:2009:244, paragraph 35).

78 In the present case, while it is true that the law transposing Directive 2013/32 into Bulgarian law entered into force only in December 2015, that is to say, after Ms Alheto lodged her application for international protection in the European Union and after the contested decision had been adopted, it is apparent, however, from the referring court's reply to the request for clarification that, since 2007, Bulgarian law has included provisions laying down a requirement for a full and *ex nunc* examination, which apply to applications for international protection.

79 It follows from that reply that, according to the referring court, those provisions were considered by the national authorities to be capable of transposing Article 46(3) of Directive 2013/32 into national law.

80 In those circumstances, and given the fact that Directive 2013/32 was already in force when the application for international protection at issue in the main proceedings was lodged and the contested decision adopted, the interpretation of Article 46(3) of that directive sought by the referring court in the context of its third, fourth and sixth questions must be considered necessary in order to allow that court to rule in the main proceedings (see, to that effect, judgment of 23 April 2009, *VTB-VAB and Galatea*, C-261/07 and C-299/07, EU:C:2009:244, paragraphs 37 and 40).

81 As regards the fifth question, which concerns the interpretation of point (b) of the first paragraph of Article 35 of Directive 2013/32, which, in conjunction with Article 33(2)(b) of that directive, authorises Member States to declare an application for international protection inadmissible when the applicant is sufficiently protected in a third country, it follows from the order for reference that that ground of inadmissibility had not yet been transposed into Bulgarian law on the date of adoption of the contested decision. However, based on the assumption that the national provision that has in the meantime transposed that ground of inadmissibility is nevertheless applicable *ratione temporis* to the main proceedings, an assumption which it is for the referring court alone to confirm, that court correctly asks whether it may, in the context of a full and *ex nunc* examination, as laid down in Article 46(3) of Directive 2013/32, assess the admissibility of the application for international protection at issue in the main proceedings in the light of such a ground of inadmissibility and, if so, what scope should be afforded to that ground of inadmissibility.

The first question

82 By its first question, the referring court asks, in essence, whether Article 12(1)(a) of Directive 2011/95, read in conjunction with Article 10(2) of Directive 2013/32, must be interpreted as meaning that the processing of an application for international protection lodged by a person registered with UNRWA requires an examination as to whether that person benefits from effective protection or assistance from that agency.

83 As is apparent from the order for reference, this question arises on account of the fact that the Deputy Director of the DAB failed specifically to examine, in the contested decision, whether the protection or assistance which the applicant in the main proceedings received from UNRWA in the area of operations of that agency had ceased, in circumstances where, had that fact been established, she would potentially have been eligible, in Bulgaria, for refugee status in accordance with Article 1(D) of the Geneva

Convention and Article 12(1)(a) of Directive 2011/95.

84 In that regard, it must be noted, as was recalled in paragraphs 6 and 7 of the present judgment, that UNRWA is an agency of the United Nations which was established to protect and assist, in the Gaza Strip, the West Bank, Jordan, Lebanon and Syria, Palestinians who are 'Palestine refugees'. It follows that a person, such as the applicant in the main proceedings, who is registered with UNRWA, is eligible to receive protection and assistance from that agency in the interests of her well-being as a refugee.

85 On account of that specific refugee status established in those territories of the Near East for Palestinians, persons registered with UNRWA are, in principle, by virtue of the first sentence of Article 12(1)(a) of Directive 2011/95, which corresponds to the first paragraph of Article 1(D) of the Geneva Convention, excluded from refugee status in the European Union. That said, it follows from the second sentence of Article 12(1)(a) of Directive 2011/95, which corresponds to the second paragraph of Article 1(D) of the Geneva Convention, that, when an applicant for international protection in the European Union no longer receives protection or assistance from UNRWA, that exclusion ceases to apply.

86 As the Court has held, the second sentence of Article 12(1)(a) of Directive 2011/95 applies where it becomes evident, based on an assessment, on an individual basis, of all the relevant evidence, that the personal safety of the Palestinian concerned is at serious risk and that it is impossible for UNRWA, whose assistance was requested by that person, to guarantee that the living conditions of that individual would be compatible with its mission, and that person is forced to leave the UNRWA area of operations owing circumstances beyond his control. In that case, that Palestinian may, unless he or she falls within the scope of any of the grounds for exclusion set out in Article 12(1)(b), Article 12(2) and Article 12(3) of that directive, *ipso facto* be entitled to the benefits of that directive, without necessarily having to demonstrate a well-founded fear of being persecuted, within the meaning of Article 2(d) of that directive, until the time when he is able to return to the territory of former habitual residence (judgment of 19 December 2012, *Abed El Karem El Kott and Others*, C-364/11, EU:C:2012:826, paragraphs 49 to 51, 58 to 65, 75 to 77 and 81).

87 It follows from the information recalled above that Article 12(1)(a) of Directive 2011/95 sets out, first, a ground for exclusion from refugee status and, second, a ground for no longer applying that ground for exclusion, both of which may be decisive for the purpose of assessing whether the Palestinian in question is entitled to access to refugee status in the European Union. As the Advocate General essentially noted in points 43 to 45 of his Opinion, the rules laid down in that provision, as interpreted by the Court, therefore constitute a *lex specialis*. The national provisions transposing that set of rules must be applied to an application for international protection lodged by a person registered with UNRWA, providing that that application has not previously been rejected on the basis of another ground for exclusion or of inadmissibility.

88 That finding is borne out by the purpose of Directive 2011/95. Since that directive was adopted on the basis, inter alia, of Article 78(2)(a) TFEU and therefore seeks, in accordance with that provision, to establish a uniform asylum system, it is essential that all the authorities that are empowered in the European Union to deal with applications for international protection apply, when the applicant is a person registered with UNRWA, the provisions transposing the rules set out in Article 12(1)(a) of that directive.

89 Those provisions must also be applied when, as in the present case, the application for international protection includes, in addition to an application for refugee status, an application for subsidiary protection. As is apparent from Article 10(2) of Directive 2013/32, when examining an application for international protection, the competent authority must first determine whether the applicant qualifies as a refugee. Consequently, the fact that the rules set out in Article 12(1)(a) of Directive 2011/95 do not apply to the part of the application relating to subsidiary protection does not exempt the competent authority from its obligation first to apply the provisions transposing those rules, in order to verify whether refugee status must be granted.

90 In the light of the foregoing, the answer to the first question is that Article 12(1)(a) of Directive 2011/95, read in conjunction with Article 10(2) of Directive 2013/32, must be interpreted as meaning that the processing of an application for international protection lodged by a person registered with UNRWA requires an examination of the question whether that person receives effective protection or assistance from that agency, provided that that application has not been previously rejected on the basis of a ground of inadmissibility or on the basis of a ground for exclusion other than that laid down in the first sentence of Article 12(1)(a) of Directive 2011/95.

The second question

91 By the first part of its second question, the referring court asks, in essence, whether the second sentence of Article 12(1)(a) of Directive 2011/95 must be interpreted as precluding national legislation that does not lay down or incorrectly transposes the ground

for no longer applying the ground for exclusion from refugee status contained in that provision.

92 As set out in paragraphs 85 to 87 of the present judgment Article 12(1)(a) of Directive 2011/95 contains, first, a ground for exclusion, to the effect that any third-country national or stateless person receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commission for Refugees is to be excluded from being a refugee in the European Union, and secondly, a ground for no longer applying that ground for exclusion, to the effect that, when such protection or assistance has ceased without the position of that national or stateless person being definitively settled in accordance with the relevant resolutions adopted by the United Nations, that national or stateless person is *ipso facto* to be entitled to the benefits of the directive.

93 As stated in paragraph 21 of the present judgment, the wording of Article 12(1)(a) of Directive 2011/95 corresponds to that of Article 12(1)(a) of Directive 2004/83.

94 It follows that Article 12(1)(a) of Directive 2004/83 and Article 12(1)(a) of Directive 2011/95 preclude a national law which fails to transpose both that ground for exclusion and that ground for no longer applying it.

95 In the present case, Article 12(1)(4) of the ZUB, in its version applicable prior to the entry into force of the national law transposing Directive 2011/95, did not provide for that ground for no longer applying the ground for exclusion. Article 12(1)(4) of the ZUB, as worded in the version subsequent to the entry into force of that law, for its part, transposed the second sentence of Article 12(1)(a) of Directive 2011/95, but wrongly uses the expression 'has not ceased' instead of the expression 'has ceased'. The referring court considers that, in those circumstances, it is difficult, or impossible, to interpret those national provisions in accordance with Article 12(1)(a) of Directive 2011/95.

96 Subject to the review to be carried out by the referring court of the possibilities provided for by Bulgarian law for the interpretation of those national provisions in accordance with Article 12(1)(a) of Directive 2004/83 or Article 12(1)(a) of Directive 2011/95, it must be held that the latter provisions preclude such national provisions, since those national provisions incorrectly transpose the said directives.

97 By the second part of its second question, the referring court asks, in essence, whether the second sentence of Article 12(1)(a) of Directive 2004/83 and the second sentence of Article 12(1)(a) of Directive 2011/95 have direct effect and may be applied even if the applicant for international protection has not expressly referred to them.

98 In that regard, it follows from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the State has failed to implement the directive in domestic law within the period prescribed or where it has failed to implement the directive correctly (judgments of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 33; of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 31; and of 7 July 2016, *Ambisig*, C-46/15, EU:C:2016:530, paragraph 16).

99 The second sentence of Article 12(1)(a) of Directive 2004/83 and the second sentence of Article 12(1)(a) of Directive 2011/95 satisfy those criteria, since they set out a rule whose content is unconditional and sufficiently precise to be relied on by an individual and applied by a court. Furthermore, those provisions provide that, in the circumstances to which they relate, an applicant may '*ipso facto*' be entitled to the benefits of this directive.

100 In the present case, it follows from the order for reference that Ms Alheto claims, in support of her application for international protection, that, notwithstanding her registration with UNRWA, qualification as a refugee in the European Union is the only way effectively to protect her from the threats to which she is exposed. It follows that, even though the applicant in the main proceedings has not expressly referred either to the second sentence of Article 12(1)(a) of Directive 2004/83 or to the second sentence of Article 12(1)(a) of Directive 2011/95, there is nothing to prevent the referring court from ruling on whether the national legislation is compatible with either of those provisions.

101 In the light of the foregoing, the answer to the second question is that the second sentence of Article 12(1)(a) of Directive 2004/83 and the second sentence of Article 12(1)(a) of Directive 2011/95 must be interpreted as:

– precluding national legislation which does not lay down or which incorrectly transposes the ground for no longer applying the ground for exclusion from being a refugee contained therein;

– having direct effect; and

– being applicable even if the applicant for international protection has not expressly referred to them.

The third question

102 By its third question, the referring court asks, in essence, whether Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, must be interpreted as meaning that a court or tribunal of a Member State seised at first instance of an appeal against a decision on an application for international protection may take into account matters of fact or of law, such as the applicability of Article 12(1)(a) of Directive 2011/95 to the applicant's circumstances, which were not examined by the body that took that decision.

103 In that regard, it should be noted, first of all, that Directive 2013/32 distinguishes between the 'determining authority', which it defines in Article 2(f) as 'any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases' and the 'court or tribunal' referred to in Article 46. The procedure before a determining authority is governed by the provisions of Chapter III of that directive, entitled 'Procedures at first instance', while the procedure before a court or tribunal must comply with the rules laid down in Chapter V of that directive, entitled 'Appeals procedures' which is made up of Article 46.

104 Since Article 46(3) of Directive 2013/32 concerns, in accordance with its wording, 'at least … appeals procedures before a court or tribunal of first instance', the interpretation of that provision set out below applies, at the very least, to any court or tribunal seised of the initial action against a decision by which the determining authority initially ruled on an application. It follows from Article 2(f), of that directive that that is also the case when that authority has a quasi-judicial character.

105 It must be recalled, next, that Article 46(3) of Directive 2013/32 defines the scope of the right to an effective remedy which applicants for international protection must enjoy, as provided for in Article 46(1) of that directive, against decisions concerning their application.

106 Thus, Article 46(3) of Directive 2013/32 states that, in order to comply with Article 46(1) of that directive, Member States bound by that directive must ensure that the court or tribunal before which the decision relating to the application for international protection is contested carries out 'a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive [2011/95]'.

107 In the absence of any reference to the laws of the Member States, and having regard to the purpose of Directive 2013/32, set out in recital 4 thereof, those words must be interpreted and applied in a uniform manner. Moreover, as recital 13 of that directive states, the approximation of rules under that directive aims to create equivalent conditions for the application of Directive 2011/95 in the Member States and to limit the movements of applicants for international protection between Member States.

108 According to the Court's settled case-law, it is necessary to determine the scope of those words in accordance with their ordinary meaning, while also taking into account the context in which they occur and the purposes of the rules of which they form part (see, inter alia, judgments of 30 January 2014, *Diakité*, C-285/12, EU:C:2014:39, paragraph 27; of 11 June 2015, *Zh. and O.*, C-554/13, EU:C:2015:377, paragraph 29, and of 26 July 2017, *Jafari*, C-646/16, EU:C:2017:586, paragraph 73).

109 In that regard, apart from the fact that it pursues the overall purpose of establishing common procedural standards, Directive 2013/32 seeks in particular, as is apparent inter alia from recital 18, to ensure that applications for international protection are dealt with 'as soon as possible …, without prejudice to an adequate and complete examination being carried out'.

110 In that context, the words 'shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law' must, in order not to deprive them of their ordinary meaning, be interpreted as meaning that the Member States are required, by virtue of Article 46(3) of Directive 2013/32, to order their national law in such a way that the processing of the appeals referred to includes an examination, by the court or tribunal, of all the facts and points of law necessary in order to make an up-to-

date assessment of the case at hand.

111 In that regard, the expression '*ex nunc*' points to the court or tribunal's obligation to make an assessment that takes into account, should the need arise, new evidence which has come to light after the adoption of the decision under appeal.

112 Such an assessment makes it possible to deal with the application for international protection exhaustively without there being any need to refer the case back to the determining authority. Thus, the court's power to take into consideration new evidence on which that authority has not taken a decision is consistent with the purpose of Directive 2013/32, as referred to in paragraph 109 of this judgment.

113 For its part, the adjective 'full' used in Article 46(3) of Directive 2013/32 confirms that the court or tribunal is required to examine both the evidence which the determining authority took into account or could have taken into account and that which has arisen following the adoption of the decision by that authority.

114 Furthermore, since that provision must be interpreted in a manner consistent with Article 47 of the Charter, the requirement for a full and *ex nunc* examination implies that the court or tribunal seised of the appeal must interview the applicant, unless it considers that it is in a position to carry out the examination solely on the basis of the information in the case file, including, where applicable, the report or transcript of the personal interview before that authority (see, to that effect, judgment of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591, paragraphs 31 and 44). In the event that new evidence comes to light after the adoption of the decision under appeal, the court or tribunal is required, as follows from Article 47 of the Charter, to offer the applicant the opportunity to express his views when that evidence could affect him negatively.

115 The words 'where applicable', contained in the limb of the sentence 'including, where applicable, an examination of the international protection needs pursuant to directive [2011/95]', underline, as the Commission submitted at the hearing, the fact that the full and *ex nunc* examination to be carried out by the court need not necessarily involve a substantive examination of the need for international protection and may accordingly concern the admissibility of the application for international protection, where national law allows pursuant to Article 33(2) of Directive 2013/32.

116 Finally, it must be stressed that it follows from recitals 16 and 22 of Article 4 and from the general scheme of Directive 2013/32 that the examination of the application for international protection by an administrative or quasi-judicial body with specific resources and specialised staff in this area is a vital stage of the common procedures established by that directive. Accordingly, the applicant's right recognised by Article 46(3) of that directive to obtain a full and *ex nunc* examination before a court or tribunal cannot diminish the obligation on the part of that applicant, which is governed by Articles 12 and 13 of that directive, to cooperate with that body.

117 It follows that, in the present case, Article 12(1)(a) of Directive 2011/95 constitutes a relevant point of law which it is for the referring court to examine in its capacity as a court or tribunal of first instance, including, in its assessment of the applicability of that provision to the circumstances of the applicant in the main proceedings, any evidence arising after the adoption of the contested decision.

118 In the light of all the foregoing considerations, the answer to the third question is that Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, must be interpreted as meaning that a court or tribunal of a Member State seised at first instance of an appeal against a decision relating to an application for international protection must examine both facts and points of law, such as the applicability of Article 12(1)(a) of Directive 2011/95 to the applicant's circumstances, which the body that took that decision took into account or could have taken into account, and those which arose after the adoption of that decision.

The fourth question

119 By its fourth question, the referring court asks, in essence, whether Article 46(3) of Directive 2013/32, read in conjunction with Articles 18, 19 and 47 of the Charter, must be interpreted as meaning that the requirement for a full and *ex nunc* examination both of facts and of points of law also covers the grounds of inadmissibility of the application for international protection referred to in Article 33(2) of that directive and, if so, whether, in the event of an examination of such a ground of inadmissibility by the court or tribunal, even though that ground had not been examined by the determining authority, the file must be referred back to that authority for it to conduct the admissibility interview provided for in Article 34 of that directive.

120 As stated in paragraph 115 of the present judgment, the full and *ex nunc* examination of the appeal may concern the admissibility of an application for international protection, where permitted under national law. In accordance with the purpose of Directive 2013/32 of establishing a system in which, at the very least, the court or tribunal seised at first instance of an appeal against a decision of a determining authority must conduct a full and up-to-date examination, that court or tribunal may, inter alia, find that the applicant benefits from sufficient protection in a third country, with the result that it becomes unnecessary to examine the requirement for protection in the European Union. The application is then, for that reason, 'inadmissible'.

121 As regards the cumulative conditions to which the application of such a ground of inadmissibility is subject, such as those referred to, as regards the first country of asylum ground, in Article 35 of that directive, or, as regards the safe third country ground, in Article 38 of that directive, that court or tribunal must rigorously examine whether each of those conditions has been satisfied by inviting, where appropriate, the determining authority to produce any documentation or factual evidence which may be relevant.

122 In the present case, it is apparent from the wording of the fourth question and accompanying explanations, that the referring court envisages, as the case may be, the application of the 'first country of asylum' concept, defined in Article 35 of Directive 2013/32, or the 'safe third country' concept, defined in Article 38 of that directive, to which the second paragraph of Article 35 of that directive refers, or even the concept of 'safe country of origin', defined in Article 36(1) of that directive, the latter concept being referred to in point (c) of the fourth question.

123 As regards the concept of 'safe country of origin', it must be noted that that concept is not included, as such, in the grounds of inadmissibility laid down in Article 33 of Directive 2013/32. Consequently, there is no need to examine it further in the context of the present reference for a preliminary ruling.

124 By contrast, in so far as the referring court envisages the application of the 'first country of asylum' or 'safe third country' concepts, it must conduct the examination referred to in paragraph 121 of the present judgment and ensure, before ruling on the matter, that the applicant has had the opportunity to set out her views in person on the applicability of the ground of inadmissibility to her particular situation.

125 While an applicant's right to be heard with regard to the admissibility of his or her application before any decision on the matter is taken is ensured, in the context of the procedure before the determining authority, by the personal interview provided for in Article 34 of Directive 2013/32, that right derives, during the appeal procedure referred to in Article 46 of that directive, from Article 47 of the Charter and is exercised, if necessary, by means of a hearing of the applicant (see, to that effect, judgment of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591, paragraphs 37 to 44).

126 It must be held, in that regard, that, in the event that the ground of inadmissibility examined by the court or tribunal hearing the action was also examined by the determining authority before the document contested in the action was adopted, that court or tribunal may rely on the report of the personal interview conducted by that authority without hearing the applicant, unless it considers it necessary.

127 If, by contrast, the determining authority did not examine that ground of inadmissibility and, consequently, did not conduct the personal interview referred to in Article 34 of Directive 2013/32, it is for the court or tribunal, if it considers that such a ground ought have been examined by that authority or should be examined on account of new evidence that has arisen, to conduct such a hearing.

128 As laid down in Article 12(1)(b) of Directive 2013/32, for personal interviews conducted by the determining authority the applicant must receive, during his hearing by the court, the services of an interpreter whenever necessary in order to present his or her arguments.

129 As regards, finally, the point raised by the referring court, concerning whether the requirement for a full and *ex nunc* examination of both facts and points of law must be interpreted in the light of Articles 18 and 19 of the Charter, it suffices to observe that, while the fundamental rights guaranteed by those provisions which relate to the right to asylum and protection in the event of removal, expulsion or extradition must be observed when implementing such a requirement, they do not offer, in the context of the reply to the question now referred, specific additional guidance concerning the scope of that requirement.

130 In the light of the foregoing, the answer to the fourth question is that Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, must be interpreted as meaning that the requirement for a full and *ex nunc* examination of the facts and

points of law may also concern the grounds of inadmissibility of the application for international protection referred to in Article 33(2) of that directive, where permitted under national law, and that, in the event that the court or tribunal hearing the appeal plans to examine a ground of inadmissibility which has not been examined by the determining authority, it must conduct a hearing of the applicant in order to allow that individual to express his or her point of view in person concerning the applicability of that ground to his or her particular circumstances.

The fifth question

131 By its fifth question, the referring court asks, in essence, whether the first paragraph of Article 35 of Directive 2013/32 must be interpreted as meaning that a person registered with UNRWA must, if he is a beneficiary of effective protection or assistance from that agency in a third country that is not the same as the territory in which he habitually resides but which falls within the area of operations of that agency, be considered as enjoying sufficient protection in that third country, within the meaning of that provision.

132 It follows from the order for reference that this question has been raised on account of the fact that Ms Alheto, during the armed conflict between the State of Israel and Hamas in July and August 2014, left the Gaza Strip in search of safety in Jordan where she stayed and from where she left for Bulgaria.

133 Jordan is part of UNRWA's area of operations. Consequently, although it is not for the Court to examine the nature of that agency's mandate or its ability to fulfil it, it cannot be ruled out that that agency may be able to provide a person registered with it with living conditions in Jordan that meet the requirements of its mission after that person has fled the Gaza Strip.

134 Accordingly, in the event that a person who has left the UNRWA area of operations and lodged an application for international protection in the European Union benefits from effective protection or assistance from UNRWA, thereby enabling him or her to stay there in safety, under dignified living conditions and without being at risk of being refouled to the territory of habitual residence for as long as he or she is unable to return there in safety, that person cannot be regarded by the authority empowered to decide on that application as having been forced, by reason of circumstances beyond his or her control, to leave UNRWA's area of operations. That person must, in that case, be excluded from refugee status in the European Union, in accordance with Article 12(1)(a) of Directive 2011/95, as interpreted by the case-law recalled in paragraph 86 of the present judgment.

135 In the present case, it is for the referring court to assess, on the basis of an individual assessment of all the relevant evidence, whether Ms Alheto's case falls within that category.

136 If so, those circumstances would also, subject to the considerations set out below, be likely to lead to the rejection of the application for international protection in so far as it concerns the grant of subsidiary protection.

137 Article 33(2)(b) of Directive 2013/32 allows the Member States to consider an application for international protection inadmissible, as a whole, in particular, when a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35 of the directive.

138 In that regard, the very wording of points (a) and (b) of the first paragraph of Article 35 of Directive 2013/32 provides that a country can be considered to be a first country of asylum for a particular applicant if he or she has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection; or (b) he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement, provided that he or she will be readmitted to that country.

139 Persons registered with UNRWA, as recalled in paragraph 6 of this judgment, have the status of 'Palestine refugees in the Near East'. Consequently, they do not benefit from refugee status specifically linked to the Hashemite Kingdom of Jordan and cannot therefore, by the mere fact of that registration and protection or assistance granted to them by that agency, fall within the scope of point (a) of the first paragraph of Article 35 of Directive 2013/32.

140 By contrast, a Palestinian registered with UNRWA who has left his place of habitual residence in the Gaza Strip for Jordan, before travelling to a Member State and filing an application for international protection, must be regarded as otherwise enjoying sufficient protection in that third country, including the benefit of the principle of non-refoulement, within the meaning of point (b) of the first paragraph of Article 35 of Directive 2013/32, provided, first, that he is guaranteed to be able to be readmitted there, second, that he benefits there from effective protection or assistance from UNRWA, which is recognised, or regulated, by that third country

and, third, that the competent authorities of the Member State in which the application for international protection was lodged are certain that he will be able to stay in that third country in safety under dignified living conditions for as long as necessary in view of the risks in the Gaza Strip.

141 In that scenario, the Hashemite Kingdom of Jordan, as an independent State whose territory is separate from that of the habitual residence of the person concerned, would constitute, by virtue of its agreement to readmit the person concerned, of its recognition of the effective protection or assistance provided by UNRWA in its territory, and of its adherence to the principle of non-refoulement, a State actor of protection, within the meaning of Article 7(1)(a) of Directive 2011/95, and would satisfy all the conditions required by point (b) of the first paragraph of Article 35 of Directive 2013/32 in order to fall within the concept of 'first country of asylum', referred to in that provision.

142 It is for the referring court to assess, if necessary after ordering the DAB to produce any relevant documentation or factual evidence, whether all the conditions described in paragraph 140 of the present judgment are satisfied in the present case.

143 In the light of the foregoing, the answer to the fifth question is that point (b) of the first paragraph of Article 35 of Directive 2013/32 must be interpreted as meaning that a person registered with UNRWA must, if he or she is a beneficiary of effective protection or assistance from that agency in a third country that is not the territory in which he or she habitually resides but which forms part of the area of operations of that agency, be considered as enjoying sufficient protection in that third country, within the meaning of that provision, when it:

– agrees to readmit the person concerned after he or she has left its territory in order to apply for international protection in the European Union; and

– recognises that protection or assistance from UNRWA and supports the principle of non-refoulement, thus enabling the person concerned to stay in its territory in safety under dignified living conditions for as long as necessary in view of the risks in the territory of habitual residence.

The sixth question

144 By its sixth question, the referring court asks, in essence, whether Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, must be interpreted as meaning that the court or tribunal seised at first instance of an appeal against a decision concerning an application for international protection must, in the event that it annuls that decision, rule itself on that application for international protection by granting or rejecting it.

145 In that regard, it must be noted that Article 46(3) of Directive 2013/32 only concerns the 'examination' of the appeal and does not therefore govern what happens after any annulment of the decision under appeal.

146 Thus, by adopting Directive 2013/32, the EU legislature did not intend to introduce any common rule to the effect that the quasi-judicial or administrative body referred to in Article 2(f) of that directive should be deprived of its powers following the annulment of its initial decision concerning an application for international protection. It therefore remains open to the Member States to provide that the file must, following such an annulment, be referred back to that body for a new decision.

147 However, Article 46(3) of Directive 2013/32 would be deprived of any practical effect if it were accepted that, after delivery of a judgment by which the court or tribunal of first instance conducted, in accordance with that provision, a full and *ex nunc* assessment of the international protection needs of the applicant by virtue of Directive 2011/95, that body could take a decision that ran counter to that assessment or could allow a considerable period of time to elapse, which could increase the risk that evidence requiring a new up-to-date assessment might arise.

148 Consequently, even though the purpose of Directive 2013/32 is not to establish a common standard in respect of the power to adopt a new decision on an application for international protection after the annulment of the initial decision, it nevertheless follows from its purpose of ensuring the fastest possible processing of applications of that nature, from the obligation to ensure that Article 46(3) is effective, and from the need, arising from Article 47 of the Charter, to ensure an effective remedy, that each Member State bound by that directive must order its national law in such a way that, following annulment of the initial decision and in the event of the file being referred back to the quasi-judicial or administrative body referred to in Article 2(f) of that directive, a new decision is adopted within a short period of time and complies with the assessment contained in the judgment annulling the initial decision.

149 It follows that the answer to the sixth question is that Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, must be interpreted as meaning that it does not establish common procedural standards in respect of the power to adopt a new decision concerning an application for international protection following the annulment, by the court hearing the appeal, of the initial decision taken on that application. However, the need to ensure that Article 46(3) of that directive has a practical effect and to ensure an effective remedy in accordance with Article 47 of the Charter requires that, in the event that the file is referred back to the quasi-judicial or administrative body referred to in Article 2(f) of that directive, a new decision must be adopted within a short period of time and must comply with the assessment contained in the judgment annulling the initial decision.

Costs

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

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

1. Article 12(1)(a) of Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, read in conjunction with Article 10(2) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection must be interpreted as meaning that the processing of an application for international protection lodged by a person registered with the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) requires an examination of the question whether that person receives effective protection or assistance from that agency, provided that that application has not been previously rejected on the basis of a ground of inadmissibility or on the basis of a ground for exclusion other than that laid down in the first sentence of Article 12(1)(a) of Directive 2011/95.

2. The second sentence of Article 12(1)(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted and the second sentence of Article 12(1)(a) of Directive 2011/95 must be interpreted as:

– precluding national legislation which does not lay down or which incorrectly transposes the ground for no longer applying the ground for exclusion from being a refugee contained therein;

– having direct effect; and

– being applicable even if the applicant for international protection has not expressly referred to them.

3. Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a court or tribunal of a Member State seised at first instance of an appeal against a decision relating to an application for international protection must examine both facts and points of law, such as the applicability of Article 12(1)(a) of Directive 2011/95 to the applicant's circumstances, which the body that took that decision took into account or could have taken into account, and those which arose after the adoption of that decision.

4. Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter of Fundamental Rights, must be interpreted as meaning that the requirement for a full and *ex nunc* examination of the facts and points of law may also concern the grounds of inadmissibility of the application for international protection referred to in Article 33(2) of that directive, where permitted under national law, and that, in the event that the court or tribunal hearing the appeal plans to examine a ground of inadmissibility which has not been examined by the determining authority, it must conduct a hearing of the applicant in order to allow that individual to express his or her point of view in person concerning the applicability of that ground to his or her particular circumstances.

5. Point (b) of the first paragraph of Article 35 of Directive 2013/32 must be interpreted as meaning that a person registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) must, if he or she is a beneficiary of effective protection or assistance from that agency in a third country that is not the territory in which he or she habitually resides but which forms part of the area of operations of that agency, be considered as enjoying sufficient protection in that third country, within the meaning of that provision, when it:

– agrees to readmit the person concerned after he or she has left its territory in order to apply for international protection in the European Union; and

– recognises that protection or assistance from UNRWA and supports the principle of non-refoulement, thus enabling the person concerned to stay in its territory in safety under dignified living conditions for as long as necessary in view of the risks in the territory of habitual residence.

6. Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter of Fundamental Rights, must be interpreted as meaning that it does not establish common procedural standards in respect of the power to adopt a new decision concerning an application for international protection following the annulment, by the court hearing the appeal, of the initial decision taken on that application. However, the need to ensure that Article 46(3) of that directive has a practical effect and to ensure an effective remedy in accordance with Article 47 of the Charter of Fundamental Rights requires that, in the event that the file is referred back to the quasi-judicial or administrative body referred to in Article 2(f) of that directive, a new decision must be adopted within a short period of time and must comply with the assessment contained in the judgment annulling the initial decision.

Case C-22/17 P - Neonart svetlobni in reklamni napisi Krevh d.o.o. v European Union Intellectual Property Office (EUIPO)

ORDER OF THE COURT (Seventh Chamber)

11 May 2017 (*)

(Appeal — Article 181 of the Rules of Procedure of the Court of Justice — EU trade mark — Application for registration of the word mark neonart — Application lodged with General Court of the European Union signed by a 'lawyer' — Manifest inadmissibility — Article 19 of the Statute of the Court of Justice of the European Union — No representation by a lawyer — Appeal manifestly unfounded)

In Case C-22/17 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 16 January 2017,

Neonart svetlobni in reklamni napisi Krevh d.o.o., established in Maribor (Slovenia), represented by J. Marn,

appellant,

the other party to the proceedings being:

European Union Intellectual Property Office (EUIPO),

defendant at first instance,

THE COURT (Seventh Chamber),

composed of A. Prechal, President of the Chamber, C. Toader and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 181 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 By its appeal, Neonart svetlobni in reklamni napisi Krevh d.o.o. seeks to have set aside the order of the General Court of the European Union of 14 November 2016, Neonart svetlobni in reklamni napisi Krevh v EUIPO (neonart) (T-221/16, not published, 'the order under appeal', EU:T:2016:673), by which that court dismissed as manifestly inadmissible its action for annulment of the decision of the Second Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 25 January 2016 (Case R 1932/2015-2) concerning an application for registration of the word sign 'neonart' as an EU trade mark.

2 Neonart svetlobni in reklamni napisi Krevh also requests that the Court refer the case back to the General Court, in the event that the appeal is upheld, and order EUIPO to pay the costs.

3 In support of its appeal, the appellant relies on a single ground of appeal, alleging infringement of Article 19 of the Statute of the Court of Justice of the European Union and of Article 45(4)(a) of the Rules of Procedure of the General Court.

The appeal

4 Pursuant to Article 181 of its Rules of Procedure, where an appeal is, in whole or in part, manifestly inadmissible or

manifestly unfounded, the Court may at any time, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide by reasoned order to dismiss the appeal in whole or in part.

5 It is appropriate to apply that provision to the present case.

6 On 6 April 2017, the Advocate General took the following position:

'1. I propose that the Court should dismiss the appeal in the present case as manifestly unfounded and order the appellant to pay the costs, in accordance with Articles 137 and 184(1) of the Rules of Procedure of the Court of Justice, for the following reasons.

2. In support of its appeal, the appellant puts forward a single ground, alleging that the General Court infringed Article 19 of the Statute of the Court of Justice of the European Union ('the Statute') and Article 45(4)(a) of the Rules of Procedure of the General Court in concluding that its representative, Mr Marn, could not validly represent the appellant before the General Court. The General Court came to this conclusion on the ground that Mr Marn, not having been admitted to the Slovenian Bar, is not a lawyer for the purposes of Article 19 of the Statute.

3. The appellant submits that the General Court erred in law by applying the Slovenian version, instead of the English version, of Article 19 of the Statute to define the term 'lawyer', since English had been chosen as the language of the case before the General Court. The appellant also contends that the General Court should have applied national law to determine whether Mr Marn could validly represent a party in proceedings before the courts of a Member State. Furthermore, the appellant affirms that if Mr Marn is not a member of the Slovenian Bar, that is because it does not allow its members to practice at the Bar and at the same time be employed as university professors, as Mr Marn is, or advertise their business freely.

4. According to the Court's settled case-law, it is clear from the fourth paragraph of Article 19 of the Statute that two cumulative conditions must be satisfied for a person to be validly permitted to represent parties, other than the Member States and the Union institutions, before the Courts of the European Union: first, that person must be a lawyer; and second, he or she must be authorised to practice before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) (see, to that effect, order of 17 July 2014, Brown Brothers Harriman v OHIM, C-101/4 P, not published, EU:C:2014:2115, paragraph 15 and case-law cited). With regard to the first of those conditions, the person who signs the application must be a member of the Bar in order to be regarded as a lawyer for the purposes of Article 19 of the Statute; it is not sufficient that that person is entitled to represent parties in proceedings before the courts of a Member State (see, to that effect, order of 20 February 2008, Comunidad Autónoma de Valencia v Commission, C-363/06 P, not published, EU:C:2008:99, paragraphs 22 and 23, and order of 28 February 2005, Energy Technologies ET v OHIM — Aparellaje eléctrico(UNEX), T-445/04, EU:T:2005:70, paragraph 9).

5. In the present case, it is common ground that Mr Marn, who signed the application lodged with the General Court, is not a member of the Slovenian Bar. It follows from the Court's case-law that even if, as the appellant asserts, Mr Marn has been awarded a law degree, has passed the State examination in law and is entitled to represent clients in various proceedings before the Slovenian courts, he cannot be regarded as a lawyer for the purposes of Article 19 of the Statute. Consequently, the General Court was correct to hold, in paragraph 8 of the order under appeal, that Mr Marn did not fulfil the first of the two cumulative conditions set out in the preceding paragraph and, therefore, was not authorised to represent the applicant before the General Court. Moreover, as the General Court was correct to find in paragraph 9 of the order under appeal, Mr Marn has not demonstrated that he is covered by the exception laid down in the seventh paragraph of Article 19 of the Statute for university teachers being nationals of a Member State whose law accords them a right of audience.

6. It is also well-established that the notion of lawyer, for the purposes of Article 19 of the Statute, must be interpreted, as far as possible, independently and without reference to national law (see, to that effect, judgment of 6 September 2012, Prezes Urzędu Komunikacji Elektronicznej and Poland v Commission, C-422/11 P and C-423/11 P, EU:C:2012:553, paragraphs 34 and 35, and order of 20 October 2008, Imperial Chemicals Industries v OHIM (FACTORY FINISH),T-487/07, not published, EU:T:2008:453, paragraphs 20 and 21 and the case-law cited).

7. Lastly, as it is not disputed that the Republic of Slovenia is the pertinent jurisdiction with regard to the verification of Mr Marn's legal credentials to represent the applicant before the General Court, that court did not err in law by seeking to establish whether Mr Marn could properly be described as 'odvetnik', the term which corresponds to 'lawyer' in the Slovenian version of Article 19 of

the Statute.

8. Having regard to the foregoing, I am of the view that the appeal in the present case should be dismissed, in accordance with Article 181 of the Rules of Procedure of the Court of Justice, as manifestly unfounded, and that the appellant should be ordered to bear its own costs.'

7 For the same reasons as those given by the Advocate General, the appeal must be dismissed as, in any event, manifestly unfounded.

Costs

8 Under Article 137 of the Rules of Procedure of the Court, applicable to appeal proceedings by virtue of Article 184(1) of those Rules, a decision as to costs is to be given in the order which closes the proceedings. As the present order was adopted before the appeal was served on the defendant at first instance and, therefore, before the latter has incurred costs, Neonart svetlobni in reklamni napisi Krevh must be ordered to bear its own costs.

On those grounds, the Court (Seventh Chamber) hereby orders:

1. The appeal is dismissed.

2. Neonart svetlobni in reklamni napisi Krevh d.o.o. is to bear its own costs.

Luxembourg, 11 May 2017.

A. Calot Escobar

Case C-25/17 - Tietosuojavaltuutettu

JUDGMENT OF THE COURT (Grand Chamber)

10 July 2018 (*)

(Reference for a preliminary ruling — Protection of individuals with regard to the processing of personal data — Directive 95/46/EC — Scope of the directive — Article 3 — Data collected and processed by the members of a religious community in the course of their door-to-door preaching — Article 2(c) — Definition of a 'personal data filing system' — Article 2(d) — Definition of a 'controller' of the processing of personal data — Article 10(1) of the Charter of Fundamental Rights of the European Union)

In Case C-25/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), made by decision of 22 December 2016, received at the Court on 19 January 2017, in the proceedings

Tietosuojavaltuutettu

intervening parties:

Jehovan todistajat — uskonnollinen yhdyskunta,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, T. von Danwitz (Rapporteur), J.L. da Cruz Vilaça, J. Malenovský, E. Levits and C. Vajda, Presidents of Chambers, A. Borg Barthet, J.-C. Bonichot, A. Arabadjiev, S. Rodin, F. Biltgen, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: P. Mengozzi,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 28 November 2017,

after considering the observations submitted on behalf of **[the parties and interveners]**:::

after hearing the Opinion of the Advocate General at the sitting on 1 February 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(c) and (d) and Article 3 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) read in the light of Article 10 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings brought by the tietosuojavaltuutettu (Data Protection Supervisor, Finland) concerning the legality of a decision of the tietosuojalautakunta (Data Protection Board, Finland) prohibiting the Jehovan todistajat — uskonnollinen yhdyskunta (Jehovah's Witnesses religious community, 'the Jehovah's Witnesses Community') from collecting or

processing personal data in the course of their door-to-door preaching unless the requirements of Finnish legislation relating to the processing of personal data are observed.

Legal context

European Union law

3 Recitals 10, 12, 15, 26 and 27 of Directive 95/46 state:

‘(10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950,] and in the general principles of Community law; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community;

…

(12) Whereas the protection principles must apply to all processing of personal data by any person whose activities are governed by Community law; whereas there should be excluded the processing of data carried out by a natural person in the exercise of activities which are exclusively personal or domestic, such as correspondence and the holding of records of addresses;

…

(15) Whereas the processing of such data is covered by this Directive only if it is automated or if the data processed are contained or are intended to be contained in a filing system structured according to specific criteria relating to individuals, so as to permit easy access to the personal data in question;

…

(26) Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; …

(27) Whereas the protection of individuals must apply as much to automatic processing of data as to manual processing; whereas the scope of this protection must not in effect depend on the techniques used, otherwise this would create a serious risk of circumvention; whereas, nonetheless, as regards manual processing, this Directive covers only filing systems, not unstructured files; whereas, in particular, the content of a filing system must be structured according to specific criteria relating to individuals allowing easy access to the personal data; whereas, in line with the definition in Article 2(c), the different criteria for determining the constituents of a structured set of personal data, and the different criteria governing access to such a set, may be laid down by each Member State; whereas files or sets of files as well as their cover pages, which are not structured according to specific criteria, shall under no circumstances fall within the scope of this Directive’.

4 Article 1(1) of Directive 95/46 provides:

‘In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.’

5 Article 2 of that directive provides:

‘For the purpose of this Directive:

(a) “personal data” shall mean any information relating to an identified or identifiable natural person (“data subject”); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) “processing of personal data” (“processing”) shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

(c) “personal data filing system” (“filing system”) shall mean any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;

(d) “controller” shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law;

…’

6 Article 3 of the directive states:

‘1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

2. This Directive shall not apply to the processing of personal data:

– in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,

– by a natural person in the course of a purely personal or household activity.’

Finnish law

7 Directive 95/46 was transposed into Finnish law by the henkilötietolaki 523/1999 (Law on personal data No 523/1999, ‘Law No 523/1999’).

8 Paragraph 2, first and second paragraphs, of that law, entitled ‘Soveltamisala’ (Scope), provides;

‘This Law applies to the automated processing of personal data. It also applies to other means of personal data processing where the personal data form part of a personal data filing system or a part of such a system or are intended to form part of a personal data filing system or a part of such a system.

This Law does not apply to the processing of personal data by a natural person for purely personal purposes or for comparable ordinary and private purposes.’

9 Paragraph 3(3) of Law No 523/1999 defines a ‘personal data filing system’ as a ‘set of personal data, connected by a common use and processed fully or partially by automated means or organised using data sheets or lists or any other comparable means permitting the retrieval of data relating to persons easily and without excessive cost’.

10 In accordance with Paragraph 44 of that law, at the request of the Data Protection Supervisor, the Data Protection Board may prohibit processing of personal data that is contrary to that law or to the rules and regulations issued on the basis thereof, and order the parties concerned to remedy the unlawful conduct or negligence within a prescribed period.

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

11 On 17 September 2013, at the request of the Data Protection Supervisor the Finnish Data Protection Board adopted a decision

prohibiting the Jehovah's Witnesses Community from collecting or processing personal data in the course of door-to-door preaching carried out by its members unless the legal requirements for processing such data laid down, in particular, in Paragraphs 8 and 12 of the Law No 523/1999 were satisfied. Furthermore, on the basis of Paragraph 44(2) of that law, the Data Protection Board imposed a ban on the collection of personal data by the Jehovah's Witnesses Community for the purposes of that community for a period of six months unless those conditions were observed.

12 In the grounds for its decision, the Data Protection Board considered that the collection of the data at issue by members of the Jehovah's Witnesses Community constituted processing of personal data within the meaning of that law, and that the Jehovah's Witnesses Community and its members were both data controllers.

13 The Jehovah's Witnesses Community brought an action before the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland) against that decision. By judgment of 18 December 2014, that court annulled the decision on the ground, inter alia, that the Jehovah's Witnesses Community was not a controller of personal data within the meaning of Law No 523/1999 and that its activity did not constitute unlawful processing of such data.

14 The Data Protection Supervisor challenged that judgment before the Korkein hallinto-oikeus (Supreme Administrative Court, Finland).

15 According to the findings of that court, the members of the Jehovah's Witnesses Community take notes in the course of their door-to-door preaching about visits to persons who are unknown to themselves or that Community. The data collected may consist, among other things, of the name and addresses of persons contacted, together with information concerning their religious beliefs and their family circumstances. Those data are collected as a memory aid and in order to be retrieved for any subsequent visit without the knowledge or consent of the persons concerned.

16 The referring court also found that the Jehovah's Witnesses Community has given its members guidelines on the taking of such notes which appear in at least one of its magazines which is dedicated to preaching. That community and its congregations organise and coordinate the door-to-door preaching by their members, in particular by creating maps from which areas are allocated between the members who engage in preaching and by keeping records about preachers and the number of the Community's publications distributed by them. Furthermore, the congregations of the Jehovah's Witnesses Community maintain a list of persons who have requested not to receive visits from preachers and the personal data on that list, called the 'refusal register', are used by members of that community. Lastly, the Jehovah's Witnesses Community has, in the past, made forms available to its members for the purpose of collecting those data in the course of their preaching. However, the use of those forms was abandoned following a recommendation by the Data Protection Supervisor.

17 The referring court observes that, according to information from the Jehovah's Witnesses Community, it does not require members who engage in preaching to collect data, and that in cases in which such data has been collected it has no knowledge of either the nature of the notes taken which are, moreover, only informal personal notes nor of the identity of the preachers who collected those data.

18 As regards the need for the present request for a preliminary ruling, the Korkein hallinto-oikeus (Supreme Administrative Court) takes the view that the examination of the case in the main proceedings requires consideration to be given, on one hand, to the rights to privacy and protection of personal data and, on the other, to freedom of religion and association guaranteed by the Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as the Finnish Constitution.

19 The referring court considers that the door-to-door preaching practised by members of a religious community, such as the Jehovah's Witnesses Community, is not one of the activities excluded from the scope of Directive 95/46, by virtue of the first indent of Article 3(2) thereof. However, the question arises as to whether that activity is a purely personal or household activity within the meaning of the second indent of Article 3(2). In that regard, account must be taken of the fact that, in the present case, the data collected are more than informal notes in an address book, as the notes taken concern unknown persons and contain sensitive data relating to their religious beliefs. The fact that door-to-door preaching is an essential part of the Jehovah's Witnesses Community's activity, which is organised and coordinated by it and by its congregations, must also be taken into consideration.

20 Furthermore, since the collected data at issue in the main proceedings are processed otherwise than by automatic means, it must be determined, having regard to Article 3(1) of Directive 95/46 read together with Article 2(c) thereof, whether that set of data constitutes a filing system within the meaning of those provisions. According to the information provided by the Jehovah's Witnesses

Community, those data are not shared, so that it is impossible to know with certainty the nature and extent of the data collected. However, it may be assumed that the purpose of collecting and subsequent processing of the data at issue in the main proceedings is for the easy retrieval of that data concerning a specific person or address for the purposes of a subsequent visit. The data collected are not, however, structured in the form of data sheets.

21 If the data processing at issue in the main proceedings falls within the scope of Directive 95/46, the referring court notes that the question then arises as to whether the Jehovah's Witnesses Community must be regarded as a controller of that processing within the meaning of Article 2(d) thereof. The case-law of the Court deriving from the judgment of 13 May 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317), broadly defines the concept of 'controller' within the meaning of those provisions. Furthermore, it is clear from Opinion 1/2010 of 16 February 2010 on the concepts of 'controller' and 'processor' produced by the Working Group set up pursuant to Article 29 of Directive 95/46, that, in particular, the 'effective control' and the conception that the data subject has of the controller must be taken into account.

22 In the present case, regard should be had to the fact that the Jehovah's Witnesses Community organises, coordinates and encourages door-to-door preaching, and that in its publications it has given guidelines on the collection of data in the course of that activity. Furthermore, the Data Protection Supervisor found that that community has effective control over the means of data processing and the power to prohibit or limit that processing, and that it previously defined the purpose and means of data collection by giving guidelines on collection. Furthermore, the forms previously used are also evidence of the active involvement of that community in data processing.

23 However, account should also be taken of the fact that the members of the Jehovah's Witnesses Community can decide themselves whether to collect data and to determine the means of doing so. Furthermore, that community does not itself collect data and does not have access to the data collected by its members, except that on the 'refusal' list. However, such circumstances do not preclude the potential for several data controllers, each with different roles and responsibilities.

24 In those circumstances the Korkein hallinto-oikeus (Supreme Administrative Court) decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the exceptions to the scope of [Directive 95/46] laid down in Article 3(2), first and second indents, thereof be interpreted as meaning that the collection and other processing of personal data carried out by the members of a religious community in connection with door-to-door preaching fall outside the scope of that directive? When assessing the applicability of [Directive 95/46], what significance is to be given, on one hand, to the fact that it is the religious community and its congregations which organise the preaching activity in the course of which the data is collected and, on the other, to the fact this also concerns the personal religious practice of the members of a religious community?

(2) Must the definition of a "filing system" in Article 2(c) of … Directive [95/46], examined in the light of recitals 26 and 27 of that directive, be interpreted as meaning that, taken as a whole, the personal data (consisting of names and addresses and other information about and characteristics of a person) collected otherwise than by automatic means in connection with the door-to-door preaching described above

(a) does not constitute such a filing system, because the data does not include specific lists or data sheets or any other comparable search method as provided for in the definition laid down in the [Law No 523/1999], or

(b) does constitute such a filing system, because, taking account of its intended purpose, the information required for later use may in practice be searched easily and without unreasonable expense in accordance with [Law No 523/1999]?

(3) Must the phrase "alone or jointly with others determines the purposes and means of the processing of personal data" appearing in Article 2(d) of … Directive [95/46] be interpreted as meaning that a religious community that organises an activity in the course of which personal data is collected (in particular, by allocating areas in which the activity is carried out among the various preachers, supervising the activity of those preachers and keeping a list of individuals who do not wish the preachers to visit them) may be regarded as a controller, in respect of the processing of personal data carried out by its members, even if the religious community claims that only the individual members who engage in preaching have access to the data that they gather?

(4) Must Article 2(d) of Directive [95/46] be interpreted to the effect that in order for a religious community to be considered a controller it must have taken other specific measures, such as giving written instructions or orders directing the collection of data, or

is it sufficient that that religious community can be regarded as having de facto control of its members' activities?

It is necessary to answer Questions 3 and 4 only if, on the basis of the answers to Questions 1 and 2, [Directive 95/46] is applicable. It is necessary to answer Question 4 only if, on the basis of Question 3, the application of Article 2(d) of [Directive 95/46] to the Community cannot be regarded as being excluded.'

The request to have the oral procedure reopened

25 By two documents lodged at the Court Registry on 12 December 2017 and 15 February 2018 respectively, the Jehovah's Witnesses Community requested the Court to order the reopening of the oral part of the procedure pursuant to Article 83 of the Rules of Procedure of the Court. In support of the first of those requests, the Jehovah's Witnesses Community claims, in particular, that it did not have the opportunity at the hearing to respond to the observations submitted by the other parties, some of which did not reflect the facts in the main proceedings. As regards the second request, the Jehovah's Witnesses Community argues essentially that the Opinion of the Advocate General is based on inaccurate or potentially misleading facts, some of which are not mentioned in the request for a preliminary ruling.

26 Pursuant to Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to have a decisive bearing on the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

27 That is not the case here. In particular, the requests of the Jehovah's Witnesses Community seeking to have the oral procedure reopened do not contain any new argument on the basis of which the present case should be decided. Furthermore, that party and the other interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union submitted, both during the written phase and the oral phase of the proceedings, their observations concerning the interpretation of Article 2(c) and (d), and Article 3 of Directive 95/46, read in the light of Article 10 of the Charter, which is the subject of the questions referred for a preliminary ruling.

28 As regards the facts in the main proceedings, it must be recalled that in proceedings under Article 267 TFEU, only the court making the reference may define the factual context in which the questions which it asks arise or, at very least, explain the factual assumptions on which the questions are based. It follows that a party to the main proceedings cannot allege that certain factual premisses on which the arguments advanced by the other interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union are based, or the analysis of the Advocate General, are incorrect in order to justify the reopening of the oral procedure, on the basis of Article 83 of the Rules of Procedure (see, to that effect, judgment of 26 June 2008, *Burda*, C-284/06, EU:C:2008:365, paragraphs 44, 45 and 47).

29 Against that background, the Court, having heard the Advocate General, considers that it has all the evidence necessary to enable it to reply to the questions referred and that the present case does not thereby fall to be decided on the basis of an argument which has not been debated between the parties. The request to reopen the oral procedure must therefore be rejected.

Admissibility of the request for a preliminary ruling

30 The Jehovah's Witnesses Community claims that the request for a preliminary ruling is inadmissible. While challenging the main facts on which that request is based, it claims that the request for a preliminary ruling relates to the conduct of some of its members who are not parties to the main proceedings. Therefore, that request concerns a hypothetical problem.

31 In that connection, it is solely for the national court hearing the case, which has the responsibility of taking the subsequent judicial decision, to determine, with regard to the particular aspects of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it refers to the Court. Consequently, where the questions put by national courts concern the interpretation of a provision of European Union law, the Court is, in principle, bound to give a ruling. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the

Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraphs 24 and 25 and the case-law cited).

32 In the present case, the order for reference contains sufficient factual and legal information to understand both the questions referred for a preliminary ruling and their scope. Further, and most importantly, nothing in the file leads to the conclusion that the interpretation requested of EU law is unrelated to the actual facts of the main action or its object, or that the problem is hypothetical, in particular on account of the fact that the members of the Jehovah's Witnesses Community whose collection of personal data is the basis for the questions referred are not parties to the main proceedings. It is clear from the order for reference that the questions referred are intended to assist the referring court to determine whether that community may itself be regarded as a controller, within the meaning of Directive 95/46, in connection with the collection of the personal data by its members in the course of their door-to-door preaching activities.

33 The reference for a preliminary ruling is therefore admissible.

Consideration of the questions referred

The first question

34 By its first question, the referring court asks essentially whether Article 3(2) of Directive 95/46, read in the light of Article 10(1) of the Charter, must be interpreted as meaning that the collection of personal data by members of a religious community in the course of door-to-door preaching and the subsequent processing of those data constitutes the processing of personal data carried out for the purposes of the activities referred to in Article 3(2), first indent, of that directive or the processing of personal data carried out by a natural person in the course of a purely personal or household activity within the meaning of Article 3(2), second indent, thereof.

35 In order to answer that question, it should be observed from the outset, as is clear from Article 1(1) and recital 10 of Directive 95/46, that that directive seeks to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy, with respect to the processing of personal data (judgments of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 66, and of 5 June 2018, *Wirtshaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraph 26).

36 Article 3 of Directive 95/46, which defines the scope of the directive, states in paragraph 1 that its provisions 'shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system'.

37 However, Article 3(2) lays down two exceptions to the scope of application of that directive which must be strictly interpreted (see, to that effect, judgments of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paragraph 29, and of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725, paragraph 38). Furthermore, Directive 95/46 does not lay down any further limitation of its scope (judgment of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraph 46).

38 First, as regards the exception in Article 3(2), first indent, of Directive 95/46, it has been held that the activities mentioned therein by way of exceptions are, in any event, activities of the State or of State authorities and are unrelated to fields in which individuals are active. Those activities are intended to define the scope of the exception provided for in that provision, with the result that that exception applies only to the activities which are expressly listed there or which can be classified in the same category (judgments of 6 November 2003, *Lindqist*, C-101/01, EU:C:2003:596, paragraphs 43 and 44; of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraph 41; and of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725, paragraphs 36 and 37).

39 In the present case, the collection of personal data by members of the Jehovah's Witnesses Community in the course of door-to-door preaching is a religious procedure carried out by individuals. It follows that such activity is not an activity of the State authorities and cannot therefore be treated in the same way as the activities referred to in Article 3(2), first indent, of Directive 95/46.

40 Second, as regards the exception in Article 3(2), second indent, of Directive 95/46, that provision does not exclude from its scope data processing carried out in relation simply to an activity which is simply a personal or household activity, but only data

processing carried out in relation to an activity that is 'purely' personal or household in nature (see, to that effect, judgment of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paragraphs 30).

41 The words 'personal or household', within the meaning of that provision, refer to the activity of the person processing the personal data and not to the person whose data are processed (see, to that effect, judgment of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paragraphs 31 and 33).

42 As the Court held, Article 3(2), second indent, of Directive 95/46 must be interpreted as covering only activities that are carried out in the context of the private or family life of individuals. In that connection, an activity cannot be regarded as being purely personal or domestic where its purpose is to make the data collected accessible to an unrestricted number of people or where that activity extends,even partially, to a public space and is accordingly directed outwards from the private setting of the person processing the data in that manner (see, to that effect, judgments of 6 November 2003, *Lindqvist*, C-101/01, EU:C:2003:596, paragraph 47; of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraph 44; and of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paragraphs 31 and 33).

43 In so far as it appears that the personal data processing at issue in the main proceedings is carried out in the course of door-to-door preaching by members of the Jehovah's Witnesses Community, it must be determined whether such an activity is a purely personal or household activity within the meaning of Article 3(2), second indent, of Directive 95/46.

44 In that connection, it is clear from the order for reference that door-to-door preaching, in the course of which personal data are collected by members of the Jehovah's Witnesses Community, is, by its very nature, intended to spread the faith of the Jehovah's Witnesses Community among people who, as the Advocate General observed in point 40 of his Opinion, do not belong to the faith of the members who engage in preaching. Therefore, that activity is directed outwards from the private setting of the members who engage in preaching.

45 Furthermore, it is also clear from the order for reference that some of the data collected by the members of that community who engage in preaching are sent by them to the congregations of that community which compile lists from that data of persons who no longer wish to receive visits from those members. Thus, in the course of their preaching, those members make at least some of the data collected accessible to a potentially unlimited number of persons.

46 As to whether the fact that the processing of personal data is carried out in the course of an activity relating to a religious practice may confer a purely personal or household nature on that door-to-door preaching, it must be recalled that the right to freedom of conscience and religion, enshrined in Article 10(1) of the Charter, implies, in particular, the freedom for everyone to manifest his religion or belief, in worship, teaching, practice and observance.

47 The Charter adopts a broad understanding of the concept of 'religion' in that provision covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public (judgment of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others*, C-426/16, EU:C:2018:335, paragraph 44 and the case-law cited).

48 Furthermore, the freedom to manifest one's religion individually or collectively in public or in private, since it may take various forms such as the teaching, practice and performance of rites, includes also the right to attempt to convince other persons, for example by means of preaching (ECtHR, 25 May 1993, *Kokkinakisv. Greece*, EC:ECHR:1993:0525JUD001430788, § 31, and ECtHR, 8 November 2007, *Perry v. Latvia*, CE:ECHR:2007:1108JUD003027303, § 52).

49 However, although the door-to-door preaching activities of the member of a religious community is thereby protected by Article 10(1) of the Charter as an expression of the faith of those preachers, that fact does not confer an exclusively personal or household character on that activity, within the meaning of Article 3(2), second indent, of Directive 95/46.

50 Taking account of the considerations set out in paragraphs 44 and 45 of the present judgment, the preaching extends beyond the private sphere of a member of a religious community who is a preacher.

51 Having regard to the foregoing considerations, the answer to Question 1 is that Article 3(2) of Directive 95/46, read in the light of Article 10(1) of the Charter, must be interpreted as meaning that the collection of personal data by members of a religious

community in the course of door-to-door preaching and the subsequent processing of those data does not constitute either the processing of personal data for the purpose of activities referred to in Article 3(2), first indent, of that directive or the processing of personal data carried out by a natural person in the course of a purely personal or household activity, within the meaning of Article 3(2), second indent, thereof.

The second question

52 By its second question, the referring court asks essentially whether Article 2(c) of Directive 95/46 must be interpreted as meaning that the concept of a 'filing system' referred to in that provision covers a set of personal data collected in the course of door-to-door preaching, consisting of names and addresses as well as other information concerning persons contacted, if those data may, in practice, be easily retrieved for later use, or whether, in order to be covered by that definition, that set of data must include data sheets, specific lists or other search methods.

53 As is clear from Article 3(1) and recitals 15 and 27 of Directive 95/46, that directive covers both automatic processing of data and the manual processing of such data, so that the scope of the protection it confers on data subjects does not depend on the techniques used and avoids the risk of that protection being circumvented. However, it is also clear that that directive applies to the manual processing of personal data only where the data processed form part of a filing system or are intended to form part of a filing system.

54 In the present case, since the processing of the personal data at issue in the main proceedings is carried out otherwise than by automatic means, the question arises as to whether the data processed form part of or are intended to form part of a filing system within the meaning of Article 2(c) and Article 3(1) of Directive 95/46.

55 In that connection, it is stipulated in Article 2(c) of Directive 95/46 that the concept of a 'filing system' is 'any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis'.

56 In accordance with the objective set out in paragraph 53 of the present judgment, that provision broadly defines the concept of 'filing system', in particular by referring to 'any' structured set of personal data.

57 As is clear from recitals 15 and 27 of Directive 95/46, the content of a filing system must be structured in order to allow easy access to personal data. Furthermore, although Article 2(c) of that directive does not set out the criteria according to which that filing system must be structured, it is clear from those recitals that those criteria must be 'relat[ed] to individuals'. Therefore, it appears that the requirement that the set of personal data must be 'structured according to specific criteria' is simply intended to enable personal data to be easily retrieved.

58 Apart from that requirement, Article 2(c) of Directive 95/46 does not lay down the practical means by which a filing system is be structured or the form in which it is to be presented. In particular, it does not follow from that provision, or from any other provision of that directive, that the personal data at issue must be contained in data sheets or specific lists or in another search method, in order to establish the existence of a filing system within the meaning of that directive.

59 In the present case, it is clear from the findings of the referring court that the data collected in the course of the door-to-door preaching at issue in the main proceedings are collected as a memory aid, on the basis of an allocation by geographical sector, in order to facilitate the organisation of subsequent visits to persons who have already been contacted. They include not only information relating to the content of conversations concerning the beliefs of the person contacted, but also his name and address. Furthermore, those data, or at least a part of them, are used to draw up lists kept by the congregations of the Jehovah's Witnesses Community of persons who no longer wish to receive visits by members who engage in the preaching of that community.

60 Thus, it appears that the personal data collected in the course of the door-to-door preaching at issue in the main proceedings are structured according to criteria chosen in accordance with the objective pursued by that collection, which is to prepare for subsequent visits and to keep lists of persons who no longer wish to be contacted. Thus, as it is apparent from the order for reference, those criteria, among which are the name and address of persons contacted, their beliefs or their wish not to receive further visits, are chosen so that they enable data relating to specific persons to be easily retrieved.

61 In that connection, the specific criterion and the specific form in which the set of personal data collected by each of the members who engage in preaching is actually structured is irrelevant, so long as that set of data makes it possible for the data relating to a specific person who has been contacted to be easily retrieved, which is however for the referring court to ascertain in the light of all the circumstances of the case in the main proceedings.

62 Therefore, the answer to Question 2 is that Article 2(c) of Directive 95/46 must be interpreted as meaning that the concept of a 'filing system', referred to by that provision, covers a set of personal data collected in the course of door-to-door preaching, consisting of the names and addresses and other information concerning the persons contacted, if those data are structured according to specific criteria which, in practice, enable them to be easily retrieved for subsequent use. In order for such a set of data to fall within that concept, it is not necessary that they include data sheets, specific lists or other search methods.

The third and fourth questions

63 By Questions 3 and 4, which it is appropriate to examine together, the referring court asks essentially whether Article 2(d) of Directive 95/46, read in the light of Article 10(1) of the Charter, must be interpreted as meaning that a religious community may be regarded as a controller, jointly with its members who engage in preaching, with regard to the processing of personal data carried out by the latter in the context of door-to-door preaching organised, coordinated and encouraged by that community, and whether it is necessary for that purpose for the community to have access to those data, or whether it must be established that the religious community has given its members written guidelines or instructions in relation to that processing.

64 In the present case, the Data Protection Board, in the decision at issue in the main proceedings, found that the Jehovah's Witnesses Community is a controller, jointly with its members who engage in preaching, of the processing of personal data carried out by the latter in the context of door-to-door preaching. In so far as only the responsibility of that community is challenged, the responsibility of the members who engage in preaching does not appear to be called into question.

65 As expressly provided in Article 2(d) of Directive 95/46, the concept of 'controller' refers to the natural or legal person who 'alone or jointly with others determines the purposes and means of the processing of personal data'. Therefore, that concept does not necessarily refer to a single natural or legal person and may concern several actors taking part in that processing, with each of them then being subject to the applicable data protection provisions (see, to that effect, judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraph 29).

66 The objective of that provision being to ensure, through a broad definition of the concept of 'controller', effective and complete protection of the persons concerned, the existence of joint responsibility does not necessarily imply equal responsibility of the various operators engaged in the processing of personal data. On the contrary, those operators may be involved at different stages of that processing of personal data and to different degrees, so that the level of responsibility of each of them must be assessed with regard to all the relevant circumstances of the particular case (see, to that effect, judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraphs 28, 43 and 44).

67 In that connection, neither the wording of Article 2(d) of Directive 95/46 nor any other provision of that directive supports a finding that the determination of the purpose and means of processing must be carried out by the use of written guidelines or instructions from the controller.

68 However, a natural or legal person who exerts influence over the processing of personal data, for his own purposes, and who participates, as a result, in the determination of the purposes and means of that processing, may be regarded as a controller within the meaning of Article 2(d) of Directive 95/46.

69 Furthermore, the joint responsibility of several actors for the same processing, under that provision, does not require each of them to have access to the personal data concerned (see, to that effect, judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraph 38).

70 In the present case, as is clear from the order for reference, it is true that members of the Jehovah's Witnesses Community who engage in preaching determine in which specific circumstances they collect personal data relating to persons visited, which specific data are collected and how those data are subsequently processed. However, as set out in paragraphs 43 and 44 of the present judgment, the collection of personal data is carried out in the course of door-to-door preaching, by which members of the Jehovah's Witnesses Community who engage in preaching spread the faith of their community. That preaching activity is, as is

apparent from the order for reference, organised, coordinated and encouraged by that community. In that context, the data are collected as a memory aid for later use and for a possible subsequent visit. Finally, the congregations of the Jehovah's Witnesses Community keep lists of persons who no longer wish to receive a visit, from those data which are transmitted to them by members who engage in preaching.

71 Thus, it appears that the collection of personal data relating to persons contacted and their subsequent processing help to achieve the objective of the Jehovah's Witnesses Community, which is to spread its faith and are, therefore, carried out by members who engage in preaching for the purposes of that community. Furthermore, not only does the Jehovah's Witnesses Community have knowledge on a general level of the fact that such processing is carried out in order to spread its faith, but that community organises and coordinates the preaching activities of its members, in particular, by allocating areas of activity between the various members who engage in preaching.

72 Such circumstances lead to the conclusion that the Jehovah's Witnesses Community encourages its members who engage in preaching to carry out data processing in the context of their preaching activity.

73 In the light of the file submitted to the Court, it appears that the Jehovah's Witnesses Community, by organising, coordinating and encouraging the preaching activities of its members intended to spread its faith, participates, jointly with its members who engage in preaching, in determining the purposes and means of processing of personal data of the persons contacted, which is, however, for the referring court to verify with regard to all of the circumstances of the case.

74 That finding cannot be called into question by the principle of organisational autonomy of religious communities which derives from Article 17 TFEU. The obligation for every person to comply with the rules of EU law on the protection of personal data cannot be regarded as an interference in the organisational autonomy of those communities (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 58).

75 Having regard to the foregoing considerations, the answer to Questions 3 and 4 is that Article 2(d) of Directive 95/46, read in the light of Article 10(1) of the Charter, must be interpreted as meaning that it supports the finding that a religious community is a controller, jointly with its members who engage in preaching, of the processing of personal data carried out by the latter in the context of door-to-door preaching organised, coordinated and encouraged by that community, without it being necessary that the community has access to those data, or to establish that that community has given its members written guidelines or instructions in relation to the data processing.

Costs

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

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

1. Article 3(2) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, read in the light of Article 10(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that the collection of personal data by members of a religious community in the course of door-to-door preaching and the subsequent processing of those data does not constitute either the processing of personal data for the purpose of activities referred to in Article 3(2), first indent, of that directive or the processing of personal data carried out by a natural person in the course of a purely personal or household activity, within the meaning of Article 3(2), second indent, thereof.

2. Article 2(c) of Directive 95/46 must be interpreted as meaning that the concept of a 'filing system', referred to by that provision, covers a set of personal data collected in the course of door-to-door preaching, consisting of the names and addresses and other information concerning the persons contacted, if those data are structured according to specific criteria which, in practice, enable them to be easily retrieved for subsequent use. In order for such a set of data to fall within that concept, it is not necessary that they include data sheets, specific lists or other search methods.

3. Article 2(d) of Directive 95/46, read in the light of Article 10(1) of the Charter of Fundamental Rights, must be interpreted as meaning that it supports the finding that a religious community is a controller, jointly with its members who engage in preaching, for the processing of personal data carried out by the latter in the context of door-to-door preaching organised, coordinated and encouraged by that community, without it being necessary that the community has access to those data, or to establish that that community has given its members written guidelines or instructions in relation to the data processing.

Case C 40/17 - Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 19 December 2018(1)

Case C-40/17

Fashion ID GmbH & Co. KG
v
Verbraucherzentrale NRW e.V.
joined parties:
Facebook Ireland Limited,
Landesbeauftragte für Datenschutz und Informationsfreiheit Nordrhein-Westfalen

(Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany))

(Reference for a preliminary ruling — Directive 95/46/EC — Protection of personal data of website users — Standing of a consumer protection association to bring a claim — Liability of a website operator — Transfer of personal data to a third party — Embedded plug-in — Facebook 'Like' button — Legitimate interests — Consent of the data subject — Duty to provide information)

I. Introduction

1. Fashion ID GmbH & Co. KG is an online retailer which sells fashion items. It embedded a plug-in in its website: Facebook's 'Like' button. As a result, when a user lands on Fashion ID's website, information about that user's IP address and browser string is transferred to Facebook. That transfer occurs automatically when Fashion ID's website has loaded, irrespective of whether the user has clicked on the 'Like' button and whether or not he has a Facebook account.

2. Verbraucherzentrale NRW e.V, a German consumer protection association, brought legal proceedings for an injunction against Fashion ID on the ground that the use of that plug-in results in a breach of data protection legislation.

3. Seised of the case, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), seeks the interpretation of several provisions of Directive 95/46/EC ('Directive 95/46'). (2) As a preliminary issue, the referring court enquires whether that directive allows national legislation to grant standing to a consumer association to bring a claim such as the one in this case. Turning to the substance, the core question posed is whether Fashion ID must be classified as a 'controller' with regard to the data processing taking place, and if so, how exactly are the individual obligations imposed by Directive 95/46 to be met in such a scenario. Whose legitimate interests are to be considered under the balancing exercise required by Article 7(f) of Directive 95/46? Does Fashion ID have a duty to inform data subjects about the processing? And is it also Fashion ID that must collect the informed consent of data subjects in this respect?

II. Legal framework

A. EU law

Directive 95/46

4. The objective of Directive 95/46 is set out in its first article. The first paragraph of that article reads: 'Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data'. Pursuant to paragraph 2 of the same provision, 'Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1'.

5. Article 2 contains the following definitions:

'(a) "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) "processing of personal data" ("processing") shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

…

(d) "controller" shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law;

…

(h) "the data subject's consent" shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.'

6. Article 7 provides criteria that must be met for data processing to be legitimate: 'Member States shall provide that personal data may be processed only if:

(a) the data subject has unambiguously given his consent; or

…

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1(1).'

7. Article 10 sets out the minimum information that must be provided to the data subject:

'Member States shall provide that the controller or his representative must provide a data subject from whom data relating to himself are collected with at least the following information, except where he already has it:

(a) the identity of the controller and of his representative, if any;

(b) the purposes of the processing for which the data are intended;

(c) any further information such as

the recipients or categories of recipients of the data,

– whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply,

– the existence of the right of access to and the right to rectify the data concerning him

in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.'

8. Chapter III of Directive 95/46 concerns judicial remedies, liability and sanctions. Articles 22 to 24 contained therein provide as follows:

'Article 22

Remedies

Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question.

Article 23

Liability

1. Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered.

The controller may be exempted from this liability, in whole or in part, if he proves that he is not responsible for the event giving rise to the damage.

Article 24

Sanctions

The Member States shall adopt suitable measures to ensure the full implementation of the provisions of this Directive and shall in particular lay down the sanctions to be imposed in case of infringement of the provisions adopted pursuant to this Directive.'

B. German law

Gesetz gegen den unlauteren Wettbewerb

9. Paragraph 3(1) of the Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition) ('the UWG') provides that unlawful commercial practices shall be prohibited.

10. Paragraph 8(1) and (3) (3) of the UWG sets out that a commercial practice which is unlawful may give rise to an order to cease and desist, or a prohibition order applied for by 'qualified entities' listed in the *Unterlassungsklagengesetz* (Law on Injunctions) or on the European Commission's list, pursuant to Article 4(3) of Directive 2009/22/EC on injunctions for the protection of consumers' interests. (3)

Unterlassungsklagengesetz

11. Paragraph 2(1) and (2) (11) of the Unterlassungsklagengesetz (Law on Injunctions) provides:

'(1) Any person who infringes the provisions in place to protect consumers (consumer protection laws), other than in the application or recommendation of general conditions of sale, may have an order to cease and desist and a prohibition order imposed on him in the interests of consumer protection.

(2) For the purposes of this provision, "consumer protection laws" shall mean, in particular:

…

11. the provisions that regulate the lawfulness

(a) of the collection of a consumer's personal data by a trader, or

(b) of the processing or use of personal data collected about a consumer by a trader

if the data are collected, processed or used for the purposes of publicity, market and opinion research, operation of a credit agency, preparation of personality and usage profiles, address trading, other data trading or comparable commercial purposes.'

Telemediengesetz

12. Paragraph 2(1) of the Telemediengesetz (Law on telemedia) ('the TMG') provides as follows:

'For the purpose of this Law,

1. a service provider is any natural person or legal entity who holds his own or third-party telemedia for use or mediates access to use; …'

13. Paragraph 12(1) of the TMG states that: 'A service provider may collect and use personal data to make telemedia available only in so far as this Law or another legislative provision expressly relating to telemedia so permits or the user has consented to it.'

14. Paragraph 13(1) of the TMG provides as follows:

'At the beginning of the session the service provider shall inform the user, in a generally understandable manner, about the nature, extent and purpose of the collection and use of personal data and about the processing of his data in States outside the scope of application of [Directive 95/46/], unless the user has already been informed thereof. In the case of an automated procedure which allows subsequent identification of the user and which prepares the collection or use of personal data, the user shall be informed at the beginning of this procedure. The content of this information must be accessible to the user at any time.'

15. Pursuant to Paragraph 15(1) of the TMG:

'A service provider may collect and use the personal data of a user only to the extent necessary in order to facilitate, and charge for, the use of telemedia (data concerning use). Data concerning use include, in particular:

1. features allowing identification of the user,

2. information about the beginning, end and extent of the particular use, and

3. information about the telemedia used by the user.'

III. Facts, proceedings, and questions referred

16. Fashion ID ('the Defendant')' is an online retailer. It sells fashion items on its website. The Defendant embedded the 'Like' plug-in supplied by Facebook Ireland Limited ('Facebook Ireland')(4) in its website. As a result the so-called Facebook 'Like' button appears on the Defendant's website.

17. The order for reference further explains how the (non-visible) part of the plug-in functions: when a visitor lands on the Defendant's website on which the Facebook 'Like' button is placed, his browser automatically sends information concerning his IP address and browser string to Facebook Ireland. The transmission of this information occurs without it being necessary to actually click on the Facebook 'Like' button. It also seems to follow from the order for reference that when the Defendant's website is visited, Facebook Ireland places different kinds of cookies (session, datr and fr cookies) on the user's device.

18. Verbraucherzentrale NRW ('the Applicant'), a consumer protection association, brought judicial proceedings against the Defendant before a Landgericht (District Court, Germany). The Applicant sought an order to force the Defendant to cease integrating

the social plug-in ‘Like’ from Facebook on the grounds that the Defendant allegedly did not:

– ‘expressly and clearly explain the purpose of the collection and use of the data transmitted in that way to users of the internet page before the provider of the plug-in begins to access the user’s IP address and browser string, and/or

– obtain the consent of users of the internet page to access to their IP address and browser string by the plug-in provider and to the data usage, in each case prior to the access occurring, and/or

– inform users who have given their consent within the meaning of second head of claim that this can be revoked at any time with effect for the future, and/or

– inform that “If you are a user of a social network and do not wish that social network to collect data about you via our website and link these to your user data saved on the social network, you must log out of the social network before visiting our website”.’

19. The Applicant claimed that Facebook Inc. or Facebook Ireland saves the IP address and browser string and links them to a specific user (member or non-member). The Defendant’s argument in response is a lack of knowledge in this respect. Facebook Ireland argues that the IP address is converted to a generic IP address and is saved only in this form and that there is no allocation of the IP address and browser string to user accounts.

20. The Landgericht (District Court) ruled against the Defendant on the first three pleas. The Defendant appealed. A cross-appeal was lodged by the Applicant in respect of the fourth plea.

21. It is within that factual and legal context that the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) decided to refer the following questions to the Court:

‘(1) Do the rules in Articles 22, 23 and 24 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) preclude national legislation which, in addition to the powers of intervention conferred on the data-protection authorities and the remedies available to the data subject, grants public-service associations the power to take action against the infringer in the event of an infringement in order to safeguard the interests of consumers?

If Question 1 is answered in the negative:

(2) In a case such as the present one, in which someone has embedded a programming code in his website which causes the user’s browser to request content from a third party and, to this end, transmits personal data to the third party, is the person embedding the content the “controller” within the meaning of Article 2(d) of [Directive 95/46] if that person is himself unable to influence this data-processing operation?

(3) If Question 2 is answered in the negative: Is Article 2(d) of [Directive 95/46] to be interpreted as meaning that it definitively regulates liability and responsibility in such a way that it precludes civil claims against a third party who, although not a “controller”, nonetheless creates the cause for the processing operation, without influencing it?

(4) Whose “legitimate interests”, in a situation such as the present one, are the decisive ones in the balancing of interests to be undertaken pursuant to Article 7(f) of [Directive 95/46]? Is it the interests in embedding third-party content or the interests of the third party?

(5) To whom must the consent to be declared under Articles 7(a) and 2(h) of [Directive 95/46] be made in a situation such as that in the present case?

(6) Does the duty to inform under Article 10 of [Directive 95/46] also apply in a situation such as that in the present case to the operator of the website who has embedded the content of a third party and thus creates the cause for the processing of personal data by the third party?’

22. Written submissions have been lodged by the Applicant, the Defendant, Facebook Ireland, the Landesbeauftragte für Datenschutz und Informationsfreiheit Nordrhein-Westfalen (State Commissioner for Data Protection and Freedom of Information

North Rhine-Westphalia, Germany) ('LDI NW'), Belgium, German, Italian, Austrian, and Polish Governments as well as the Commission. Oral submissions were made by the Applicant, the Defendant, Facebook Ireland, the LDI NW, Belgium, Germany, Austria, and the Commission at the hearing held on 6 September 2018.

IV. Assessment

23. In this Opinion, I propose that Directive 95/46 does not preclude national legislation granting an association tasked with the protection of consumers, such as the Applicant, standing to bring an action against an alleged infringer of data protection laws (A). I also consider that the Defendant is a joint controller, along with Facebook Ireland, its liability being limited however to a specific stage of the data processing (B). Third, I am of the view that the balancing exercise provided for in Article 7(f) of Directive 95/46 requires the legitimate interests of not only the Defendant but also of Facebook Ireland to be taken into account (as well as, of course, the rights of data subjects) (C). Fourth, the data subject's informed consent for a given data processing stage must be declared to the Defendant. The Defendant also has the obligation to provide information to the data subject (D).

A. National legislation granting standing to associations tasked with protection of interests of consumers

24. By the first question posed, the referring court asks in essence whether Directive 95/46 precludes a national rule allowing associations for the protection of consumers' interests to commence legal proceedings against a person allegedly breaching data protection laws. In this respect, the referring court cites Articles 22 to 24 of Directive 95/46 specifically. It notes that the national legislation at issue could be considered as a 'suitable measure' under Article 24. In addition it emphasises that Regulation (EU) 2016/679 ('the GDPR'), (5) which has replaced Directive 95/46, now explicitly confers such a right on associations in its Article 80(2). (6)

25. The Defendant and Facebook Ireland argue that Directive 95/46 does not allow for standing of such associations, because no such standing is expressly provided for, as Directive 95/46 aims, in their view, at full harmonisation. According to the Defendant, allowing standing in this way would threaten the independence of supervisory authorities due to the public pressure to which those authorities would be exposed.

26. The Applicant, the LDI NW, and all the governments that have taken a position in the present case share the view that Directive 95/46 does not preclude the legislation at issue.

27. I agree with the latter view.(7)

28. I consider it important to recall, at the outset, the (default) constitutional rule embedded in the third paragraph of Article 288 TFEU according to which a 'directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods' which best ensure the result to be achieved by the directive. (8)

29. It follows that in order to implement obligations under a directive, the Member States are free to adopt any measures they deem fit, as long as those measures are not expressly excluded by the directive itself, or do not conflict with that directive's aims.

30. The *text* of Directive 95/46 does not expressly exclude the possibility under national law to grant standing to associations tasked with the protection of consumers' rights.

31. Looking at the *objectives* pursued by Directive 95/46, these include 'ensuring effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data'. (9) Moreover, pursuant to the 10th recital of Directive 95/46 'the approximation of the national laws applicable in this area must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community'. (10)

32. It can be understood from the order for reference that Germany has granted standing for associations such as the Applicant to challenge what those associations consider to be an unlawful commercial practice or a practice infringing consumer protection laws, the latter including data protection legislation.

33. In this context, I fail to see how granting such standing would in any way contradict the aims of Directive 95/46 or weaken the effort to achieve those objectives. If anything, allowing standing to this kind of association seems rather to enhance such achievement of the aims and implementation of the directive in actually contributing to strengthening the rights of data subjects through the means of collective redress. (11)

34. I consider that the Member States are thus not precluded from providing for a rule for the standing of associations, such as the one allowing the Applicant to bring the action at issue in the main proceedings, if the Member States wish to do so.

35. In view of this answer, I consider the discussion that unfolded in the course of these proceedings, focusing on whether the national legislation in question should fall specifically under Article 24 of Directive 95/46 as a type of 'suitable measure', or whether it could fall under Article 22, a bit of a red herring. If the Member States are supposed to implement a directive by any means they see fit, and that particular way of implementation is not precluded either by the text or by the aim and purpose of the directive, the specific article of the directive under which a particular national measure can be categorised is of secondary importance. (12) Nevertheless, for what it is worth, 'suitable measures to ensure the full implementation of the provisions of this Directive' under Article 24 could certainly be construed as including national provisions such as those at issue in the present case.

36. I do not think that this general conclusion is in any way undermined by the following considerations, which were discussed in the course of these proceedings.

37. First, it is true that Directive 95/46 does not appear on the list provided for in Annex I to Directive 2009/22. The latter lays down rules on injunctions that can be brought by so called 'qualified entities' to enhance the protection of the collective interests of consumers. (13) The list in Annex I contains several directives and Directive 95/46 is not amongst them.

38. Nevertheless, and as the German Government submits, the list in Annex I to Directive 2002/29 cannot be viewed as exhaustive in the sense that it would preclude national legislation providing for injunctive actions concerning the respect of rules contained in directives other than those listed in Annex I to Directive 2002/29. A fortiori, it would be rather surprising if such an illustrative list contained in a piece of secondary legislation were to be suddenly construed as depriving Member States of their choice in how to implement a directive, provided for by the Treaty.

39. Second, I turn to the argument submitted by the Defendant and Facebook Ireland concerning the full harmonisation effected by Directive 95/46, which would, in their view, exclude any explicitly unforeseen action.

40. It is true that the Court has consistently stated that the harmonisation flowing from Directive 95/46 is not limited to minimal harmonisation but amounts to harmonisation which is 'generally complete'. (14) At the same time, it has also been acknowledged that the same directive 'allows the Member States a margin for manoeuvre in certain areas', provided that Directive 95/46 is complied with. (15)

41. As I suggested elsewhere, (16) the question whether there is a 'full harmonisation' at EU law level (in the sense of legislative preemption, precluding any legislative action on the part of the Member States) cannot be addressed in general, with regard to an entire field of law or a subject matter of a directive. Instead, that assessment is to be carried out with regard to each specific provision (a certain rule or a specific aspect) of the directive in question.

42. Looking at the specific 'procedural' provisions of Directive 95/46 which are at issue in the present case, namely Articles 22 to 24, these are worded in very general terms. (17) Taking into account the level of generality and abstraction of those provisions, it would indeed be quite striking to suggest that those provisions generate the effect of legislative preemption, excluding any measures which can be taken by the Member States but which are not specifically mentioned in those articles. (18)

43. Third, another argument raised by the Defendant concerned the threat to the independence of supervisory authorities. (19) It essentially suggested that if the standing of consumer associations were allowed, those associations would bring actions in parallel with, and/or instead of, the supervisory authority, which would lead to public pressure and bias on the part of the supervisory authority, and eventually contravene the requirement of the complete independence of supervisory authorities set out in Article 28(1) of the directive.

44. This argument has no weight. Provided that such a supervisory authority were in fact truly independent in the first place, (20)

I fail to see, like the German Government, how an action such as the one in the main proceedings could threaten its independence. An association cannot enforce the law in the sense of making its view binding on the supervisory authorities. That is the exclusive province of the courts. A consumer association can only, in this way like any individual consumer, bring an action. Therefore, the claim that any and every (private) action brought by an individual or by a consumer association would put pressure on the bodies tasked with (public) enforcement and thus cannot be allowed to co-exist in parallel with the system of public enforcement is of such a peculiar nature that there is little need to address this argument any further. (21)

45. Fourth and finally, I turn to the argument according to which Article 80(2) of the GDPR has to be understood as modifying (and reversing) the previous situation by allowing for something (standing of associations) that was not permitted before.

46. That argument is unconvincing.

47. It is important to recall that with the GDPR replacing Directive 95/46, the nature of the legal instrument in which the rules are found changed from that of a directive to that of a regulation. That change also meant that in contrast to a directive, where Member States remain free to choose how to implement the content of that legislative instrument, national rules implementing a regulation may, in principle, only be adopted when expressly authorised.

48. Viewed from this perspective, the argument that the explicit provision on standing of associations, now included in the GDPR, means that that standing was excluded under Directive 95/46, is questionable. If an argument could be drawn from such a juxtaposition, (22) then it would rather be to the contrary: if providing rules to allow such standing was not precluded by the latter directive (based on the arguments I presented above), the change of legal form from directive to regulation would justify including such a provision in order to make it clear that such a possibility indeed remains.

49. Therefore, in the light of the above, my first interim conclusion is that Directive 95/46 does not preclude national legislation which grants public-service associations standing to commence legal proceedings against the alleged infringer of data protection legislation in order to safeguard the interests of consumers.

B. Is Fashion ID a data controller?

50. By its second question, the referring court is asking whether the Defendant, because it embedded a plug-in in its website which causes the user's browser to request content from a third party and transmits personal data to that third party, is to be considered a 'controller' within the meaning of Article 2(d) of Directive 95/46, even if the Defendant is unable to influence the data-processing operation.

51. By the lack of *ability to influence the data processing operation*, stated by the referring court in its question, I understand that in the context of the present case, this does not relate to the *causing* of the process of transmission of that data (and on the factual level, the Defendant clearly has an influence because it has embedded the plug-in concerned). It seems rather to relate to the possible *subsequent processing* of the data by Facebook Ireland.

52. As the referring court notes, the response to its second question has implications that go well beyond the present case and the social network operated by Facebook Ireland. A number of websites embed third-party content of varying nature. If a person such as the Defendant were to be classified as a 'controller', (co-)responsible for any (subsequent) processing that takes place in respect of the data collected because that website operator embedded third-party content enabling the transfer of such data, then such a statement would indeed have wider implications for the way third-party content is handled.

53. Within the structure of the present case, the second question is also the key question which goes to the heart of the issue: in cases of embedded third-party content on a website, *who* bears the responsibility and *for what* exactly? It is also the (im)precision in answering this question that has an impact on the answers to the following questions on legitimate interests, consent, and duty to inform.

54. In this section, I will first make a few introductory remarks on the notion of personal data relevant for the present case (1). I will then present recent case-law of the Court, suggesting how the second question could be answered, if the Court's previous decisions are to be embraced with no further questions asked (2). I will then explain why more questions should perhaps be asked and, in the context of the present case, the analysis somewhat refined (3). I will conclude by stressing, for the purposes of the

definition of the notion of (joint) control, the importance of the unity of 'purposes and means' that ought to exist amongst the (joint) controllers with regard to the respective stage of processing of personal data (data processing operation) in question (4).

1. Personal data in the present case

55. It ought to be recalled that the notion of 'personal data' is defined in Article 2(a) of Directive 95/46 as being 'any information relating to an identified or identifiable natural person ("data subject")'. Recital 26 of the same directive explains in this respect that 'to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person'.

56. The Court has already clarified that an IP address can, under certain circumstances, constitute personal data. (23) The Court further stated that for these purposes, for there to be an 'identifiable person' within the meaning of Article 2(a) of Directive 95/46, 'it is not necessary that that information alone allows the data subject to be identified', and that recourse to additional data may thus be necessary. It also stated that 'it is not required that all the information enabling the identification of the data subject must be in the hands of one person' as far as the possibility to combine the respective data 'constitutes a means likely reasonably to be used to identify the data subject'. (24)

57. The referring court does not discuss whether the IP address, alone or in combination with the browser string which is also transmitted, constitute personal data in the sense of that criteria. Facebook Ireland appears to be disputing that qualification. (25)

58. It is clear that such an assessment is for the national court to carry out. In general, with regard to any plug-ins that may be embedded or any other third-party content, for information to be classed as personal it is indispensable that that data allows the data subject to be identified (be it directly or indirectly). For the purposes of the present case, I shall take as given that, as it appears to follow from the questions asked by the referring court, in the circumstances of the main proceedings, the IP address and the browser string do indeed *constitute* personal data and fulfil the criteria of Article 2(a) of Directive 95/46 as clarified by the Court.

2. Wirtschaftsakademie Schleswig-Holstein locuta, causa finita?

59. As far as the answer to the second question is concerned, the Defendant and Facebook Ireland submit that the Defendant cannot be considered as being a controller because it has no influence over the personal data that will be processed. Thus, only Facebook Ireland can be classified as such. As a subsidiary argument, Facebook Ireland puts forward that the Defendant acts together with it, as joint controller, the responsibility of a person such as the Defendant however being limited to its actual zone of influence.

60. The Applicant**,** the LDI NW, and all the governments that have intervened in the present case as well as the Commission share, in essence, the position that the notion of 'controller' has a broad meaning and includes the Defendant. However, their views as to the exact scope of the Defendant's responsibility vary considerably in those submissions. The differences concern the question whether (or not) the Defendant and Facebook Ireland should be held jointly responsible, whether or not their joint responsibility should be limited to the stage of the processing of personal data in which the Defendant is actually involved, and whether a distinction shall be made in this context between the visitors to the Defendant's website that have a Facebook account and those who do not.

61. As a starting point, it is clear that under Article 2(d) of Directive 95/46, the notion of 'controller' covers a person that '*alone or jointly* with others determines the *purposes and means* of the processing of personal data'. (26) The notion of controller can thus refer to several actors taking part in the personal data processing (27) and should be interpreted broadly. (28)

62. The issue of joint control has recently been addressed by the Court in the judgment in *Wirtschaftsakademie Schleswig-Holstein.* (29)With regard to the role of the administrator of a Facebook fan page, the Court concluded that that administrator acted as a controller, jointly with Facebook Ireland, within the meaning of Article 2(d) of Directive 95/46. This was because the administrator contributed to determining, jointly with Facebook Ireland, the purposes and means of processing the personal data of visitors to the fan page. (30)

63. More specifically, the Court noted that by creating the fan page at issue, the administrator gave Facebook Ireland 'the opportunity to place cookies on the computer or other device of a person visiting its fan page', and thus process personal data. (31) The Court pointed out that 'the creation of a fan page on Facebook Ireland involves the definition of parameters by the administrator,

depending inter alia on the target audience and the objectives of managing and promoting its activities, which has an influence on the processing of personal data for the purpose of producing statistics based on visits to the fan page'. (32) The processing at issue enabled Facebook Ireland 'to improve its system of advertising' while it provided the administrator with the means to manage better, via anonymised statistics, the promotion of its own activity. (33)

64. The Court concluded that by 'its definition of parameters', the administrator at issue took part in the determination of the purposes and means of processing the personal data of the visitors to its fan page. Therefore, it had to be considered as a controller responsible for that processing jointly with Facebook Ireland (with 'even greater' responsibility with regard to the personal data of Facebook Ireland non-users). (34)

65. In *Jehovan todistajat*,the Court underlined another important clarification with regard to the notion of joint controller: for there to be joint control and joint responsibility, it is not required that each of the controllers must have access to (all of) the personal data concerned. Thus, a religious community could also be a joint controller in cases in which the community itself apparently had no access to the collected data in question. In that case it was the individual members of the community of Jehovah's Witnesses who were in physical possession of the personal data. It was enough that the preaching activity, in the course of which personal data was apparently being collected, was organised, coordinated and encouraged by that community. (35)

66. If considered at a higher level of abstraction, and if focusing only on the notion of joint control, I am bound to agree that in view of such recent judicial pronouncements, it is to be concluded that the Defendant acts as a controller, and is jointly responsible together with Facebook Ireland for data processing. (36)

67. First, it appears that the Defendant made it possible for Facebook Ireland to obtain the personal data of the users of the Defendant's website by using the plug-in at issue.

68. Second, it is true that, as opposed to the administrator concerned in *Wirtschaftsakademie Schleswig-Holstein,* the Defendant does not appear to be determining the parameters of any information about its website's users which would be returned to it in an anonymised or other form. The sought-after 'benefit' appears to be free advertisement of its products that allegedly occurs when the user of its website decides to click on the Facebook 'Like' button to share, via its Facebook account, her thoughts concerning, let's say, a black cocktail dress. Thus, and subject to factual verification by the referring court, the use of the plug-in allows the Defendant to optimise the advertisement of its products by being able to make them visible on Facebook.

69. Alternatively, viewed in a different light, the Defendant could be said to be (co-)determining the parameters of the data collected by the simple act of embedding the plug-in at issue in its website. It is the plug-in itself that provides parameters of the personal data to be collected. Thus, by voluntarily integrating that tool into its website, the Defendant has set those parameters with regard to any visitors to its website.

70. Third and in any case, in the light of *Jehovan todistajat*, a joint controller can be still classified as such without even having access to any 'fruits of joint labour'. Thus, the fact that the Defendant does not have access to the data passed on to Facebook or that it apparently does not receive any tailored or aggregated statistics in return, does not appear to be decisive.

3. The problems: who then is not a joint controller?

71. Will effective protection be enhanced if everyone is made responsible for ensuring it?

72. That, in a nutshell, is the deeper moral and practical dilemma demonstrated by the present case and expressed in legal terms by the scope of the definition of (joint) controller. In the understandable desire to secure the effective protection of personal data, the recent case-law of the Court has been very inclusive when being asked to define, in one way or another, the notion of (joint) controller. So far, however, the Court has not been faced with the practical implications of such a sweeping definitional approach with regard to the subsequent steps of exact duties and specific liability of parties who are classified as joint controllers. Since this case offers precisely such an opportunity, I would suggest seizing it in order to enhance the preciseness in the definitions that ought to be exist for the notion of (joint) controller.

(a) On obligation and responsibility

73. When looking at the applicable test to identify a 'joint controller' with a critical eye, it seems that the crucial criterion after *Wirtschaftsakademie Schleswig-Holstein*and *Jehovan todistajat* is that the person in question 'made it possible' for personal data to be collected and transferred, potentially coupled with some input that such a joint controller has as to the parameters (or at least where there is silent endorsement of them). (37) If that is indeed the case, then in spite of a clearly stated intention to that effect to exclude it in *Wirtschaftsakademie Schleswig-Holstein*, (38)it is difficult to see how normal users of an online (based) application, be it a social network or any other collaborative platform, but also other programmes, (39) would not also become joint controllers. A user will typically set up his account, providing parameters to the administrator as to how his account is to be structured, what information he wishes to receive, on what subjects and from whom. He will also invite his friends, colleagues and others to share information in the form of (often quite sensitive) personal data, via the application, thus not only providing data concerning those persons, but also inviting those persons to become involved themselves, in this way clearly contributing to the obtaining and processing of personal data of those persons.

74. Furthermore, what about the other parties in a 'personal data chain'? When pushed to an extreme, if the only relevant criterion for joint control is to have made the data processing possible, thus in effect contributing to that processing at any stage, would the internet service provider, which makes the data processing possible because it provides access to the internet, or even the electricity provider, then not also be joint controllers potentially jointly liable for the processing of personal data?

75. The intuitive answer is of course 'no'. The problem is that the delineation of responsibility so far does not follow from the broad definition of a controller. The danger of that definition being too broad is that it results in a number of persons being co-responsible for the processing of personal data.

76. However, in contrast to the cases outlined in the previous section, the questions posed by the referring court in the present case do not stop at how to define 'controller'. They pick up on and continue exploration of related issues in terms of the allocation of actual obligations imposed by Directive 95/46. Those issues themselves demonstrate the problems of an over-inclusive definition of a controller, especially when coupled with the lack of a precise rule as to what exactly the specific duties and responsibilities of controllers are under Directive 95/46. The interested parties' submissions in response to questions 5 and 6, which are concerned with the exact allocation of responsibilities under the directive, illustrate this well.

77. Question 5 essentially enquires as to *who* is supposed to obtain the data subject's consent and *for what purpose*. The suggested answers to that question vary considerably.

78. The Applicant and the LDI NW consider that the obligation to obtain the data subject's informed consent is on the Defendant, which decided to integrate the plug-in at issue. That is, in the Applicant's view, all the more important for non-Facebook users who have not accepted the general terms and conditions of Facebook. The Defendant's position is that the consent must be given to the third party providing the embedded content, namely Facebook Ireland. Facebook Irelandconsiders that the consent does not have to be given to a particular addressee, as Directive 95/46 specifies only that the consent has to be free, specific and informed.

79. Austria, Germany and Poland put forward that the consent must be given before the processing of the data occurs and, according to Austria it must relate both to the collection and possible transmission of data. Poland stresses that consent must be given to the Defendant. Germany considersthat it must be given to the Defendant or to the third party providing the embedded content (Facebook Ireland) because both are co-responsible for the processing. The Defendant only has to receive the consent for transmission of the data to the third party because for all other processing and use of the collected data, it no longer acts as the controller. That does not, however, exclude the possibility for the website operator to receive consent concerning the processing by the third party, which can be governed by an agreement between both of them. Italy submits that the consent must be given to all those who take part in the processing of the personal data, namely the Defendant and Facebook Ireland. Belgium and the Commission stress that Directive 95/46 does not specify to whom the consent must be given.

80. A similar diversity of views exists with regard to the issue of *who* bears the obligation to inform under Article 10 of Directive 95/46 and with regard to *what* exactly, addressed by the sixth question posed by the referring court.

81. According to the Applicant, it is the website operator who has the obligation to communicate the necessary information to the data subject. The Defendant has made the opposite argument, stressing that it is for Facebook Ireland to provide information as the Defendant does not have accurate knowledge. Similarly, Facebook Ireland stresses that it has the information obligation, as that obligation is addressed only to the controller (or its representative). It notes that the reply to question 6 is closely linked to whether the website operator is a controller. Article 10 shows that it is inappropriate to classify the website operator as a controller because

the latter is not in a position to provide that information. The LDI NW considers that the information must be given by the website operator, but acknowledges the difficulty in determining what information should be given, as the Defendant has no influence over the processing of data by Facebook Ireland. The interweaving of the data processing objectives suggests that the website operator should be co-responsible for the processing that it has made possible.

82. Belgium, Italy and Poland state that the obligation to inform also applies to the website operator such as the one at issue, given that it qualifies as a controller. Belgium adds that the website operator may also have an obligation to verify the purpose of the subsequent data processing and take appropriate measures to guarantee the protection of natural persons. The German Government argues that the information obligation applies to the website operator to the extent that it is responsible for the processing, namely for the transmission of data to the external supplier of the embedded content, but not for all subsequent data processing stages, which are the responsibility of that external supplier. In the view of Austria and of the Commission both the website operator and external supplier are subject to the obligation to provide information under Article 10 of Directive 95/46.

83. Beyond the issues raised by questions 5 and 6, it might be added that similar conceptual difficulties are likely to arise also when considering other obligations defined by Directive 95/46 such as the right of access under Article 12 thereof. It is true that the Court stated in *Wirtschaftsakademie Schleswig-Holstein*that 'Directive 95/46 does not, where several operators are jointly responsible for the same processing, require each of them to have access to the personal data concerned'. (40) However, a controller that does not itself have access to data for which it is nevertheless categorised as a (joint) controller cannot, quite logically, provide that access to any data subject (not to mention any further operations, such as rectification or erasure).

84. Thus, at this stage, the conceptual lack of clarity upstream (who is the controller and with regard to what exactly) that may lead in some instances to the lack of clarity downstream (who is subject to what obligation), crosses into the realm of actual impossibility for a potential joint controller to comply with valid legislation.

85. It could certainly be suggested that for the exact allocation of responsibility amongst the (potentially rather numerous joint) controllers, contracts should be concluded. This would not only provide for the allocation of responsibility, but also identify the party that is supposed to comply with each of the obligations provided for by the directive, including those that can be physically exercised by only one party.

86. I find such a proposition deeply problematic. First, it is completely unrealistic, taking into account the dense web of formal, standard contracts that would have to be signed by any kind of party, including, most likely, a number of normal users. (41) Second, the application of valid legislation, and the allocation of responsibility it provides for would be made conditional upon private agreements, to which third parties seeking to enforce their rights might not have access.

87. Third, perhaps partially pre-empting some of these issues, the GDPR appears to be introducing a new regime of joint liability in its Article 26. It is certainly true that the GDPR was not applicable *ratione temporis* to the cases discussed in this section, or in the present case. However, unless there is a specific or systematic derogation in the new legislation with regard to the relevant definitions, which appears not to be the case as Article 4 of the GDPR largely retains the same key terms as Article 2 of Directive 95/46 (while adding a number of new ones), it would be rather surprising if the interpretation of such key notions, including the notion of controller, processing, or personal data, were to significantly depart (without a very good reason) from the extant case-law.

88. If that was indeed the case, then what seems to be a regime of joint liability for joint controllers introduced in Article 26(3) of the GDPR could turn into quite a challenge. On the one hand, Article 26(1) of the GDPR makes it possible for joint controllers to 'determine their respective responsibilities for compliance with the obligations'. On the other hand, however, Article 26(3) of the GDPR makes it clear that the 'data subject may exercise his or her rights' 'in respect of and against each of the controllers' irrespective of any such arrangement. Any of the joint controllers can thus be held liable for the data processing in question.

(b) The bigger picture

89. A long time ago (the fans of a certain sci-fi franchise might wish to add 'in a galaxy far, far away'), it was cool to be on a social network. Then gradually, it started to be cool not to be on a social network. Nowadays, it appears to be a crime to be on one (and for which novel forms of vicarious liability have to be put in place).

90. There is no denying that judicial decision-making occurs in an evolving social context. It should certainly react to that context,

but not be controlled by it. A social network, like any other application or programme, is a tool. Similar to a knife or a car, it can be used in a number of ways. There is also no doubt that if used for the wrong purposes, that use must be prosecuted. But it might perhaps not be the best idea to punish anyone and everyone who has ever used a knife. One normally prosecutes the person(s) controlling the knife when it caused harm.

91. Thus, there ought to be, perhaps not always an exact match, but at least a reasonable correlation between power, control, and responsibility. Modern law naturally includes various forms of objective liability, which will be triggered merely by certain results occurring. But those tend to be justified exceptions. If, without any reasoned explanation, responsibility is attributed to someone who had no control over the result, such allocation of liability will typically be seen as unreasonable or unjust. (42)

92. Moreover, in answering the question posed at the beginning of this section (point 71), a sceptical person from the more eastern parts of the European Union might perhaps suggest, considering his historical experience, that effective protection of something tends to dramatically decrease if everyone is made responsible for it. Making everyone responsible means that no-one will in fact be responsible. Or rather, the one party that should have been held responsible for a certain course of action, the one actually exercising control, is likely to hide behind all those others nominally 'co-responsible', with effective protection likely to be significantly diluted.

93. Finally, no good (interpretation of the) law should reach a result in which the obligations provided therein cannot actually be carried out by its addressees. Thus, unless the robust definition of (joint) control is not supposed to turn into a judicially sponsored command to disconnect which is applicable to all actors, and to refrain from using any social networks, plug-ins, and potentially other third-party content for that matter, then in defining the obligations and responsibilities, reality must play a role, again including issues of knowledge and genuine bargaining power and the ability to influence any of the imputed activities. (43)

4. Back to the (legislative) roots: unity of purposes and means with regard to a certain processing operation

94. Although rather robust in its approach to the definition of joint control in *Wirtschaftsakademie Schleswig-Holstein*, the Court also hinted at the need to limit the liability of a (joint) controller. More specifically, the Court noted 'that the existence of joint responsibility does not necessarily imply equal responsibility of the various operators involved in the processing of personal data. … those operators may be involved at different stages of that processing of personal data and to different degrees, so that the level of responsibility of each of them must be assessed with regard to all the relevant circumstances of the particular case'. (44)

95. While there was no need to address that specific issue in *Wirtschaftsakademie Schleswig-Holstein*, there is in the present case, in which the referring court directly invites the Court to ascertain the possible obligations on the Defendant which follow from its status as a controller.

96. In view of the newly introduced system of joint liability in Article 26 of the GDPR, it might be difficult to envisage how *joint responsibility* could imply, with regard to the same result in terms of potentially (il)licit treatment of personal data, *non-equal responsibility*. This is in particular in view of Article 26(3) of the GDPR, which appears to steer in the direction of joint (and several) liability. (45)

97. I think however that the key statement of the Court is the second one, namely that 'operators may be involved at different stages of that processing of personal data and to different degrees'. Such a suggestion finds support in the definitions contained in Directive 95/46, in particular with regard to the definition of (i) the notion of processing in Article 2(b), and (ii) the notion of controller in Article 2(d).

98. First, the notion of personal data processing contains 'any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction'.

99. Even if the notion of processing is, similar to the notion of controller, rather broad, (46) it clearly underlines and aims at a *stage* in the processing: it refers to an *operation* or a *set of operations*, with an illustrative list of what such individual operations might be. But then logically, the issue of control should rather be assessed with regard to the discrete operation in question, not with regard to an undetermined bundle of everything and anything called processing. (47)

100. Second, the notion of joint control is not specifically defined by Directive 95/46. But logically, that notion builds on the notion of controller in Article 2(d): the situation of joint control appears when two or more persons determine the *means and the purposes of processing* of personal data together. (48) In other words, for two (or more) persons to qualify as joint controllers, there must be *identity of the purposes and means* of the personal data processing between them.

101. It is the combination of these two definitions that ought, from my point of view, to determine the obligations and potential liability of joint controllers. A (joint) controller is responsible for that operation or set of operations for which it shares or co-determines the *purposes and means* as far as a given processing *operation* is concerned. By contrast, that person cannot be held liable for either the preceding stages or subsequent stages of the overall chain of processing, for which it was not in a position to determine either the purposes or means of that stage of processing.

102. In the present case, the relevant stage (operations) of the processing corresponds to the *collection* and *transmission* of personal data that occurs by means of the Facebook 'Like' button.

103. First, as far as the *means* of those data processing operations are concerned, as suggested by the Applicant, the LDI NW and the German Government, it seems to be established that the Defendant decides on the use of the plug-in at issue, which serves as a vehicle for the collection and transmission of the personal data. That collection and transmission is triggered by visiting the Defendant's website. That plug-in was provided to the Defendant by Facebook Ireland. Both Facebook Ireland and the Defendant thus appear to have voluntarily caused the collection and transmission stage of the data processing. That of course remains, at the factual level, for the national court to verify.

104. Second, looking at the *purpose* of the data processing, the order for reference does not state the reasons for which the Defendant decided to embed the Facebook 'Like' button in its website. However, and subject to the referring court's verification, that decision appears to be inspired by the wish to increase visibility of the Defendant's products via the social network. At the same time, it would also appear that the data transferred to Facebook Ireland are used for the latter's own commercial purposes.

105. Despite the fact that the specific commercial use of the data may not be the same, in general both the Defendant and Facebook Ireland seem to pursue commercial purposes in a way that appears to be mutually complementary. In this way, although not identical, there is unity of purpose: there is a commercial and advertising purpose.

106. On the facts in the present case, it thus appears that the Defendant and Facebook Ireland co-decide on the means and purposes of the data processing at the stage of the collection and transmission of the personal data at issue. To that extent, the Defendant acts as a controller and its liability is, to that extent as well, joint with that of Facebook Ireland.

107. At the same time, I consider that the liability of the Defendant has to be limited to the stage of the data processing, in which it is engaged and that it cannot spill over into any potential subsequent stages of data processing, if such processing occurs outside the control and, it would appear, also without the knowledge of the Defendant.

108. In the light of the above, my second interim conclusion is therefore that a person, such as the Defendant, that has embedded a third-party plug-in in its website, which causes the collection and transmission of the user's personal data (that third party having provided the plug-in), shall be considered to be a controller within the meaning of Article 2(d) of Directive 95/46. However, that controller's (joint) responsibility is limited to those operations for which it effectively co-decides on the means and purposes of the processing of the personal data.

109. It ought to be added that that conclusion also answers to the third question posed. By that question the referring court wishes to ascertain, in essence, whether Directive 95/46 precludes the application of the national-law concept of *Störer* (disrupter) on the Defendant should it be established that the Defendant *cannot be considered* as controller. Pursuant to the order for reference, the concept of *Störer* requires the person who does not infringe a right but who has created or increased the risk of such an infringement by a third party to do everything that is reasonable and within its power to prevent that infringement. If the Defendant cannot be considered to be a controller, the referring court suggests that the prerequisites for the application of the concept of *Störer* have been met because, by embedding the plug-in for the Facebook 'Like' button, the Defendant has, at the very least, created the risk of an infringement by Facebook.

110. In view of the answer provided to the referring court's second question, there is no need to address the third one. Once it is

established that a given person is to be categorised as a controller within the scope of Directive 95/46, its obligations as controller have to be assessed in the light of the obligations defined by that directive. The opposite conclusion would lead to a differentiated liability of controllers for a particular infringement across the different Member States. In this sense, and with regard to the definition of controller, Directive 95/46 indeed effects full harmonisation with regard to the addressees of the defined obligations. (49)

C. Legitimate interests to be taken into account under Article 7(f) of Directive 95/46

111. The fourth question asked in the present case concerns the legitimacy of the processing of personal data in the absence of data subject's consent within meaning of Article 7(a) of Directive 95/46.

112. In this respect, the referring court points to Article 7(f) of Directive 95/46 under which the personal data may be processed if this is 'necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject …'. More specifically the referring court wishes to ascertain *whose* legitimate interests should be taken into account in the context of the present case: those of the Defendant that has embedded the third-party content, or those of that third party (namely Facebook Ireland). (50)

113. As a preliminary point it ought to be noted that the Commission considers that the fourth question is irrelevant because *in casu* the user's consent must be provided anyway, by application of the legislation implementing Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector ('E-Privacy Directive'). (51)

114. I agree with the Commission that the E-Privacy Directive (which pursuant to Article 1(2) thereof clarifies and supplements Directive 95/46 in the electronic communications sector) (52) seems to apply to the situation at hand, to the extent that placement of cookies on the users' devices takes place. (53) Furthermore Article 2(f) and recital 17 of the E-Privacy Directive define the consent by reference to the notion of consent in Directive 95/46.

115. Whether the placement of cookies occurred in the case in the main proceedings was the subject of ample debate at the hearing. That factual clarification is for the national court to make. However, and in any case, as described in the order for reference, the referring court considers that the data transmitted constitutes personal data. (54) The issue of cookies does not appear therefore to provide the response to all the issues that apparently arise in the present case in relation to the data processing. (55)

116. I am thus of the view that question 4 requires further consideration.

117. The Applicant puts forward that the legitimate interest to be taken into account is that of the Defendant. It adds that neither the Defendant nor Facebook Ireland can claim a legitimate interest in the present case.

118. The Defendant and Facebook Ireland argue, in essence, that the legitimate interests to be considered are those of the person embedding the third-party content as well as that of the third party, while considering the interests of the website visitors whose fundamental rights may be affected.

119. The LDI NW, Poland, Germany and Italy consider that the legitimate interests of both the Defendant and Facebook Ireland should be taken into account as both of them have made the processing at issue possible. Austria embraces a similar view. Similarly, and by referring to the judgment of the Court in *Google Spain*, Belgium stresses that the legitimate interests to be taken into account are those of the controller as well as of the third parties to whom the personal data concerned have been communicated.

120. It ought to be recalled at the outset that all processing of personal data must in principle comply, among other conditions, with one of the criteria which make data processing legitimate, which are listed in Article 7 of Directive 95/46. (56)

121. Specifically regarding Article 7(f), the Court recalled that that provision 'lays down three cumulative conditions so that the processing of personal data is lawful, namely, first, the pursuit of a legitimate interest by the data controller or by the third party or parties to whom the data are disclosed; second, the need to process personal data for the purposes of the legitimate interests pursued; and third, that the fundamental rights and freedoms of the person concerned by the data protection do not take precedence'. (57)

122. Directive 95/46 does not define or enumerate 'legitimate interests'. That notion appears to be rather elastic and open-ended. (58) There is no type of interest that is excluded per se, as long of course as they are themselves legal. As was in essence discussed at the hearing and as stated above, (59) what seems to be at issue in the present case is the collection and the transmission of personal data for the purpose of advertising optimisation, although the precise ultimate goals of both the Defendant and Facebook Ireland may not be exactly the same.

123. With those considerations in mind, I would agree that marketing or advertising can, as such, constitute such a legitimate interest. (60) It is rather difficult to go beyond that statement in the context of the present case, as there is no specific information as to the exact ways in which the data transmitted and obtained is being used, beyond those general statements.

124. That being said, the referring court does not discuss nor request guidance concerning the assessment to be made of the specific legitimate interests put forward in the main proceedings. In its question 4, the referring court wishes to ascertain merely *whose* legitimate interests should be considered so that the balancing exercise under Article 7(f) of Directive 95/46 can be made.

125. In the light of my suggested reply to question 2 above, I consider that the legitimate *interests of both* the Defendant and Facebook Ireland have to be taken into account because *both of them act as joint controllers* for the respective personal data processing operation.

126. As their status of joint controllers implies that they also share the aims of personal data processing, the existence of a legitimate interest must be established in respect of both of them, at least at the general level as explained above. That interest must then be balanced against the rights of the data subjects as provided for in the last part of Article 7(f) of Directive 95/46, (61) that balancing depending 'in principle on the specific circumstances of the particular case'. (62) I recall that the data processing under such circumstances must also be subjected to the condition of necessity. (63)

127. In the light of the above, my third interim conclusion is that for the purpose of the assessment of the possibility to process personal data under the conditions set out in Article 7(f) of Directive 95/46, the legitimate interests of both joint controllers at issue have to be taken into account and balanced against the rights of the data subjects.

D. The Defendant's obligations concerning the consent to be received from, and information to be provided to, the data subject

128. By question 5, the referring court wishes to know to whom the consent which has to be declared under Article 7(a) and Article 2(h) of Directive 95/46 must be provided in the circumstances of the present case.

129. By question 6 the referring court wishes to know whether the obligation to inform under Article 10 of the Directive 95/46 applies, in the situation at hand, to the operator of a website (such as the Defendant) which has embedded the content of a third party and thus caused the processing of personal data by that third party.

130. As seen above, (64) there are a multitude of proposed answers to these questions. However, once the exact nature of the obligation under question 2 has been determined, both with regard to the bearer (*who*) and nature of the obligation (for *what*), and that issue is thus clarified upstream, then the answers to questions 5 and 6, which concern certain obligations downstream, become clearer.

131. First of all, I consider that both the consent and the information provided must cover all the aspects of the data processing operation(s) for which the joint controllers are jointly liable, namely the collection and the transmission. Conversely, those consent and information obligations do not extend to subsequent stages of the data processing in which the Defendant is not involved and for which it logically does not determine either means or purposes.

132. Second, under those conditions, one could suggest that the consent may be provided to either of the joint controllers. However, considering the particular situation at hand, that consent has to be provided to the Defendant, because it is when its website is actually visited that the processing operation is triggered. It would obviously not be in line with efficient and timely protection of data subjects' rights if the consent were to be given only to the joint controller that is involved later (if at all), once the collection and transmission has already taken place.

133. A similar answer is to be given with regard to the information obligation that the Defendant has under Article 10 of Directive 95/46. That provision defines a minimum list of information that must be communicated to the data subject by the controller (or by its representative). It contains the following elements: the controller's (or its representative's) identity, the purposes of the processing for which the data are intended and any further information where this is 'necessary having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject'. Article 10 provides examples of such further information which include, in what might be relevant in the present case, information about the recipient of the data or about the existence of the right of access and the right to rectify the data concerning the data subject.

134. Considering that list, the Defendant clearly appears to be in a position to provide information about the identity of the joint controllers, about the purpose of the respective stage of the processing (the operation(s) over which it has joint control); and also about the fact that those data will be transferred.

135. By contrast, as far as the right of access and the right to rectify are concerned, I understand that the Defendant itself does not have such access to the data being transferred to Facebook Ireland, since it is in no way involved in the storage of data. Thus, it could for instance be suggested that that matter would have to be the subject of an agreement with Facebook Ireland.

136. But such proposals would, beyond the arguments set out above, (65) again seek to extend the obligations and liability of a (joint) controller(s) to operations for which they are not responsible. If joint control means responsibility for those operation(s) for which there is the unity of purposes and means amongst the controllers, then logically the other ensuing obligations under the directive, such as consent, information, access or rectification ought to correspond to the scope of that original obligation. (66)

137. It was also noted by the Commission at the hearing that those of the visitors who have a Facebook account may have previously consented to such a transfer occurring. That could lead to a differentiated liability of the Defendant, with the Commission apparently suggesting the Defendant's duty to inform and require consent would then apply only to Facebook non-users visiting the website of the Defendant.

138. I do not agree. I find it difficult to accept the idea that there should be differentiated (less protective) treatment in respect of 'Facebook users' in the circumstances of the present case because they would have already accepted the possibility of (any and all of) their personal data being processed by Facebook. Indeed, such an argument implies that upon opening a Facebook account one accepts in advance any data processing with regard to any online activity of such 'Facebook users' by any third party having whatever connection with Facebook. That is so even in a situation in which there is no visible sign of such data processing occurring (as seems to be the case when one simply visits the Defendant's website). In other words, accepting the Commission's suggestion would in effect mean that by opening a Facebook account, a user has actually waived any protection of personal data online vis-à-vis Facebook.

139. I thus consider that the liability and the ensuing consent and information obligations of the Defendant should be the same vis-a-vis the data subjects irrespective of whether or not they have a Facebook account.

140. Furthermore, it is again clear that that consent has to be given and information provided *before* the data are collected and transferred. (67)

141. Thus, in the light of the above, my final interim conclusion in response to questions 5 and 6 is that, in a situation such as that in the present case, the consent of the data subject obtained under Article 7(a) of Directive 95/46 has to be given to a website operator, such as the Defendant, which has embedded the content of a third party. Article 10 of Directive 95/46 shall be interpreted as meaning that the obligation to inform under that provision also applies to that website operator. The consent of the data subject under Article 7(a) of Directive 95/46 has to be given, and information within the meaning of Article 10 of the same directive provided, before the data are collected and transferred. However, the extent of those obligations shall correspond with that operator's joint responsibility for the collection and transmission of the personal data.

V. Conclusion

142. In the light of the above, I suggest that the Court respond to questions posed by Oberlandesgericht Düsseldorf ((Higher Regional Court, Düsseldorf, Germany) as follows:

– Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data does not preclude national legislation which grants public-service associations standing to commence legal proceedings against the alleged infringer of data protection legislation in order to safeguard the interests of consumers.

– A person that has embedded a third-party plug-in in its website, which causes the collection and transmission of the user's personal data (that third party having provided the plug-in), shall be considered to be a controller within the meaning of Article 2(d) of Directive 95/46. However, that controller's (joint) responsibility is limited to those operations for which it effectively co-decides on the means and purposes of the processing of the personal data.

– For the purpose of the assessment of the possibility to process personal data under the conditions set out in Article 7(f) of Directive 95/46, the legitimate interests of both joint controllers at issue have to be taken into account and balanced against the rights of the data subjects.

– The consent of the data subject obtained under Article 7(a) of Directive 95/46 has to be given to a website operator which has embedded the content of a third party. Article 10 of Directive 95/46 shall be interpreted as meaning that the obligation to inform under that provision also applies to that website operator. The consent of the data subject under Article 7(a) of Directive 95/46 has to be given, and information within the meaning of Article 10 of the same directive provided, before the data are collected and transferred. However, the extent of those obligations shall correspond with that operator's joint responsibility for the collection and transmission of the personal data.

1 Original language: English.

2 Directive of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

3 Directive of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 110, p. 30).

4 I note that the order for reference states that the plug-in was made available to the Defendant by Facebook Ireland *or* by the latter's parent company, Facebook Inc., incorporated in the United States of America. However, it would appear that both before the referring court, and also in the proceedings before this Court, Facebook Ireland assumes possible liability under Directive 95/46 in the context of the present proceedings. I thus see no reason to discuss the potential applicability of Directive 95/46 in respect of Facebook Ireland's parent company.

5 Regulation of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 (General Data Protection Regulation) (OJ 2016 L 119, p. 1).

6 'Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority which is competent pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing.'

7 While adding, for the sake of completeness, that although the judgment of 28 July 2016, *Verein für Konsumenteninformation* (C-191/15, EU:C:2016:612) concerned a question of interpretation of Directive 95/46 that arose in national proceedings brought by an association, the Court did not consider the issue of the standing of the association in that case, simply because that specific question was not raised.

8 As restated for instance in the judgments of 23 May 1985, *Commission* v *Germany* (C-29/84, EU:C:1985:229, paragraph 22); of 14 February 2012, *Flachglas Torgau* (C-204/09, EU:C:2012:71, paragraph 60); and of 19 April 2018, *CMR* (C-645/16, EU:C:2018:262, paragraph 19).

9 Judgment of 13 May 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317, paragraph 53).

10 See also judgment of 16 December 2008, *Huber* (C-524/06, EU:C:2008:724, paragraph 50).

11 Thus, in contrast to the judgment of 25 January 2018, *Schrems* (C-498/16, EU:C:2018:37), not involving any assignment of claims to a particular person and having apparently a clear legal basis in national law for what seems to be a type representation of the collective interest of consumers.

12 Or, to put it differently, Member States will also need to provide, especially as far as the institutional structure or procedures are concerned, for a number of other matters, which would also not be explicitly referred to in a directive (such as, in terms of judicial enforcement of a right, not just the issues of standing, but also for example time limits for bringing an action; court fees (if any); jurisdiction of courts; etc.). Could it then also be claimed that since neither Article 22, nor Article 24 of the Directive 95/46 mention any of these issues, the Member State is also precluded from providing for such matters in national law?

13 As defined in Article 3 of Directive 2009/22.

14 See for instance, judgments of 6 November 2003, *Lindqvist* (C-101/01, EU:C:2003:596, paragraph 96); of 16 December 2008, *Huber* (C-524/06, EU:C:2008:724, paragraph 51); of 24 November 2011, *Asociación Nacional de Establecimientos Financieros de Crédito* (C-468/10 and C-469/10,

EU:C:2011:777, paragraph 29); and of 7 November 2013, *IPI* (C-473/12, EU:C:2013:715, paragraph 31).

15 Judgment of 6 November 2003, *Lindqvist* (C-101/01, EU:C:2003:596, paragraph 97).

16 See my Opinion in *Dzivev* (C-310/16, EU:C:2018:623, points 72 and 74).

17 Reproduced above at point 8.

18 See again the examples given above, footnote 12.

19 Which are, pursuant to Article 28 of Directive 95/46, responsible for monitoring the application of the provisions adopted pursuant to that directive.

20 On the standard required under Article 28(1) of Directive 95/46, see judgments of 9 March 2010, *Commission* v *Germany* (C-518/07, EU:C:2010:125, paragraphs 18 to 30), and of 16 October 2012, *Commission*v *Austria* (C-614/10, EU:C:2012:631, paragraphs 41 to 66).

21 By analogy with another area of law, would for example private enforcement of competition law then also threaten the independence of (national) competition authorities? See judgments of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraphs 26 to 27 and 29), and of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraphs 59 to 60). See also recital 5 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1).

22 In general (irrespective of the specific issue of changed legal form), what does the fact that the legislature inserted something into a subsequent piece of legislation, that was not present in the previous embodiments of the same, mean for the interpretation of the latter? It may well be that that principle was indeed 'inherently present' in the previous embodiment and now has just been clarified. But it may also mean that precisely because that provision was not previously present, the new one is an amendment. In view of the frequent and questionable (mis)use of the argument 'it has always been there, now it is just explicit', in effect amounting to an extension of the new rule well before its temporal scope of application, such type of arguments should be used with caution, if at all.

23 Concerning the issue of *dynamic* IP addresses, see judgment of 19 October 2016, *Breyer* (C-582/14, EU:C:2016:779, paragraph 33 et seq.). See also judgment of 24 November 2011, *Scarlet Extended*(C-70/10, EU:C:2011:771, paragraph 51).

24 Judgment of 19 October 2016, *Breyer* (C-582/14, EU:C:2016:779, paragraphs 41 to 45).

25 Above, point 19.

26 Emphasis added.

27 Judgments of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein* (C-210/16, EU:C:2018:388, paragraph 29), and of 10 July 2018, *Jehovan todistajat* (C-25/17, EU:C:2018:551, paragraph 65).

28 See judgments of 13 May 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317, paragraph 34), and of 10 July 2018, *Jehovan todistajat* (C-25/17, EU:C:2018:551, paragraph 66).

29 Judgment of 5 June 2018 (C-210/16, EU:C:2018:388).

30 Judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein* (C-210/16, EU:C:2018:388, paragraph 39).

31 Judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein* (C-210/16, EU:C:2018:388, paragraph 35).

32 Judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein* (C-210/16, EU:C:2018:388, paragraph 36).

33 Judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein* (C-210/16, EU:C:2018:388, paragraphs 34 and 38).

34 Judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein* (C-210/16, EU:C:2018:388, paragraphs 39 and 41).

35 Judgment of 10 July 2018 (C-25/17, EU:C:2018:551, paragraphs 68 to 72).

36 As suggested by Advocate General Bot in his Opinion in *Wirtschaftsakademie Schleswig-Holstein* (C-210/16, EU:C:2017:796, points 66 to 72).

37 With apparently an analogy with consumer protection, meaning that in terms of negotiation, the 'non-professional' party should have same genuine say in negotiating the terms, does not appear to be applicable in this context. Thus, it is open to debate how much actual 'definition of parameters' there is for a fan page administrator (and how much is just mechanical clicking and choice between prepared options, as with any other 'consumer').

38 Judgment of 5 June 2018, *Wirtschaftsakade*

mie Schleswig-Holstein (C-210/16, EU:C:2018:388, paragraph 35).

39 A number of programmes and applications nowadays, with the sometimes explicit, sometimes perhaps less explicit, agreement of the user, transmit analytical information, that may include personal data, to the developer or software vendor.

40 Judgment of 5 June 2018 (C-210/16, EU:C:2018:388, paragraph 38).

41 Again, under what exact conditions and with what negotiation power might indeed be open to debate (see also above footnote 37).

42 Or, as put in less candid terms by Sir Humphrey Appleby (himself apparently relying on an older, unattributed quote): 'Responsibility without power — the prerogative of the eunuch throughout the ages' (In *Yes, Prime Minister*, Season 2, Episode 7, 'The National Education Service', first aired 21 January 1988).

43 Also in the sense outlined above at point 73 and footnotes 38 and 42.

44 Judgment of 5 June 2018 (C-210/16, EU:C:2018:388, paragraph 43).

45 See above, points 87 to 88.

46 See also Article 29 Data Protection Working Party (an advisory body established by Article 29 of Directive 95/46, now replaced by the European Data Protection Board, set up under Article 68 of the GDPR) Opinion 4/2007 on the concept of personal data, 01248/07/EN WP 136, 20 June 2007, p. 4.

47 Also in view of the simple fact that processing will hardly ever be linear, going through all of the operations listed in Article 2(b) one by one, in sequence, and by one person. Rather, the life of personal data is likely to be cyclical, running in loops, with bifurcations here and there, with data sets collected at different ends, consulted by a different person, subsequently merged and consulted, then later, again perhaps re-combined and retransmitted to different persons, and so on.

48 The Article 29 Data Protection Working Party suggested that 'joint control will arise when different parties determine with regard to specific processing operations either the purpose or [the] essential elements of the means'. See Opinion 1/2010 on the concepts of 'controller' and 'processor', adopted on 16 February 2010, Article 29 Data Protection Working Party, doc. 00264/10/EN WP 169, p. 19.

49 In contrast to the situation discussed with regard to question 1 above at points 39 to 42.

50 Reading the original German version of the fourth question, I understand the scope of the question posed by the referring court as being limited to the identification of interests that are *to be taken into account*and not, as the English translation of the German question would imply, *are decisive* (in the potential sense of carrying more weight) in that balancing of interests. The question thus appears to be enquiring into the input of the balancing exercise, not what its output ought to be.

51 Directive of the European Parliament and of the Council of 12 July 2002 (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37).

52 See also judgment of 5 May 2011, *Deutsche Telekom* (C-543/09, EU:C:2011:279, paragraph 50). Pursuant to recital 10 of the E-Privacy Directive, 'in the electronic communications sector, Directive [95/46] applies in particular to all matters concerning protection of fundamental rights and freedoms, which are not specifically covered by the provisions of this Directive, including the obligations on the controller and the rights of individuals. Directive [95/46] applies to non-public communications services'.

53 See, in this context, Article 5(3) of the E-Privacy Directive which states that 'Member States shall ensure that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information, in accordance with Directive [95/46], inter alia about the purposes of the processing. […]'.

54 In this context again cross-referring to the introductory Section B.1. (points 55 to 58 above) and the need for factual verification of what exactly is being transmitted and whether that information in fact amounts to personal data.

55 See also Article 29 Data Protection Working Party Document 02/2013 providing guidance on obtaining consent for cookies, 1676/13/EN WP 208, 2 October 2013, pp. 5 to 6, suggesting that 'since storing information or gaining the information already stored on users' devices by way of cookies can entail the processing of personal data, in this case data protection rules clearly apply'.

56 See, in this sense, judgments of 13 May 2014*, Google Spain and Google*(C-131/12, EU:C:2014:317*,* paragraph 71 and the case-law cited), and of 4 May 2017, *Rīgas satiksme* (C-13/16, EU:C:2017:336, paragraph 25).

57 Judgment of 4 May 2017, *Rīgas satiksme* (C-13/16, EU:C:2017:336, paragraph 28). See also judgment of 24 November 2011, *Asociación Nacional de Establecimientos Financieros de Crédito* (C-468/10 and C-469/10, EU:C:2011:777, paragraph 38).

58 See my Opinion in *Rīgas satiksme* (C-13/16, EU:C:2017:43, points 64 and 65). As I recalled there, transparency (judgment of 9 November 2010*, Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662, paragraph 77)), protection of the property, health and family life (judgment of 11 December 2014, *Ryneš* (C-212/13, EU:C:2014:2428, paragraph 34)) have been acknowledged as such by the Court. See also judgments of 29 January 2008, *Promusicae* (C-275/06, EU:C:2008:54, paragraph 53), and of 4 May 2017, *Rīgas satiksme* (C-13/16, EU:C:2017:336, paragraph 29).

59 See above, points 104 to 105 of this Opinion.

60 See also Opinion 06/2014 of Article 29 Data Protection Working Party on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (844/14/EN WP 217), p. 25.

61 As I suggested elsewhere, the respective 'competing legitimate interests need not only to be established, but also to outweigh the interests or rights and freedoms of the data subject', arising from Articles 7 and 8 of the Charter. See my Opinion in *Rīgas satiksme* (C-13/16, EU:C:2017:43, point 56 and points 66 to 69 and the case-law cited).

62 Judgment of 4 May 2017, *Rīgas satiksme* (C-13/16, EU:C:2017:336, paragraph 31 and the case-law cited).

63 There must thus be an adequate relationship between the aims (the claimed legitimate interest) and chosen means (personal data processed). See in this sense judgment of 4 May 2017, *Rīgas satiksme*(C-13/16, EU:C:2017:336, paragraph 30 and the case-law cited).

64 Above, points 76 to 82 of this Opinion.

65 Above, points 84 to 88.

66 Which of course does not preclude, other potential (and subsequent) controllers having that duty with regard to their respective data processing operations.

67 Above, point 132. See Article 29 Data Protection Working Party Document 02/2013 providing guidance on obtaining consent for cookies, 1676/13/EN WP 208, 2 October 2013, p. 4. See also Article 29 Data Protection Working Party Document Opinion 15/2011 on the definition of consent 1197/11/EN WP187, 13 July 2011, p. 9.

Case C 416/17 - European Commission v French Republic

JUDGMENT OF THE COURT (Fifth Chamber)
4 October 2018 (*)

(Failure of a Member State to fulfil obligations — Articles 49 and 63 TFEU and the third paragraph of Article 267 TFEU — Series of charges to tax — Difference in treatment according to the Member State of residence of the sub-subsidiary — Reimbursement of the advance payment of tax unduly paid — Requirements relating to the evidence establishing a right to such reimbursement — Capping of the right to reimbursement — Discrimination — National court adjudicating at last instance — Obligation to make a reference for a preliminary ruling)

In Case C-416/17,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 10 July 2017,

European Commission, represented by J.-F. Brakeland and W. Roels, acting as Agents,

applicant,

v

French Republic, represented by E. de Moustier, A. Alidière and D. Colas, acting as Agents,

defendant,

THE COURT (Fifth Chamber),
composed of J.L. da Cruz Vilaça, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fifth Chamber, E. Levits (Rapporteur), M. Berger and F. Biltgen, Judges,
Advocate General: M. Wathelet,
Registrar: M.-A. Gaudissart, Deputy Registrar,
having regard to the written procedure and further to the hearing on 20 June 2018,
after hearing the Opinion of the Advocate General at the sitting on 25 July 2018,
gives the following

Judgment

1 By its application, the European Commission asks the Court to declare that, by its discriminatory and disproportionate treatment of French parent companies which receive dividends from foreign subsidiaries with regard to the right to reimbursement of tax levied in breach of EU law, as interpreted by the Court in its judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), the French Republic has failed to fulfil its obligations under Article 49, Article 63 and the third paragraph of Article 267 TFUE, along with the principles of equivalence and effectiveness.

National law

2 In the version in force during the tax years at issue in the case which gave rise to the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), Article 146(2) of the code général des impôts (General Tax Code; 'CGI') provides as follows:

'Where distributions made by a parent company give rise to the application of the advance payment provided for in Article 223 *sexies*, that advance payment shall be reduced, where appropriate, by the amount of the tax credits which are applied to the income from shareholdings … received in the course of the tax years ending within the last five years at most.'

3 Article 158 *bis*(I) of the CGI, in the version in force during the tax years at issue in the case which gave rise to the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), provides as follows:

'Persons who receive dividends distributed by French companies shall be deemed in that respect to have received income in the

form of:

(a) the sums they receive from the company;

(b) a tax credit represented by a credit opened with the Treasury.

That tax credit shall be equal to half of the actual payments made by the company.

It may be used only in so far as the income is included in the base of the income tax payable by the recipient.

It shall be received as payment for that tax.

It shall be refunded to natural persons where the amount of the tax credit exceeds the amount of the tax for which they are liable.'

4 The first paragraph of Article 223 *sexies*(1) of the CGI indicated, in the version applicable to distributions paid after January 1999:

'… Where the profits distributed by a company are subject to a deduction on the ground that that company has not been subject to corporation tax at the normal rate … that company is required to make an advance payment equal to the tax credit calculated under the conditions provided for in Article 158 *bis*(I). The advance payment shall be due with respect to distributions giving entitlement to a tax credit provided for in Article 158 *bis*, whoever the recipients are.'

Background to the dispute

Judgment of 15 September 2011, Accor (C-310/09, EU:C:2011:581)

5 In 2001, Accor, a company governed by French law, sought reimbursement from the French tax authority of the advance payment made when dividends received from its subsidiaries established in other Member States were redistributed. That application for reimbursement was linked to the fact that, when redistributing dividends only from resident companies, a parent company was entitled to set off the tax credit applied to the distribution of those dividends against the advance payment of tax for which it is liable. Following that authority's refusal to grant that application, Accor brought an action before the French administrative courts.

6 Having been requested to deliver a preliminary ruling by the Conseil d'État (Council of State, France), the Court stated, in its judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), first, in paragraph 49, that, by contrast with dividends originating from resident subsidiaries, the French legislation did not permit avoidance of taxation at the level of the non-resident distributing subsidiary, while dividends received both from resident subsidiaries and from non-resident subsidiaries were subject to the advance payment when redistributed.

7 The Court held, in paragraph 69 of that judgment, that such a difference in treatment between dividends distributed by a resident subsidiary and those distributed by a non-resident subsidiary was contrary to Articles 49 and 63 TFEU.

8 Next, in paragraph 92 of that judgment, the Court held that a Member State had to be in a position to determine the amount of the corporation tax paid in the Member State in which the distributing company was established which must be the subject of the tax credit granted to the recipient parent company, and, accordingly, that it was not sufficient to provide evidence that the distributing company had been taxed, in the Member State in which it was established, on the profits underlying the dividends distributed, without providing information relating to the nature and rate of the tax actually charged on those profits.

9 The Court added, in paragraphs 99 and 101 of that judgment, that the evidence required should enable the tax authorities of the Member State of taxation to ascertain, clearly and precisely, whether the conditions for obtaining a tax advantage have been met and that the request for production of that information should be made within the statutory period for retention of administrative documents and accounts, as laid down by the law of the Member State in which the subsidiary is established, without it being required to provide documents covering a period significantly longer than that period.

10 The Court accordingly held that:

‘1. Articles 49 TFEU and 63 TFEU preclude legislation of a Member State intended to eliminate economic double taxation of dividends, such as that at issue in the main proceedings, which allows a parent company to set off against the advance payment, for which it is liable when it redistributes to its shareholders dividends paid by its subsidiaries, the tax credit applied to the distribution of those dividends if they originate from a subsidiary established in that Member State, but does not offer that option if those dividends originate from a subsidiary established in another Member State, since, in that case, that legislation does not give entitlement to a tax credit applied to the distribution of those dividends by that subsidiary;

…

3. The principles of equivalence and effectiveness do not preclude the reimbursement to a parent company of sums which ensure the application of the same tax regime to dividends distributed by its subsidiaries established in France and those distributed by the subsidiaries of that company established in other Member States, and subsequently redistributed by that parent company, being subject to the condition that the person liable for the tax furnish evidence which is in its sole possession and relating, with respect to each dividend concerned, in particular to the rate of taxation actually applied and the amount of tax actually paid on profits made by subsidiaries established in other Member States, whereas, with respect to subsidiaries established in France, that evidence, known to the administration, is not required. Production of that evidence may however be required only if it does not prove virtually impossible or excessively difficult to furnish evidence of payment of the tax by the subsidiaries established in the other Member States, in the light in particular of the provisions of the legislation of those Member States concerning the avoidance of double taxation, the recording of the corporation tax which must be paid and the retention of administrative documents. It is for the national court to determine whether those conditions are met in the case before the national court.’

The judgments of the Conseil d’État

11 Following the delivery of the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), the Conseil d’État (Council of State, France), in its judgments of 10 December 2012, *Rhodia*(FR:CESSR:2012:317074.20121210), and of 10 December 2012, *Accor* (FR:CESSR:2012:317075.20121210) (‘the judgments of the Conseil d’État (Council of State)’) established the conditions for the reimbursement of advance payments made in breach of EU law.

12 With regard, first, to the scope of the reimbursement of the advance payments, the judgments of the Conseil d’État (Council of State) state that:

– where a dividend redistributed to a French parent company by one of its subsidiaries established in another Member State has not been taxed at the level of that subsidiary, the tax paid by a sub-subsidiary does not have to be taken into account in determining the advance payment to be reimbursed to the parent company (judgments of the Conseil d’État (Council of State) of 10 December 2012, *Rhodia*, FR:CESSR:2012:317074.20121210, paragraph 29, and of 10 December 2012, *Accor*, FR:CESSR:2012:317075.20121210, paragraph 24);

– where a distributing company has paid effective tax in its Member State at a rate higher than the normal rate of the French tax, that is 33.33%, the amount of the tax credit which it may claim must be limited to one third of the dividends that it has received and redistributed (judgments of the Conseil d’État (Council of State) of 10 December 2012, *Rhodia*, FR:CESSR:2012:317074.20121210, paragraph 44, and of 10 December 2012, *Accor*, FR:CESSR:2012:317075.20121210, paragraph 40).

13 As regards, in the second place, the evidence to be provided in support of the applications for reimbursement, the Conseil d’État (Council of State) acknowledged:

– the binding effect of the advance payment declarations for the purposes of determining the amount of the dividends received from subsidiaries established in another Member State (judgments of the Conseil d’État (Council of State) of 10 December 2012, *Rhodia*, FR:CESSR:2012:317074.20121210, paragraphs 24 and 25, and of 10 December 2012, *Accor*, FR:CESSR:2012:317075.20121210, paragraphs 19 and 20);

– the need for a person to possess all the evidence capable of demonstrating that its application is well founded throughout the duration of the proceedings, without the expiry of the statutory period for retention exempting it from that obligation (judgments of the Conseil d’État (Council of State) of 10 December 2012, *Rhodia*, FR:CESSR:2012:317074.20121210, paragraph 35, and of 10 December 2012, *Accor*, FR:CESSR:2012:317075.20121210, paragraph 31).

Pre-litigation procedure

14 Following the judgments of the Conseil d'État (Council of State), the Commission received several complaints concerning the conditions for reimbursement of advance payments made by French companies which had received dividends of foreign origin.

15 Since the Commission was not satisfied with the information exchanged between it and the French Republic, on 27 November 2014, it sent a letter of formal notice to the French authorities in which it noted that certain conditions for the reimbursement of advance payments of tax established by the judgments of the Conseil d'État (Council of State) were likely to constitute infringements of EU law.

16 In its reply of 26 January 2015, the French Republic disputed the complaints made against it. On 29 April 2016, the Commission sent a reasoned opinion calling upon the French Republic to take steps to comply within a period of two months of receipt of that opinion.

17 Since the French Republic maintained its position in its reply of 28 June 2016, the Commission brought the present action for failure to fulfil obligations on the basis of Article 258 TFEU.

[…redacted by Organising Committee…].

Fourth complaint, alleging infringement of Article 267(3) TFEU

Arguments of the parties

100 According to the Commission, the Conseil d'État (Council of State) should have made a reference for a preliminary ruling to the Court before establishing the procedures for reimbursement of the advance payment, the levying of which was found to be incompatible with Articles 49 and 63 TFEU in accordance with the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581).

101 First, the Commission submits that the Conseil d'État (Council of State) is a court against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 267 TFEU, which is required to make a reference for a preliminary ruling when it is seised of a dispute that raises a question concerning the interpretation of EU law.

102 Second, the compatibility with EU law of the restrictions arising from the judgments of the Conseil d'État (Council of State) appears doubtful, at the very least, in the light, in particular, of the case-law established in the judgment of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707). In any event, the mere fact that the Commission has a different understanding of the principles established in the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), from that expressed by the Conseil d'État (Council of State) shows that the solutions arising from those judgments cannot enjoy a presumption of compatibility with EU law.

103 The French Republic maintains that the Commission has failed to specify the difficulties with which the Conseil d'État (Council of State) was faced in the cases which gave rise to the judgments referred to by that institution and which justified a reference for a preliminary ruling under the third paragraph of Article 267 TFEU. The only difficulties faced by the Conseil d'État (Council of State) were, in reality, factual difficulties and not difficulties concerning the interpretation of EU law.

104 In any event, according to the French Republic, the Conseil d'État (Council of State) was justified in considering that the answers to the questions put to it could be clearly inferred from the case-law.

Findings of the Court

105 It is important to note that the Commission's fourth complaint is based on the premiss that the Conseil d'État (Council of State), as a court adjudicating at last instance, was not entitled to interpret EU law, as it arises from the judgments of 10 December 2012, *Rhodia* (FR:CESSR:2012:317074.20121210), and of 10 December 2012, *Accor* (FR:CESSR:2012:317075.20121210), without, first, making a reference for a preliminary ruling to the Court.

106 In that regard, it should be noted, first, that the obligation of the Member States to comply with the provisions of the FEU Treaty is binding on all their authorities, including, for matters within their jurisdiction, the courts.

107 Thus, a Member State's failure to fulfil obligations may, in principle, be established under Article 258 TFEU whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution (judgments of 9 December 2003, *Commission* v *Italy*, C-129/00, EU:C:2003:656, paragraph 29, and of 12 November 2009, *Commission* v *Spain*, C-154/08, not published, EU:C:2009:695, paragraph 125).

108 Second, it must also be noted that, where there is no judicial remedy against the decision of a national court, that court is in principle obliged to make a reference to the Court within the meaning of the third paragraph of Article 267 TFEU where a question of the interpretation of the FEU Treaty is raised before it (judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 42).

109 Moreover, the obligation to make a reference laid down in that provision is intended in particular to prevent a body of national case-law that is not in accordance with the rules of EU law from being established in any of the Member States (judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 33 and the case-law cited).

110 Indeed, that court is not under such an obligation when it finds that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt, and the existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the European Union (see, to that effect, judgments of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 21; of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraphs 38 and 39; and of 28 July 2016, *Association France Nature Environnement*, C-379/15, EU:C:2016:603, paragraph 50).

111 In that regard, as regards the matter examined in the context of the first complaint of the present action for failure to fulfil obligations, as the Advocate General observed in point 99 of his Opinion, the judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), being silent in that respect, the Conseil d'État (Council of State) chose to depart from the judgment of 13 November 2012, *Test Claimants in the FII GroupLitigation* (C-35/11, EU:C:2012:707), on the ground that the British scheme at issue was different from the French tax credit and advance payment scheme, while it could not be certain that its reasoning would be equally obvious to the Court.

112 Furthermore, it follows from what was held in paragraphs 29 to 46 of the present judgment, in the context of examining the first complaint raised by the Commission, that the absence of a reference for a preliminary ruling on the part of the Conseil d'État (Council of State) in the cases giving rise to the judgments of 10 December 2012, Rhodia (FR:CESSR:2012:317074.20121210), and of 10 December 2012, *Accor* (FR:CESSR:2012:317075.20121210), led that court to adopt, in those judgments, a solution based on an interpretation of the provisions of Articles 49 and 63 TFEU which is at variance with that of the present judgment, which implies that the existence of reasonable doubt concerning that interpretation could not be ruled out when the Conseil d'État (Council of State) delivered its ruling.

113 Consequently, there is no need to examine the other arguments put forward by the Commission in the context of the present complaint and it must be held that it was for the Conseil d'État (Council of State), as a court or tribunal against whose decisions there is no judicial remedy under national law, to request a preliminary ruling from the Court of Justice on the basis of the third paragraph of Article 267 TFEU in order to avert the risk of an incorrect interpretation of EU law (see, to that effect, judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraph 44).

114 Consequently, since the Conseil d'État (Council of State) failed to make a reference to the Court, in accordance with the procedure provided for in the third paragraph of Article 267 TFEU, in order to determine whether it was necessary to refuse to take into account, for the purpose of calculating the reimbursement of the advance payment made by a resident company in respect of the distribution of dividends paid by a non-resident company via a non-resident subsidiary, the tax incurred by that second company on the profits underlying those dividends, even though its interpretation of the provisions of EU law in the judgments of 10 December 2012, *Rhodia* (FR:CESSR:2012:317074.20121210), and of 10 December 2012, *Accor* (FR:CESSR:2012:317075.20121210), was not so obvious as to leave no scope for doubt, the fourth complaint must be upheld.

Costs

115 Under Article 138(1) of the Rules of Procedure of the Court, 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 French Republic has been unsuccessful in part, each party must be ordered to bear its own costs.

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

1. Declares that, by refusing to take into account, in order to calculate the reimbursement of the advance payment made by a resident company in respect of the distribution of dividends paid by a non-resident company via a non-resident subsidiary, the tax incurred by that second company on the profits underlying those dividends, even though the national mechanism for the avoidance of economic double taxation allows, in the case of a purely domestic chain of interests, the tax levied on the dividends distributed by a company at every level of that chain of interests to be offset, the French Republic has failed to fulfil its obligations under Articles 49 and 63 TFEU;

2. Declares that, since the Conseil d'État (Council of State, France) failed to make a reference to the Court of Justice of the European Union, in accordance with the procedure provided for in the third paragraph of Article 267 TFEU, in order to determine whether it was necessary to refuse to take into account, for the purpose of calculating the reimbursement of the advance payment made by a resident company in respect of the distribution of dividends paid by a non-resident company via a non-resident subsidiary, the tax incurred by that second company on the profits underlying those dividends, even though its interpretation of the provisions of EU law in the judgments of 10 December 2012, *Rhodia* (FR:CESSR:2012:317074.20121210), and of 10 December 2012, *Accor* (FR:CESSR:2012:317075.20121210), was not so obvious as to leave no scope for doubt, the French Republic failed to fulfil its obligations under the third paragraph of Article 267 TFEU;

3. Dismisses the action as to the remainder;

4. Orders the European Commission and the French Republic to bear their own costs.

Monachos Eirinaios, kata kosmon Antonios Giakoumakis tou Emmanouil
v
Dikigorikos Syllogos Athinon
(Request for a preliminary ruling from the Symvoulio tis Epikrateias
OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 19 December 2018(1)
Case C-431/17
Monachos Eirinaios, kata kosmon Antonios Giakoumakis tou Emmanouil
v
Dikigorikos Syllogos Athinon
(Request for a preliminary ruling from the Symvoulio tis Epikrateias (Council of State, Greece))
(Directive 98/5/EC — Article 3 — Article 6 — Registration of a monk as a lawyer in a Member State other than that in which he obtained his professional qualification — National rules precluding registration)

1. Can a man serve two masters? When one of those masters is God, a Christian can find initial guidance in the Gospels: 'no man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and Mammon'. (2) (The impeccable legal exchange between Jesus of Nazareth and a lawyer preserved in the parable of the Good Samaritan clearly demonstrates, however, that it is perfectly possible to serve God and be a member of the legal profession. (3)) Where a monk wishes to register as a lawyer with a bar association of a Member State other than that where he acquired his professional title and serve thus both justice and God, it is also necessary to look to Directive 98/5/EC. (4)

2. By this request for a preliminary ruling the Symvoulio tis Epikrateias (Council of State, Greece; 'the referring court') asks whether it is compatible with Directive 98/5 for the competent authorities to refuse to register Monachos Eirinaios, (5) a monk in a monastery in Greece, as a lawyer practising under his home-country professional title on the ground that monks simply cannot, under national law, be entered in the registers of bar associations. That raises the question of how to reconcile the provisions of Directive 98/5 concerning *registration* of lawyers practising under their home-country professional title, which introduce mandatory obligations, with those concerning the rules *of professional conduct* applicable to such lawyers, which leave the Member States a wide discretion. The Court's interpretation will need to ensure that the directive is construed in a consistent and cohesive manner.

Legal framework

EU law

Directive 98/5

3. Recital 1 of Directive 98/5 highlights the importance of the possibility, for nationals of the Member States, of practising a profession, whether in a self-employed or salaried capacity, in a Member State other than that in which they obtained their professional qualifications. Recitals 2 and 3 explain that the directive offers an alternative means to Directive 89/48 for gaining admission to the profession of lawyer in a host Member State. (6)

4. According to recital 5, action 'is justified at Community level not only because, compared with the general system for the recognition of diplomas, it provides lawyers with an easier means whereby they can integrate into the profession in a host Member State, but also because, by enabling lawyers to practise under their home-country professional titles on a permanent basis in a host Member State, it meets the needs of consumers of legal services who, owing to the increasing trade flows resulting, in particular, from the internal market, seek advice when carrying out cross-border transactions in which international law, Community law and domestic laws often overlap'.

5. Recital 6 explains that action is also justified 'because only a few Member States already permit in their territory the pursuit of activities of lawyers, otherwise than by way of provision of services, by lawyers from other Member States practising under their

home-country professional titles; … however, in the Member States where this possibility exists, the practical details concerning, for example, the area of activity and the obligation to register with the competent authorities differ considerably; … such a diversity of situations leads to inequalities and distortions in competition between lawyers from the Member States and constitutes an obstacle to freedom of movement; … only a directive laying down the conditions governing practice of the profession, otherwise than by way of provision of services, by lawyers practising under their home-country professional titles is capable of resolving these difficulties and of affording the same opportunities to lawyers and consumers of legal services in all Member States'.

6. Recital 7 indicates that the directive does not lay down any rules concerning purely domestic situations, and that where it does affect national rules regulating the legal profession it does so no more than is necessary to achieve its purpose effectively. The directive is without prejudice in particular to national legislation governing access to and practice of the profession of lawyer under the professional title used in the host Member State.

7. Recital 8 explains that 'lawyers covered by the Directive should be required to register with the competent authority in the host Member State in order that that authority may ensure that they comply with the rules of professional conduct in force in that State; … the effect of such registration as regards the jurisdictions in which, and the levels and types of court before which, lawyers may practise is determined by the law applicable to lawyers in the host Member State'.

8. Recital 9 indicates that 'lawyers who are not integrated into the profession in the host Member State should practise in that State under their home-country professional titles so as to ensure that consumers are properly informed and to distinguish between such lawyers and lawyers from the host Member State practising under the professional title used there'.

9. Article 1(1) of the directive defines its purpose as being to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the professional qualification was obtained. Article 1(2) defines a 'lawyer' as 'any person who is a national of a Member State and who is authorised to pursue his professional activities under one of the following professional titles: … Greece: Δικηγόρος [Dikigoros] … Cyprus: Δικηγόρος [Dikigoros]'.

10. Article 2 establishes any lawyer's right to pursue the professional activities listed in detail in Article 5 on a permanent basis under his home-country professional title in another Member State.

11. In accordance with Article 3:

'1. A lawyer who wishes to practise in a Member State other than that in which he obtained his professional qualification shall register with the competent authority in that State.

2. The competent authority in the host Member State shall register the lawyer upon presentation of a certificate attesting to his registration with the competent authority in the home Member State. It may require that, when presented by the competent authority of the home Member State, the certificate be not more than three months old. It shall inform the competent authority in the home Member State of the registration.'

12. Article 4 provides that a lawyer practising in a host Member State under his home-country professional title 'shall do so under that title, which must be expressed in the official language or one of the official languages of his home Member State, in an intelligible manner and in such a way as to avoid confusion with the professional title of the host Member State'.

13. Article 5(1) defines the area of activity of a lawyer practising under his home-country professional title as 'the same professional activities as a lawyer practising under the relevant professional title used in the host Member State'. He may, inter alia, 'give advice on the law of his home Member State, on Community law, on international law and on the law of the host Member State. He shall in any event comply with the rules of procedure applicable in the national courts'.

14. Article 6(1) provides that 'irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory'. In accordance with Article 6(3), the host Member State 'may require a lawyer practising under his home-country professional title either to take out professional indemnity insurance or to become a member of a professional guarantee fund in accordance with the rules which that State lays down for professional activities pursued in its territory'.

15. Article 7 of the directive concerns disciplinary proceedings in the event that a lawyer practising under his home-country professional title fails to fulfil the obligations in force in the host Member State. In accordance with Article 7(1), 'the rules of procedure, penalties and remedies provided for in the host Member State shall apply'. Article 7(2) to (5) provides that:

'2. Before initiating disciplinary proceedings against a lawyer practising under his home-country professional title, the competent authority in the host Member State shall inform the competent authority in the home Member State as soon as possible, furnishing it with all the relevant details.

[That applies] *mutatis mutandis* where disciplinary proceedings are initiated by the competent authority of the home Member State …

3. Without prejudice to the decision-making power of the competent authority in the host Member State, that authority shall cooperate throughout the disciplinary proceedings with the competent authority in the home Member State. …

4. The competent authority in the home Member State shall decide what action to take, under its own procedural and substantive rules, in the light of a decision of the competent authority in the host Member State concerning a lawyer practising under his home-country professional title.

5. Although it is not a prerequisite for the decision of the competent authority in the host Member State, the temporary or permanent withdrawal by the competent authority in the home Member State of the authorisation to practise the profession shall automatically lead to the lawyer concerned being temporarily or permanently prohibited from practising under his home-country professional title in the host Member State.'

16. Article 9 provides that 'decisions not to effect the registration referred to in Article 3 or to cancel such registration and decisions imposing disciplinary measures shall state the reasons on which they are based'. A remedy before a court or tribunal must be available against such decisions.

National law

Presidential Decree 152/2000

17. Directive 98/5 was transposed into Greek law by Presidential Decree 152/2000 'facilitating practice of the profession of lawyer on a permanent basis in Greece by lawyers who obtained their professional qualification in another Member State of the European Union' (Proedriko Diatagma 152/2000, Diefkolynsi tis monimis askisis tou dikigorikoy epaggelmatos stin Ellada apo dikigorous pou apektisan ton epaggelmatiko tous titlo se allo kratos-melos tis EE 'the Presidential Decree').

18. Article 5(1) provides that to practise as a lawyer in Greece, the person concerned must be registered with the bar association where he will pursue his professional activities and must retain an office in that geographical area. Article 5(2) states that the board of administration of the aforesaid bar association decides upon an application for registration after submission of the following certificates: (i) an official document proving nationality of a Member State; (ii) a certificate indicating whether the applicant has a criminal record; and (iii) a certificate of registration from the competent authority of the home State which granted the professional qualification or another competent authority of the home State.

19. In addition, Article 8(1) provides that 'irrespective of the rules of professional conduct to which he is subject in his home State, the lawyer shall be subject to the same rules of professional conduct as other lawyers who are members of the relevant bar association, in respect of all the activities he pursues in Greece. In particular, he shall be subject to … those rules that govern the carrying out of a lawyer's functions in Greece, in particular those in respect of incompatibility and the carrying out of activities alien to those functions, of professional confidentiality, of professional ethics, of advertising, of professional dignity and of the proper carrying out of those functions'.

Lawyers' Code

20. Article 1 of Law 4194/2013 (Kodikas dikigoron, 'the Lawyers' Code') provides that a lawyer is a public officer whose functions constitute a cornerstone of upholding the rule of law. When performing his duties a lawyer is to handle his cases according to his professional judgment and he is not to be made subject to recommendations and instructions contrary to the law or incompatible with the interests of his client. (7)

21. Article 6 is entitled 'conditions to become a lawyer — impediments' It lays down two positive conditions in order to be a lawyer, namely (i) holding Greek nationality or the nationality of another Member State or of an EEA State and (ii) holding a law degree, together with four impediments, which include not being a clergyman or a monk.

22. Article 7(1) is entitled 'ipso jure loss of the status of a lawyer'. It provides, inter alia, that a person who is a clergyman or a monk or who is appointed to or holds any paid post under a contract entailing a relationship as an employee or a public official in the service of a legal person governed by public law shall lose *ipso jure* the status of lawyer and be removed from the register of the bar association of which he is a member. (8) A lawyer who falls within the scope of Article 7(1) is obliged to make a declaration to the bar association where he is registered and to resign. (9)

23. Article 23 provides that a lawyer is required to have a seat and office in the geographical area of the court of first instance where he is designated as a lawyer. Article 82 provides that, save for a small number of listed exceptions, a lawyer is not permitted to provide his services without remuneration.

Charter of the Church of Greece

24. Law 590/1977 on the Charter of the Church of Greece (Katastatikos Chartis tis Ekklisias tis Ellados) provides in Article 39 that monasteries are religious establishments in which the men and women cloistered may live an ascetic life, under monastic vows and in accordance with the sacred rules and traditions of the Orthodox Church concerning monastic life. The monasteries operate under the spiritual supervision of the bishop for the locality.

25. Article 56(3) forbids a person under monastic discipline to travel outside the boundaries of his ecclesiastical area without the permission of his religious superior. He must also obtain the permission of the diocesan Bishop to remain in another area for more than two months in the same calendar year, whether continuously or with intervals.

Law on Ecclesiastical Funds and the administration of Monasteries

26. Law 3414/1909 (Peri Genikou Ekklisastikou Tameiou kai dioikiseos Monastirion, the 'Law on the Ecclesiastical Funds and the administration of Monasteries') provides, in Article 18, that when someone becomes a person under monastic discipline, all his belongings pass to the monastery, with the exception of the share reserved to his heirs under the law of succession.

Facts, procedure and the question referred

27. Monachos Eirinaios is a monk in a monastery in Greece. (10) He is also a qualified lawyer and has been a member of the Pagkyprios Dikigorikos Syllogos (Cyprus Bar Association, 'the PDS') since 11 December 2014.

28. On 12 June 2015 he requested to be registered with the Dikigorikos Syllogos Athinon (Athens Bar Association, 'the DSA') as a lawyer who has acquired his professional title in another Member State. On 18 June 2015 the DSA's Board of Administration rejected his request. That decision was based on Article 8(1) of the Presidential Decree, which provides that the national rules on incompatibilities (specifically, being a clergyman or a monk) also apply to lawyers who want to practice in Greece under their home-country professional title.

29. On 29 September 2015 Monachos Eirinaios appealed against that decision before the referring court.

30. That court observes that the rules of professional conduct applying to Greek lawyers do not permit monks to practise as lawyers for reasons such as those invoked by the DSA, namely the absence of guarantees regarding their independence, doubts as to their ability to occupy themselves fully with their functions and whether they can handle contentious cases, the requirement for actual (not fictitious) establishment in the geographical area of the relevant court of first instance and the obligation not to provide services without remuneration. If the relevant bar association were obliged to register a monk in accordance with Article 3 of Directive 98/5 with a view to his practising under his home-country professional title, it would then be obliged immediately to find that he had infringed the rules of professional conduct laid down by national law, as permitted by Article 6 thereof, because those rules prohibit monks from practising as lawyers.

31. The referring court also refers to its own case-law, in which it held that the provision of the Lawyers' Code previously in force

prohibiting clergymen from becoming lawyers was not contrary to the principle of equality and to the freedom to engage in a profession or occupation. First, the public interest requires a lawyer to occupy himself exclusively with his duties and second, practice as a lawyer entails dealing with disputes, which is incompatible with the status of religious minister. (11) The referring court has also previously held that that provision is not contrary to Article 13 of the Greek Constitution, Article 52 of the EC Treaty (now Article 49 TFEU) (since the facts of that earlier case concerned a purely internal situation) and Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. (12)

32. Against that background, the referring court seeks a preliminary ruling on the following question:

'Is Article 3 of Directive 98/5 to be interpreted as meaning that the registration of a monk of the Church of Greece as a lawyer with the competent authority of a Member State other than that in which he obtained his professional qualification, in order for him to practise there under his home-country professional title, may be prohibited by the national legislature on the ground that monks of the Church of Greece cannot, under national law, be entered in the registers of bar associations since, on account of their status as persons under monastic discipline, they do not provide certain guarantees necessary for practice as a lawyer?'

33. Written observations were submitted by Monachos Eirinaios, the Greek Government, the Netherlands Government and the European Commission. At the hearing on 18 September 2018, Monachos Eirinaios, the DSA, the Greek Government and the Commission presented oral argument.

Assessment

Applicable law

34. Various directives apply to different aspects of the situation of a lawyer wishing to practise in another Member State. Thus, Directive 2005/36 deals with the recognition of professional qualifications, whereas Council Directive 77/249/EEC concerns the freedom to provide services. (13) Directive 2006/123/EC concerns a wide range of activities within the internal market, including the provision of legal advice in the context both of establishment and the provision of services. (14) Directive 98/5 applies to lawyers wishing to practice on a permanent basis in the host Member State.

35. In its written observations, the Netherlands Government submitted that since Directive 98/5 does not lay down any rules of professional conduct for lawyers, guidance could be sought from the other directives that are likely to apply.

36. I do not share that view.

37. Directive 77/249 deals with the provision of services by lawyers and not freedom of establishment. (15) However, the proceedings before the referring court concern the refusal of a bar association to register a lawyer who has obtained his professional qualifications in another Member State. The subject matter of the question referred is therefore establishment as a lawyer, which is governed by Directive 98/5, not the freedom to provide legal services. (16)

38. Directive 2005/36 applies to lawyers wishing to establish themselves immediately under the *host* Member State professional title. It does not affect the operation of Directive 98/5 (17) and is not relevant here. Monachos Eirinaios is seeking registration to practise under his Cypriot title.

39. Directive 2006/123 is indeed applicable to legal services and covers not only the provision of services but also establishment. (18) However, Article 25 of that directive, invoked by the Netherlands Government in its written submissions, applies only to the exercise of multidisciplinary *economic* activities. Being a person under monastic discipline — Monachos Eirinaios' 'parallel activity' to being a lawyer — does not fit within that rubric.

40. Monachos Eirinaios' situation clearly falls within the scope of Directive 98/5. He is a lawyer holding a professional title valid in one Member State (who thus falls within the personal scope of Directive 98/5 as defined in Article 1(1) and (2) thereof) who wishes to practise on a permanent basis in another Member State under his home-country professional title (thus satisfying the cross-border element and the material scope of Directive 98/5, as defined in Article 1(1) thereof). It follows that the compatibility with EU law of national rules prohibiting monks from being registered as lawyers under their home-country professional title, on the grounds that they do not provide certain guarantees necessary for lawyers, is to be assessed on the basis of that directive.

Preliminary remarks on Directive 98/5

41. The purpose of Directive 98/5 is to improve free movement for lawyers by facilitating the practice of that profession on a permanent basis in a Member State other than that in which the professional qualification was obtained. (19) (In what follows, I shall for convenience refer to such lawyers as 'migrant lawyers'.)

42. With a view to promoting the internal market, the directive aims to afford the same opportunities to lawyers and consumers of legal services in all Member States. It seeks in particular to meet the needs of consumers of legal services who, owing to the increasing trade flows resulting from the internal market, seek advice when carrying out cross-border transactions in which international law, EU law and domestic laws often overlap. (20)

43. Thus, the directive aims, inter alia, to put an end to the differences in national rules on the conditions for registration with the competent authorities, which gave rise to inequalities and obstacles to freedom of movement. (21) Mutual recognition of the professional titles of migrant lawyers wishing to practise under their home-country professional title underpins the achievement of the directive's objectives. (22)

44. However, whilst the directive concerns the right of establishment, it neither regulates access to the profession of lawyer nor the practice of that profession under the professional title of the host Member State. (23)

45. In pursuing its objectives, the directive has to strike a balance between different interests.

46. First, it balances giving an 'automatic' right to migrant lawyers to register with the host Member State's competent authorities without any prior host Member State control of their professional qualifications (Article 3(2)) against the need to inform consumers of legal services of the scope of such lawyers' expertise — hence, migrant lawyers are only permitted to practise under their home-country professional title expressed in the language of the home Member State (Article 4(1)). (24)

47. Second, migrant lawyers are given the right to advise on legal matters and to represent and defend clients, if necessary in conjunction with a lawyer practising before the relevant judicial authority (Article 5). In return, they must register with the competent authority in the host Member State and are subject to the obligations and rules of professional conduct of that State (Articles 3 and 6). (25)

48. Furthermore, although Article 3(2) of Directive 98/5 harmonises the requirements which must be satisfied by lawyers wishing to pursue their professional activities under their home-country professional title, the directive (i) does not lay down any rules concerning purely domestic situations (recital 7); (ii) is without prejudice to national legislation governing access to and practice of the profession of lawyer under the host Member State's professional title (recital 7); and (iii) provides that lawyers must comply with the rules of professional conduct in force in that State (recital 8 and Article 6). (26)

49. In short, Directive 98/5 is a hybrid directive, which addresses freedom of establishment for migrant lawyers wishing to practise under their home-country title by harmonising certain aspects whilst leaving Member States a substantial degree of autonomy in other respects. Promoting freedom of movement is balanced against the need to ensure that consumers are protected and that migrant lawyers fulfil their professional duties in the host Member State with respect for the due administration of justice. As a result, there is an intrinsic potential for tension between *admission* to practice (Article 3) and the *rules governing practice* (Article 6).

The question referred

50. The referring court asks, in essence, whether Article 3 of Directive 98/5 should be interpreted as permitting national rules prohibiting monks to be registered as lawyers under their home-country professional title, on the grounds that they do not provide certain guarantees necessary to practise as lawyers.

51. Monachos Eirinaios and the Commission submit that, according to the Court's case-law, Article 3 of Directive 98/5 has effected a complete harmonisation of the relevant rules. Presenting a certificate attesting registration with the competent authority of the home Member State is the only condition to which registration of the person concerned may be made subject in the host Member State. (27) Whether or not that person then provides the various guarantees necessary to practise as a lawyer is controlled by the relevant bar association at a later stage of the process.

52. The Commission adds that the question whether Article 7(1) of Directive 98/5 (which deals with disciplinary proceedings should a lawyer practising under his home-country professional title fail to fulfil the obligations in force in the host Member State) is applicable to Monachos Eirinaios is outside the scope of the present proceedings, which concerns only his right to register with the DSA.

53. At the hearing, the DSA submitted that a systematic interpretation of Articles 3(2) and 6(1) of Directive 98/5 in the light of its recitals should lead to the conclusion that a bar association may refuse to register a lawyer wanting to practise under his home-country professional title when it is apparent from the documents submitted that there is an impediment to such registration under national law.

54. The Greek Government argues that Article 3 of Directive 98/5 should be read in combination with Article 6 thereof. Were a monk to be registered with the DSA under his home-country professional title, he would immediately have to be struck off in accordance with the Greek rules of professional conduct. That would be an absurd result. The Greek Government considers that a monk does not have the independence necessary to practise as a lawyer.

55. The Dutch Government submits that Article 3 of Directive 98/5 should be interpreted as precluding national legislation prohibiting a monk from registering and practising as a lawyer under his home-country professional title. Article 6 of the directive does not cover comprehensively rules of professional conduct, which should therefore be examined in the light of other provisions of secondary law, such as Article 25(1)(a) of Directive 2006/123.

Registration under Article 3 of Directive 98/5

56. Article 3(2) of Directive 98/5 is solely concerned with registration of migrant lawyers with the competent authority of the host Member State. It provides that that authority 'shall register the lawyer' upon presentation of the relevant certificate.

57. That provision is intended to put an end to the differences in national rules on the conditions for registration with the competent authorities and thus establishes a mechanism for the mutual recognition of the professional titles of migrant lawyers (see point 43 above). It undertakes a *complete* harmonisation of the preliminary conditions required for the exercise of the right of establishment conferred by that directive. A lawyer who wishes to practise on a permanent basis in a Member State other than that in which he obtained his professional qualification is obliged to register with the competent authority in that Member State. That authority must effect that registration 'upon presentation of a certificate attesting to his registration with the competent authority of the home Member State'. (28)

58. According to the Court's settled case-law, the *only* condition to which registration may be made subject is that the person concerned should present that certificate to the competent authority of the host Member State. Registration by the host Member State is then mandatory, enabling the person concerned to practise there under his home-country professional title. (29) That analysis is confirmed by the Commission Proposal which, in its comments on Article 3, states that 'registration is an *automatic entitlement* where the applicant furnishes proof of his registration with the competent authority in his home Member State' (emphasis added). Registration places the migrant lawyer at the threshold of practice in the host Member State.

59. Thus, the Court has already held that Italian nationals who, after having obtained a university law degree in Italy, obtained a further university law degree in Spain and were registered as lawyers in that Member State must be regarded as satisfying all the conditions required for their registration with an Italian bar on presentation of a certificate attesting to their registration in Spain. (30)

60. In the same vein, the Court found in *Wilson* that requiring lawyers practising under their home-country professional title to participate in a hearing to enable the Bar Council to verify whether they were proficient in the administrative and court languages of the host Member State was contrary to Directive 98/5. (31)

61. It follows from that case-law that Member States have no discretion to introduce additional requirements for registration of migrant lawyers under their home-country professional title.

62. At one level, therefore, the answer to the referring court's question is straightforward. Article 3(2) of Directive 98/5 prohibits the introduction of an additional condition — such as not being a monk — for registration under a lawyer's home-country professional title.

63. Is that conclusion undermined by the interaction between Article 3 and Article 6 of Directive 98/5 and the existence of national rules that provide for lawyers who are (or who become) monks immediately to be struck off the bar register or that impose certain obligations such as the requirement to have a seat and office in the geographical area of the court of first instance where the person concerned is designated as a lawyer or to receive remuneration for their services?

64. It seems from the information submitted to the Court that the provision of national law that prohibits monks from *becoming* lawyers is reintroduced in the form of a prohibition on *being* a monk and *practising* as a lawyer. (32) Whether that is indeed the case, as a correct reading of national law, is a matter for the national court to verify. Other national rules invoked by the DSA and the Greek Government include the obligations to be independent, to devote oneself exclusively to one's professional duties and to have a seat and office in the geographical area of the court of first instance where one is designated as a lawyer, and the prohibition on providing services without remuneration. The argument made is essentially that because someone who is a monk 'will' breach the rules of professional conduct, it follows that he should not be registered as a lawyer in the first place.

65. It is important to begin this part of the analysis by recalling exactly what is (and, importantly, what is *not*) here at issue. The present proceedings concern a migrant lawyer seeking to establish himself and practise under his home-country professional title. They do *not* concern the right of Greece, or any other Member State, to stipulate the conditions under which a person may qualify as a lawyer under its *own*rules and practise under its *own* professional title.

66. Does Article 6 of Directive 98/5 allow a Member State to ban an individual who qualifies for registration under Article 3 of that directive from practising there as a lawyer under his home-country title on the grounds that, as a person under religious discipline, he cannot by definition conduct himself in the manner required to provide the guarantees necessary for practice as a lawyer?

67. Here, I consider that an analytical distinction should be drawn between the specific rule stating that a clergyman or a monk cannot be a lawyer, on the one hand, and the various individual rules of professional conduct invoked by the DSA (for example, relating to devoting oneself exclusively to one's duties as a lawyer, or having a seat and office in the requisite geographical area), on the other hand.

68. I do not accept that the former rule is properly to be characterised as a rule of professional *conduct* that falls within the host Member State's remit under Article 6 of Directive 98/5. It seems to me that such a rule, when it is scrutinised more closely, is a rule stating that persons with particular *characteristics* should not be allowed to practice. The unspoken assumption is that, because person A has those *characteristics*, once he commences practice he will necessarily *behave* in a particular way that is unacceptable under the deontological code. But that is an assumption; and rules of professional conduct are meant to regulate actual conduct, not assumed future behaviour. If one substitutes 'person with red hair' for 'monk' in the example that I have just given, it will readily become apparent why such a rule is not, properly speaking, a rule of professional conduct.

69. I add that as far as I can see such a rule would, moreover, in reality deprive the person adversely affected of the procedural guarantees afforded by Articles 7 and 9 of Directive 98/5. If it is assumed that a person with red hair will (for example) automatically breach client confidentiality and he is therefore disciplined in advance by being struck off the bar register before he ever starts to practice, how would the careful bilateral procedure under Article 7 between the host Member State and the home Member State or the right of recourse to a court under Article 9 afford any real protection?

70. Since only rules of professional conduct are covered by Article 6 of Directive 98/5, it follows that a national rule imposing an absolute prohibition on a monk practising as a lawyer cannot be applied to a migrant lawyer who qualifies for registration under Article 3 and who seeks to practise under his home-country title.

71. What of the second category of rules identified above?

72. It is clear from Article 6(1) of Directive 98/5 that lawyers practising under their home-country professional title in a host Member State are subject to the same rules of professional conduct as lawyers practising under the professional title of that State. (33) It thus follows from Articles 6 and 7 of that directive that such lawyers must comply with two sets of rules of professional conduct: the rules of their home Member State and those of the host Member State. If they fail to do so, they will incur disciplinary sanctions and may be exposed to professional liability. (34)

73. That said, it seems to me that the competent authorities of the host Member State are not entitled to *assume* in advance that

because the person concerned is under religious discipline (or, come to that, an atheist or a member of a particular political or philosophical grouping), he (or she) will automatically and inevitably behave in a way that breaches the disciplinary rules for lawyers in that Member State. Rather, they must wait and see how the person concerned actually *conducts himself in practice*. That is, after all, what rules of professional *conduct* are meant to regulate.

74. As the Court held in *Jakubowska*, rules of professional conduct, unlike the rules concerning the preliminary conditions required for registration, are *not harmonised* and may therefore differ considerably from those in force in the home Member State. Failure to comply with those rules may lead to a lawyer being removed from the register in the host Member State. (35) The Court there also emphasised that the absence of conflicts of interest is essential to the practice of the profession of lawyer and requires, in particular, that lawyers should be in a situation of independence vis-à-vis the public authorities and other operators, by whom they must never be influenced. Thus, the fact that particular rules of professional conduct are strict cannot be criticised per se. However, as well as being applied without distinction to all lawyers registered in that Member State, those rules should also not go beyond what is necessary to achieve their objective. (36)

75. In making the necessary assessment, the objectives pursued by the national legislation must first be identified. (37) The referring court has suggested that the reason for the prohibition on monks acting as lawyers is that the public interest requires a lawyer to occupy himself exclusively with his duties, coupled with the fact that practising as a lawyer entails dealing with disputes, which is incompatible with the status of religious minister. The referring court likewise mentions the requirement of professional independence and freedom to handle cases. Specific ancillary rules of professional conduct invoked which, it is said, a monk would not be able to comply with include the obligation to have a seat and geographical office in the area of the court of first instance where the person concerned is designated as a lawyer and the prohibition on providing services without remuneration.

76. The reasoning put forward seems to me to combine what indeed may properly be described as 'objectives' (and praiseworthy objectives at that) — protecting the due administration of justice and ensuring that the client has access to impartial advice and proper professional representation — with the recurrent assumption that a person under religious discipline will 'obviously' not be able to behave in a way that is compatible with those objectives. On the particular facts of a particular lawyer's professional conduct, that assumption may indeed be correct. However, it may also be erroneous. That can best be shown by taking two (imaginary) examples.

77. Monk X approaches professional practice as a lawyer as a minor, ancillary intellectual activity that complements his religious life. He regularly refuses to handle cases for 'bad' people; always slants his legal advice so that it accords in all respects with what, morally, he considers that his client should do in order to respect the religious teachings of the Church; and is not available on any regular basis in the geographical area in which he was designated as a lawyer. His *conduct* in practice clearly violates the detailed rules of professional conduct in the host Member State and undermines the public interest objectives of those rules. It is clear that the competent authorities of the host Member State can (and indeed should) institute disciplinary proceedings against Monk X. On the facts that I have outlined, those proceedings will result in his being struck off the register in the host Member State. (I add that he might also well be in trouble under the disciplinary rules of his home Member State.) All this will, however, happen with respect for due process; and Monk X will be able to have recourse to a court or tribunal to challenge the decision disbarring him.

78. Monk Y discusses with his religious superiors the professional requirements to which he will be subject if he starts to practise as a lawyer. Item by item, they examine together the applicable rules. He receives the necessary dispensation to have a proper seat and office in the geographical area where he is designated. It is agreed that he will charge normal fees for his services and hand them over to a designated charity. He is dispensed from formal attendance at community prayer during the working day so that he can devote himself exclusively to his duties as a lawyer. His religious superiors agree to respect his professional independence. On that basis, Monk Y commences practice as a lawyer; and his *conduct* as a lawyer is irreproachable. On the facts that I have outlined, it would clearly be objectively unjustified to institute disciplinary proceedings against him, still less to disbar him. Albeit that he is a monk, he is complying with the relevant rules of professional conduct.

79. I have deliberately given imaginary examples. It is not part of the function of this Court to second-guess what will happen as or when Monachos Eirinaios commences practice. The only conclusion that I reach here — and, I respectfully suggest, the only aspect of the story that the Court need address in answering the question referred — is that Article 6 of Directive 98/5 does not permit a Member State automatically to ban a person who qualifies for registration under Article 3 from practising there as a lawyer under his home-country title on the grounds that, as a person under religious discipline, he cannot by definition conduct himself in the manner required to provide the guarantees necessary for practice as a lawyer.

Conclusion

80. In the light of the foregoing considerations, I suggest that the Court should answer the question posed by the Symvoulio tis Epikrateias (Council of State, Greece) as follows:

Article 3(2) of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained should be interpreted as precluding the application of a national rule prohibiting a person from being registered as a lawyer under his home-country professional title on the grounds that he is a monk. Article 6 thereof does not permit a Member State automatically to ban a person who qualifies for registration under Article 3 from practising there as a lawyer under his home-country title on the grounds that, as a person under religious discipline, he cannot by definition conduct himself in the manner required to provide the guarantees necessary for practice as a lawyer.

1 Original language: English.

2 'Οὐδεὶς δύναται δυσὶ κυρίοις δουλεύειν· ἢ γὰρ τὸν ἕνα μισήσει καὶ τὸν ἕτερον ἀγαπήσει, ἢ ἑνὸς ἀνθέξεται καὶ τοῦ ἑτέρου καταφρονήσει. Οὐ δύνασθε Θεῷ δουλεύειν καὶ μαμωνᾷ', Matthew, 6:24.

3 Luke, 10:25-37.

4 Directive of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77, p. 36), last amended by Council Directive 2013/25/EU of 13 May 2013 adapting certain directives in the field of right of establishment and freedom to provide services, by reason of the accession of the Republic of Croatia (OJ 2013 L 158, p. 368).

5 The normal translation of 'Monachos Eirinaios' in English, the original language of this Opinion, would be 'Brother Eirinaios'. However, I shall here retain the term 'Monachos' (monk) in order to avoid the different perceptions and connotations that might accompany the various linguistic versions.

6 Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16), repealed by Directive 2005/36 of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22).

7 Article 5.

8 Article 7(1)(a) and (c) respectively.

9 Article 7(2).

10 The referring court described Monachos Eirinaios as a monk at the Holy Monastery of Petra, located in Karditsa. However, at the hearing counsel for Monachos Eirinaios indicated that he is currently based on the island of Zakynthos.

11 Referring court (full court), judgment No 2368/1988.

12 Referring court, judgment No 1090/1989.

13 Council Directive of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17), last amended by Council Directive 2013/25/EU of 13 May 2013 adapting certain directives in the field of right of establishment and freedom to provide services, by reason of the accession of the Republic of Croatia (OJ 2013 L 158, p. 368).

14 Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), recital 33 and Article 1(1).

15 Second recital and Article 1 of Directive 77/249.

16 See Article 1(4) of Directive 98/5. See, also to that effect, judgment of 2 December 2010, *Jakubowska*, C-225/09, EU:C:2010:729.

17 Recital 42 of Directive 2005/36. The Court has held, in judgment of 3 February 2011, *Ebert*, C-359/09, EU:C:2011:44 (a case concerning Directive 89/48, which was repealed by Directive 2005/36, and Directive 98/5) that those two directives complement one another by establishing, for lawyers from Member States, two means for gaining admission to the profession of lawyer in a host Member State under the professional title of that State: see paragraphs 27 to 35.

18 Recital 33 and Article 1(1) of Directive 2006/123.

19 Recitals 1 and 5 and Article 1(1) of Directive 98/5. See also the Commission's Proposal for a European Parliament and of Council Directive to facilitate practice of the profession of a lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, COM(94) 572 final ('the Commission Proposal'), point 1.3.

20 Recitals 1, 5 and 6.

21 Recital 6 of Directive 98/5, and judgment of 17 July 2014, *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 37 and the case-law cited.

22 See, to that effect, judgment of 17 July 2014, *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 36 and the case-law cited.

23 Judgment of 17 July 2014, *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 56.

24 Recital 9. See, to that effect, judgment of 7 November 2000, *Luxembourg* v *Parliament and Council*, C-168/98, EU:C:2000:598, where the Court held 'that the Community legislature, with a view to making it easier for a particular class of migrant lawyers to exercise the fundamental freedom of establishment, has chosen, in preference to a system of *a priori* testing of qualification in the national law of the host Member State, a plan of action combining consumer information, restrictions on the extent to which or the detailed rules under which certain activities of the profession may be practised, a number of applicable rules of professional conduct, compulsory insurance, as well as a system of discipline involving both the competent authorities of the home Member State and the host State. The legislature has not abolished the requirement that the lawyer concerned should know the national law applicable in the cases he handles, but has simply released him from the obligation to prove that knowledge in advance' (at paragraph 43). I add that since the professional title for a Greek-qualified and a Cypriot-qualified lawyer is the same ('Δικηγόρος'), the DSA would in my view be justified in requiring Monachos Eirinaios to indicate that he is not Greek-qualified – perhaps, by using '(Κύπρος)' after his title. See points 8 and 9 above.

25 See Commission Proposal at point 2.

26 See also Commission Proposal at point 3.3, which emphasises that the proposal confines itself to laying down *minimum requirements* which migrant lawyers must satisfy. For the rest, it refers to the rules in particular of professional conduct applicable in the host Member State to lawyers practising under the professional title of that State.

27 Judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraphs 66 and 67.

28 Judgment of 17 July 2014, *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 38 and the case-law cited.

29 Judgment of 17 July 2014, *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 39 and the case-law cited.

30 Judgment of 17 July 2014, *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraphs 9 and 40.

31 Judgment of 19 September 2006, C-506/04, EU:C:2006:587, paragraph 77. See also judgment of 19 September 2006, *Commission* v *Luxembourg*, C-193/05, EU:C:2006:588, paragraph 40.

32 Article 7(1)(a) of the Lawyer's Code, see point 22 above.

33 Judgment of 3 February 2011, *Ebert*, C-359/09, EU:C:2011:44, paragraph 39 and the case-law cited.

34 Judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 74.

35 Judgment of 2 December 2010, C-225/09, EU:C:2010:729, paragraph 57.

36 Judgment of 2 December 2010, *Jakubowska*, C-225/09, EU:C:2010:729, paragraphs 59 to 62.

37 See, to that effect, and only by analogy, judgment of 21 October 1999, *Zenatti*, C-67/98, EU:C:1999:514, paragraphs 26 and 30.

Case C-216/18 PPU – LM

JUDGMENT OF THE COURT (Grand Chamber)

25 July 2018 (*)

(Reference for a preliminary ruling — Urgent preliminary ruling procedure — Police and judicial cooperation in criminal matters — European arrest warrant — Framework Decision 2002/584/JHA — Article 1(3) — Surrender procedures between Member States — Conditions for execution — Charter of Fundamental Rights of the European Union — Article 47 — Right of access to an independent and impartial tribunal)

In Case C-216/18 PPU,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 23 March 2018, received at the Court on 27 March 2018, in proceedings relating to the execution of European arrest warrants issued against

LM,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta (Rapporteur), M. Ilešič, J.L. da Cruz Vilaça, J. Malenovský, E. Levits and C.G. Fernlund, Presidents of Chambers, A. Borg Barthet, J.-C. Bonichot, A. Arabadjiev, S. Rodin, F. Biltgen, C. Lycourgos and E. Regan, Judges,

Advocate General: E. Tanchev,

Registrar: L. Hewlett, Principal Administrator,

having regard to the referring court's request of 23 March 2018, received at the Court on 27 March 2018, that the reference for a preliminary ruling be dealt with under the urgent procedure, pursuant to Article 107 of the Rules of Procedure of the Court,

having regard to the decision of 12 April 2018 of the First Chamber granting that request,

having regard to the written procedure and further to the hearing on 1 June 2018,

after considering the observations submitted on behalf of **[the parties and interveners]**:::

after hearing the Opinion of the Advocate General at the sitting on 28 June 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('Framework Decision 2002/584').

2 The request has been made in connection with the execution, in Ireland, of European arrest warrants issued by Polish courts against LM ('the person concerned').

Legal context

The EU Treaty

3 Article 7 TEU provides:

‘1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

…’

The Charter

4 Title VI of the Charter of Fundamental Rights of the European Union (‘the Charter’), headed ‘Justice’, includes Article 47, entitled ‘Right to an effective remedy and to a fair trial’, which states:

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

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

...’

5 The Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) point out that the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (‘the ECHR’).

6 Article 48 of the Charter, entitled ‘Presumption of innocence and rights of defence’, states:

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

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

Framework Decision 2002/584

7 Recitals 5 to 8, 10 and 12 of Framework Decision 2002/584 are worded as follows:

‘(5) ... the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present

extradition procedures. ...

(6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation.

(7) Since the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 [EU] and Article 5 [EC]. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective.

(8) Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender.

...

(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [EU, now, after amendment, Article 2 TEU], determined by the [European] Council pursuant to Article 7(1) [EU, now, after amendment, Article 7(2) TEU,] with the consequences set out in Article 7(2) thereof [now, after amendment, Article 7(3) TEU].

...

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 [EU] and reflected in the [Charter], in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

...'

8 Article 1 of Framework Decision 2002/584, entitled 'Definition of the European arrest warrant and obligation to execute it', provides:

'1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

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

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU].'

9 Articles 3, 4 and 4a of Framework Decision 2002/584 set out the grounds for mandatory or optional non-execution of a European arrest warrant.

10 Article 7 of Framework Decision 2002/584, entitled 'Recourse to the central authority', provides:

'1. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.

2. A Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official

correspondence relating thereto.

Member State wishing to make use of the possibilities referred to in this Article shall communicate to the General Secretariat of the Council information relating to the designated central authority or central authorities. These indications shall be binding upon all the authorities of the issuing Member State.'

11 Article 15 of Framework Decision 2002/584, entitled 'Surrender decision', states:

'1. The executing judicial authority shall decide, within the time limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.

...'

Irish law

12 Framework Decision 2002/584 was transposed into Irish law by the European Arrest Warrant Act 2003.

13 Section 37(1) of the European Arrest Warrant Act 2003 provides:

'A person shall not be surrendered under this Act if—

(a) his or her surrender would be incompatible with the State's obligations under—

(i) the [ECHR], or

(ii) the Protocols to the [ECHR],

(b) his or her surrender would constitute a contravention of any provision of the Constitution ...'

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

14 On 1 February 2012, 4 June 2012 and 26 September 2013, Polish courts issued three European arrest warrants ('the EAWs') against the person concerned, in order for him to be arrested and surrendered to those courts for the purpose of conducting criminal prosecutions, inter alia for trafficking in narcotic drugs and psychotropic substances.

15 On 5 May 2017 the person concerned was arrested in Ireland on the basis of those EAWs and brought before the referring court, the High Court (Ireland). He informed that court that he did not consent to his surrender to the Polish judicial authorities and was placed in custody pending a decision on his surrender to them.

16 In support of his opposition to being surrendered, the person concerned submits, inter alia, that his surrender would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 of the ECHR. In this connection, he contends, in particular, that the recent legislative reforms of the system of justice in the Republic of Poland deny him his right to a fair trial. In his submission, those changes fundamentally undermine the basis of the mutual trust between the authority issuing the European arrest warrant and the executing authority, calling the operation of the European arrest warrant mechanism into question.

17 The person concerned relies, in particular, on the Commission's reasoned proposal of 20 December 2017 submitted in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland (COM(2017) 835 final) ('the reasoned proposal') and on the documents to which the reasoned proposal refers.

18 In the reasoned proposal, the Commission, first of all, sets out in detail the context and history of the legislative reforms, next, addresses two particular issues of concern — namely (i) the lack of an independent and legitimate constitutional review and (ii) the threats to the independence of the ordinary judiciary — and, finally, invites the Council to determine that there is a clear risk of a serious breach by the Republic of Poland of the values referred to in Article 2 TEU and to address to that Member State the necessary recommendations in that regard.

19 The reasoned proposal also sets out the findings of the Commission for Democracy through Law of the Council of Europe relating to the situation in the Republic of Poland and to the effects of the recent legislative reforms on its system of justice.

20 Finally, the reasoned proposal notes the serious concerns expressed in that regard, during the period preceding the reasoned proposal's adoption, by a number of international and European institutions and bodies, such as the United Nations Human Rights Committee, the European Council, the European Parliament and the European Network of Councils for the Judiciary, and, at national level, by the Sąd Najwyższy (Supreme Court, Poland), the Trybunał Konstytucyjny (Constitutional Tribunal, Poland), the Rzecznik Praw Obywatelskich (Ombudsman, Poland), the Krajowa Rada Sądownictwa (National Council for the Judiciary, Poland) and associations of judges and lawyers.

21 On the basis of the information in the reasoned proposal and of the findings of the Commission for Democracy through Law of the Council of Europe relating to the situation in the Republic of Poland and to the effects of the recent legislative reforms on its system of justice, the referring court concludes that, as a result of the cumulative impact of the legislative changes that have taken place in the Republic of Poland since 2015 concerning, in particular, the Trybunał Konstytucyjny (Constitutional Court), the Sąd Najwyższy (Supreme Court), the National Council for the Judiciary, the organisation of the ordinary courts, the National School of Judiciary and the Public Prosecutor's Office, the rule of law has been breached in that Member State. The referring court bases that conclusion on changes found by it to be particularly significant, such as:

– the changes to the constitutional role of the National Council for the Judiciary in safeguarding independence of the judiciary, in combination with the Polish Government's invalid appointments to the Trybunał Konstytucyjny (Constitutional Tribunal) and its refusal to publish certain judgments;

– the fact that the Minister for Justice is now the Public Prosecutor, that he is entitled to play an active role in prosecutions and that he has a disciplinary role in respect of presidents of courts, which has the potential for a chilling effect on those presidents, with consequential impact on the administration of justice;

– the fact that the Sąd Najwyższy (Supreme Court) is affected by compulsory retirement and future appointments, and that the new composition of the National Council for the Judiciary will be largely dominated by political appointees; and

– the fact that the integrity and effectiveness of the Trybunał Konstytucyjny (Constitutional Court) have been greatly interfered with in that there is no guarantee that laws in Poland will comply with the Polish Constitution, which is sufficient in itself to have effects throughout the criminal justice system.

22 That being so, the referring court considers, on the ground that the 'wide and unchecked powers' of the system of justice in the Republic of Poland are inconsistent with those granted in a democratic State subject to the rule of law, that there is a real risk of the person concerned being subjected to arbitrariness in the course of his trial in the issuing Member State. Thus, surrender of the person concerned would result in breach of his rights laid down in Article 6 of the ECHR and should, accordingly, be refused, in accordance with Irish law and with Article 1(3) of Framework Decision 2002/584 read in conjunction with recital 10 thereof.

23 In this connection, the referring court observes that, in the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), the Court of Justice held, in the context of a surrender liable to result in a breach of Article 3 of the ECHR, that, if a finding of general or systemic deficiencies in the protections in the issuing Member State is made by the executing judicial authority, that authority must make an assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to a real risk of being subject in that Member State to inhuman or degrading treatment. It states that in that judgment the Court also established a two-step procedure to be applied by an executing judicial authority in such circumstances. That authority must, first of all, make a finding of general or systemic deficiencies in the protections provided in the issuing Member State and, then, seek all necessary supplementary information from the issuing Member State's judicial authority as to the protections for the individual concerned.

24 The referring court is uncertain whether, where the executing judicial authority has found that the common value of the rule of law enshrined in Article 2 TEU has been breached by the issuing Member State and that that systemic breach of the rule of law constitutes, by its nature, a fundamental defect in the system of justice, the requirement to assess, specifically and precisely, in accordance with the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), whether there are substantial grounds to believe that the individual concerned will be exposed to a risk of breach of his right to a fair trial, as enshrined in Article 6 of the ECHR, is still applicable, or whether, in such circumstances, the view may readily be taken that no specific guarantee as to a fair trial for that individual could ever be given by an issuing authority, given the systemic nature of the breach of the rule of law, so that the executing judicial authority cannot be required to establish that such grounds exist.

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

'(1) Notwithstanding the conclusions of the Court of Justice in [the judgment of 5 April 2016,] *Aranyosi and Căldăraru* [(C-404/15 and C-659/15 PPU, EU:C:2016:198)], where a national court determines there is cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State is no longer operating under the rule of law, is it necessary for the executing judicial authority to make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where his trial will take place within a system no longer operating within the rule of law?

(2) If the test to be applied requires a specific assessment of the requested person's real risk of a flagrant denial of justice and where the national court has concluded that there is a systemic breach of the rule of law, is the national court as executing judicial authority obliged to revert to the issuing judicial authority for any further necessary information that could enable the national court discount the existence of the risk to an unfair trial and if so, what guarantees as to fair trial would be required?'

The urgent procedure

26 The referring court requested that the present reference be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court.

27 In support of that request, the referring court relied, in particular, on the fact that the person concerned is currently deprived of his liberty, pending the decision on his surrender to the Polish authorities, and that the answer to the questions referred will be decisive for adopting that decision.

28 It must be stated, first, that the present reference for a preliminary ruling concerns the interpretation of Framework Decision 2002/584, which falls within the fields covered by Title V of Part Three of the FEU Treaty, relating to the area of freedom, security and justice. Consequently, the reference can be dealt with under the urgent preliminary ruling procedure.

29 Second, as regards the criterion relating to urgency, it is necessary, in accordance with the settled case-law of the Court, to take into account the fact that the person concerned is currently deprived of his liberty and that the question as to whether he may continue to be held in custody depends on the outcome of the dispute in the main proceedings. In addition, the situation of the person concerned must be assessed as it stands at the time when consideration is given to the request that the reference be dealt with under the urgent procedure (judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, EU:C:2017:629, paragraph 72 and the case-law cited).

30 In the present instance, it is not in dispute that, at that time, the person concerned was in custody. Also, his continued detention depends on the outcome of the main proceedings, the detention measure against him having been ordered, according to the explanations provided by the referring court, in the context of the execution of the EAWs.

31 In those circumstances, on 12 April 2018 the First Chamber of the Court, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decided to grant the referring court's request that the present reference be dealt with under the urgent preliminary ruling procedure.

32 It was also decided to remit the present case to the Court for it to be assigned to the Grand Chamber.

Consideration of the questions referred

33 First of all, it is apparent from the grounds of the order for reference and from the express mention of the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), in the first question, that the questions asked by the referring court relate to the circumstances in which the executing judicial authority may, on the basis of Article 1(3) of Framework Decision 2002/584, refrain from giving effect to a European arrest warrant on account of the risk of breach, if the requested person is surrendered to the issuing judicial authority, of the fundamental right to a fair trial before an independent tribunal, as enshrined in Article 6(1) of the ECHR, a provision which, as is clear from paragraph 5 of the present judgment, corresponds to the second paragraph of Article 47 of the Charter.

34 Thus, by its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether there are substantial grounds for believing that the individual concerned will run such a risk if he is surrendered to that State. If the answer is in the affirmative, the referring court asks the Court of Justice to specify the conditions which such a check must satisfy.

35 In order to answer the questions referred, it should be recalled that EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 34 and the case-law cited).

36 Both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter (see, to that effect, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 49 and the case-law cited), are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 26 and the case-law cited).

37 Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union (Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014, EU:C:2014:2454, paragraph 192).

38 It is apparent from recital 6 of Framework Decision 2002/584 that the European arrest warrant provided for in that framework decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition.

39 The purpose of Framework Decision 2002/584, as is apparent in particular from Article 1(1) and (2) and recitals 5 and 7 thereof, is to replace the multilateral system of extradition based on the European Convention on Extradition of 13 December 1957 with a system of surrender between judicial authorities of convicted or suspected persons for the purpose of enforcing judgments or of conducting prosecutions, the system of surrender being based on the principle of mutual recognition (judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 25 and the case-law cited).

40 Framework Decision 2002/584 thus seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union of becoming an area of freedom, security and justice, and has as its basis the high level of trust which must exist between the Member States (judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 25 and the case-law cited).

41 In the field governed by Framework Decision 2002/584, the principle of mutual recognition, which, as is apparent in particular from recital 6 of that framework decision, constitutes the 'cornerstone' of judicial cooperation in criminal matters, is applied in Article 1(2) thereof which lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of the framework decision. Executing judicial authorities may therefore, in principle, refuse to execute such a warrant only on the grounds for non-execution exhaustively listed by the framework decision and execution of the warrant may be made subject only to one of the conditions exhaustively laid down in Article 5. Accordingly, while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly (see, to that effect, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraphs 49 and 50 and the case-law cited).

42 Thus, Framework Decision 2002/584 explicitly states the grounds for mandatory non-execution (Article 3) and optional non-execution (Articles 4 and 4a) of a European arrest warrant, as well as the guarantees to be given by the issuing Member State in particular cases (Article 5) (see judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 51).

43 Nonetheless, the Court has recognised that limitations may be placed on the principles of mutual recognition and mutual trust between Member States 'in exceptional circumstances' (see, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 82 and the case-law cited).

44 In that context, the Court has acknowledged that, subject to certain conditions, the executing judicial authority has the power to bring the surrender procedure established by Framework Decision 2002/584 to an end where surrender may result in the requested person being subject to inhuman or degrading treatment within the meaning of Article 4 of the Charter (see, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 104).

45 For that purpose, the Court has relied, first, on Article 1(3) of Framework Decision 2002/584, which provides that the framework decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Articles 2 and 6 TEU and, second, on the absolute nature of the fundamental right guaranteed by Article 4 of the Charter (see, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 83 and 85).

46 In the present instance, the person concerned, relying upon the reasoned proposal and the documents to which it refers, has opposed his surrender to the Polish judicial authorities, submitting, in particular, that his surrender would expose him to a real risk of a flagrant denial of justice on account of the lack of independence of the courts of the issuing Member State resulting from implementation of the recent legislative reforms of the system of justice in that Member State.

47 It should thus, first of all, be determined whether, like a real risk of breach of Article 4 of the Charter, a real risk of breach of the fundamental right of the individual concerned to an independent tribunal and, therefore, of his fundamental right to a fair trial as laid down in the second paragraph of Article 47 of the Charter is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to a European arrest warrant, on the basis of Article 1(3) of Framework Decision 2002/584.

48 In that regard, it must be pointed out that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.

49 Indeed, the European Union is a union based on the rule of law in which individuals have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 31 and the case-law cited).

50 In accordance with Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and judicial protection of the rights of individuals under that law (see, to that effect, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 32 and the case-law cited, and of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 36 and the case-law cited).

51 The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 36 and the case-law cited).

52 It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 37).

53 In order for that protection to be ensured, maintaining the independence of those bodies is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 41).

54 The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, in accordance with the Court's settled case-law, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 43).

55 Since, as stated in paragraph 40 of the present judgment, Framework Decision 2002/584 is intended to establish a simplified system of direct surrender between 'judicial authorities' for the purpose of ensuring in the area of freedom, security and justice the free movement of judicial decisions in criminal matters, maintaining the independence of such authorities is also essential in the context of the European arrest warrant mechanism.

56 Framework Decision 2002/584 is founded on the principle that decisions relating to European arrest warrants are attended by all the guarantees appropriate for judicial decisions, inter alia those resulting from the fundamental rights and fundamental legal principles referred to in Article 1(3) of the framework decision. This means that not only the decision on executing a European arrest warrant, but also the decision on issuing such a warrant, must be taken by a judicial authority that meets the requirements inherent in effective judicial protection — including the guarantee of independence — so that the entire surrender procedure between Member States provided for by the framework decision is carried out under judicial supervision (see, to that effect, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 37 and the case-law cited).

57 Furthermore, in criminal procedures for the purpose of prosecution, or of enforcement of a custodial sentence or detention order, or indeed in substantive criminal proceedings, which lie outside the scope of Framework Decision 2002/584 and of EU law, the Member States are still obliged to observe fundamental rights enshrined in the ECHR or laid down by their national law, including the right to a fair trial and the guarantees deriving from it (see, to that effect, judgment of 30 May 2013, *F*, C-168/13 PPU, EU:C:2013:358, paragraph 48).

58 The high level of trust between Member States on which the European arrest warrant mechanism is based is thus founded on the premiss that the criminal courts of the other Member States — which, following execution of a European arrest warrant, will have to conduct the criminal procedure for the purpose of prosecution, or of enforcement of a custodial sentence or detention order, and the substantive criminal proceedings — meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts.

59 It must, accordingly, be held that the existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 of the Charter, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that European arrest warrant, on the basis of Article 1(3) of Framework Decision 2002/584.

60 Thus, where, as in the main proceedings, the person in respect of whom a European arrest warrant has been issued, pleads, in order to oppose his surrender to the issuing judicial authority, that there are systemic deficiencies, or, at all events, generalised deficiencies, which, according to him, are liable to affect the independence of the judiciary in the issuing Member State and thus to compromise the essence of his fundamental right to a fair trial, the executing judicial authority is required to assess whether there is a real risk that the individual concerned will suffer a breach of that fundamental right, when it is called upon to decide on his surrender

to the authorities of the issuing Member State (see, by analogy, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 88).

61 To that end, the executing judicial authority must, as a first step, assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State (see, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 89), whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached. Information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment.

62 Such an assessment must be carried out having regard to the standard of protection of the fundamental right that is guaranteed by the second paragraph of Article 47 of the Charter (see, by analogy, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 88 and the case-law cited).

63 As regards the requirement that courts be independent which forms part of the essence of that right, it should be pointed out that that requirement is inherent in the task of adjudication and has two aspects. The first aspect, which is external in nature, presupposes that the court concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (see, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 44 and the case-law cited).

64 That essential freedom from such external factors requires certain guarantees appropriate for protecting the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office (judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 51 and the case-law cited). Their receipt of a level of remuneration commensurate with the importance of the functions that they carry out also constitutes a guarantee essential to judicial independence (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 45).

65 The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 52 and the case-law cited).

66 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. In order to consider the condition regarding the independence of the body concerned as met, the case-law requires, inter alia, that dismissals of its members should be determined by express legislative provisions (judgment of 9 October 2014, *TDC*, C-222/13, EU:C:2014:2265, paragraph 32 and the case-law cited).

67 The requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary.

68 If, having regard to the requirements noted in paragraphs 62 to 67 of the present judgment, the executing judicial authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts, that authority must, as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk (see, by analogy, in the context of Article 4 of the Charter, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 92 and 94).

69 That specific assessment is also necessary where, as in the present instance, (i) the issuing Member State has been the subject of a reasoned proposal adopted by the Commission pursuant to Article 7(1) TEU in order for the Council to determine that there is a clear risk of a serious breach by that Member State of the values referred to in Article 2 TEU, such as that of the rule of law, on account, in particular, of actions impairing the independence of the national courts, and (ii) the executing judicial authority considers that it possesses, on the basis, in particular, of such a proposal, material showing that there are systemic deficiencies, in the light of those values, at the level of that Member State's judiciary.

70 It is apparent from recital 10 of Framework Decision 2002/584 that implementation of the European arrest warrant mechanism may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, determined by the European Council pursuant to Article 7(2) TEU, with the consequences set out in Article 7(3) TEU.

71 It thus follows from the very wording of that recital that it is for the European Council to determine a breach in the issuing Member State of the principles set out in Article 2 TEU, including the principle of the rule of law, with a view to application of the European arrest warrant mechanism being suspended in respect of that Member State.

72 Therefore, it is only if the European Council were to adopt a decision determining, as provided for in Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend Framework Decision 2002/584 in respect of that Member State that the executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected.

73 Accordingly, as long as such a decision has not been adopted by the European Council, the executing judicial authority may refrain, on the basis of Article 1(3) of Framework Decision 2002/584, to give effect to a European arrest warrant issued by a Member State which is the subject of a reasoned proposal as referred to in Article 7(1) TEU only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case, that there are substantial grounds for believing that the person in respect of whom that European arrest warrant has been issued will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial.

74 In the course of such an assessment, the executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State's courts, to which the material available to it attests are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject.

75 If that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant.

76 Furthermore, the executing judicial authority must, pursuant to Article 15(2) of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk.

77 In the course of such a dialogue between the executing judicial authority and the issuing judicial authority, the latter may, where appropriate, provide the executing judicial authority with any objective material on any changes concerning the conditions for protecting the guarantee of judicial independence in the issuing Member State, material which may rule out the existence of that risk for the individual concerned.

78 If the information which the issuing judicial authority, after having, if need be, sought assistance from the central authority or one of the central authorities of the issuing Member State, as referred to in Article 7 of Framework Decision 2002/584 (see, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 97), has sent to the executing judicial authority does not lead the latter to discount the existence of a real risk that the individual concerned will suffer in the issuing Member State a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, the executing judicial authority must refrain from giving effect to the European arrest warrant relating

to him.

79 In the light of the foregoing considerations, the answer to the questions referred is that Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of the framework decision, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.

Costs

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

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

Article 1(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584, as amended, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.

PART D:
ECHR and
ECtHR JURISPRUDENCE

The European Convention of Human Rights and Fundamental Freedoms (ECHR) 1950 [Extracts]

Article 3 - Prohibition of torture
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 6 - Right to a fair trial
1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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

3. Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 8 – Right to respect for private and family life
1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 – Freedom of thought, conscience and religion
1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 12 - Right to marry
Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13 - Right to an effective remedy
Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14 – Prohibition of discrimination
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
17/10/2012

B e f o r e :

LORD JUSTICE RICHARDS
LORD JUSTICE SULLIVAN
and
SIR STEPHEN SEDLEY

Between:

EM (ERITREA) & OTHERS	**Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

Monica Carss-Frisk QC, David Chirico and Mark Symes (instructed by Wilson Solicitors LLP) for the Appellants EM & AE
Monica Carss-Frisk QC, David Chirico and Mark Symes (instructed by Sutovic & Hartigan Solicitors) for the Appellant EH
Monica Carss-Frisk QC and Melanie Plimmer (instructed by Switalskis Solicitors) for the Appellant MA
Alan Payne (instructed by the Treasury Solicitors) for the Secretary of State
Hearing dates : 18 - 20 September 2012

HTML VERSION OF JUDGMENT

Sir Stephen Sedley: :

This is the judgment of the court.

The principal issue

1. Albeit in differing circumstances, these four cases raise one central question: is it arguable that to return any of the claimants to Italy, either as an asylum-seeker pursuant to Council Regulation 343/2003 (better known as the Dublin II Regulation) or as a person already granted asylum there, would entail a real risk of inhuman or degrading treatment in violation of article 3 of the ECHR? If this is arguable, the Home Secretary's certification of each of the cases as clearly unfounded will fall, giving the entrant a right of in-country appeal against the decision to remove him or her to Italy.

2. The central answer advanced on behalf of the Home Secretary is that there is a presumption of law and of fact that Italy's treatment of asylum-seekers and refugees is compliant with its international obligations; that the presumption is rebuttable; but that, in the absence in the present cases of a legally sufficient rebuttal, evidence of a real risk to the claimants of inhuman or degrading treatment in Italy cannot prevent their return. If this is right, the claims will all have been properly certified, subject to a separate issue in MA's case as to whether it can be tenably argued that removal will violate a Convention right within the United Kingdom.

The legal framework

3. The Dublin II Regulation gives legal force within the European Union to what began as a treaty providing for asylum claims to be processed and acted on by the first member-state in which the asylum-seeker arrives, and for asylum-seekers and refugees to be returned to that state if they then seek asylum or take refuge elsewhere in the EU. The assumption underlying this system is that every member state will comply with its international obligations under what were initially the 1951 Refugee Convention and the European Convention on Human Rights but now include the Qualification Directive and the EU Charter. (There appears to be no system of cost-equalisation geared to the differing geopolitical burdens thrown on member states.)

4. When, therefore, it was established in *MSS v Belgium* [2011] ECHR 108 that Greece was in systemic default of its international obligations, the Grand Chamber of the European Court of Human Rights held Belgium to have breached article 3 of the Convention by returning asylum-seekers there. The argument of the appellants in the present group of cases is that the same can now be shown to be true of Italy, setting the United Kingdom in the same position as Belgium in *MSS*.

5. By virtue of s. 92(4)(a) of the Nationality, Immigration and Asylum Act 2002 and of para. 5(4) in part 2 of Sch. 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004, claims concerning removals to a listed country (of which Italy is one) are to be certified as clearly unfounded unless the Home Secretary is satisfied that they are not. The Home Secretary in each instance has decided that the contention that Italy is in systemic breach of its material international obligations is clearly unfounded, and that there is no separate reason to abstain from removal. Certification forbids any appeal while the applicant remains in the United Kingdom.

6. In deciding whether the Home Secretary was entitled to conclude that the statutory presumption applied to each of these cases, Alan Payne, her counsel, accepts that in most cases, these included, the court is as well placed as the Home Secretary is to evaluate whether a claim, if brought before an independent tribunal, would be bound to fail: see *R v Home Secretary, ex p. Yogathas* [2002] UKHL 36, #34; *R(L) v Home Secretary* [2003] EWCA Civ 25; *ZT (Kosovo)* [2009] UKHL 6. This concession is properly made, not least because to accord presumptive finality to the view of the Secretary of State would be to constitute her judge in her own cause. It means that we are not required to embark on the near-metaphysical question whether, even if the court takes a contrary view, a rational Home Secretary could consider the claim unfounded. The question for the court, as for the Home Secretary, is whether any tribunal could lawfully determine the material claim to be well-founded.

The four cases

7. Two of these cases, those of EH and AE, come before this court pursuant to CPR 52.15(3) and (4). Permission to apply for judicial review was refused at first instance but was granted on application to this court, which has retained the substantive cases. In these two cases, therefore, the court sits as a forum of judicial review.

8. The other two cases, those of EM and MA, are appeals against substantive decisions of the Administrative Court. Permisssion to appeal was granted by the trial judge, Kenneth Parker J, in EM's case and by Rix LJ in MA's case, having been refused by Langstaff J.

9. The four cases have been argued on the same basis. The Home Secretary accepts that MA should have the benefit of any finding in favour of the other three notwithstanding her somewhat different situation; but in MA's case a separate ground has been advanced contingently on the failure of the principal ground.

10. The factual detail of the four cases has been painstakingly set out for us by counsel. No disrespect is intended to those who have worked so hard on it if this judgment refers only to parts of it. Likewise we shall not make detailed citations from the judgments below. That of Langstaff J in *MA (Eritrea)* is recorded at [2012] EWHC 56 (Admin); that of Kenneth Parker J in *EM (Eritrea)* at [2011] EWHC 3012 (Admin) and [2012] EWHC 1799 (Admin). In the other two cases permission to apply for judicial review was refused in

reasoned judgments after argument before deputy judges – C.M.G. Ockelton, recorded at [2011] EWHC 3826 (Admin), and Stephen Males QC, recorded at [2012] EWHC 512 (Admin).

11. Mr Payne accepts that for present purposes the court may consider fresh material that has come into being since the hearings in the Administrative Court. He has waived any objection to fresh or late evidential material and, without objection, has put in some of his own.

The appellants

12. The accounts set out below summarise the claimants' cases at face value. This is because, when deciding whether an asylum claim is capable of succeeding, it is ordinarily necessary to take the facts at their highest in the claimant's favour.

(i) EH

13. EH is an Iranian national who initially arrived in Italy and must have made himself known to the authorities there, since he was fingerprinted on 11 November 2010. After a short while he left the country and made his way eventually to the United Kingdom, where on 11 March 2011 he applied for asylum on the ground that he had been tortured as a political detainee in Iran. The Italian authorities were contacted and accepted responsibility for his claim under Dublin II. His claim was certified as meeting the conditions set out in paragraphs 4 and 5 in part 2 of Sch.3 to the 2004 Act, and the case has proceeded on the basis that this was a certification that the claim was clearly unfounded. Removal directions were set.

14. The judicial review proceedings now before this court seek to challenge the decision to certify and the removal directions on the ground that there is a real risk that EH will be subjected in Italy to inhuman and degrading conditions. He relies not on his own experience of reception in Italy, which was brief, but on that of others.

15. There is a great deal of evidence that EH is now severely disturbed and suffering from PTSD and depression, both of which require treatment. It is sufficient for present purposes that we accept that this is the case, and that there is on the evidence (to which we will come) a real risk that EH, whether as an asylum-seeker or as an accepted refugee, will find himself street-homeless if returned to Italy.

(ii) EM

16. EM is an Eritrean national who left the country for fear of persecution as an Orthodox Pentecostal Christian. He made his landfall on Lampedusa, where he was fingerprinted and then placed in a hotel in Badia Tedalda. After about 2 months he and the other asylum-seekers there were told, presumably by a corrupt official, that they must each pay €120 for further processing of their applications. Having no money, he was given a train ticket to Milan, where for some three weeks he found himself homeless and destitute, living among other asylum-seekers in similar circumstances.

17. A fellow asylum-seeker helped him to travel clandestinely to the United Kingdom, where he claimed asylum. His fingerprints having been found to correspond with fingerprints on record in Italy, Italy was asked to accept responsibility for his claim and, having failed to respond, was deemed to have accepted responsibility. Removal directions were set, but were challenged by an application for judicial review. On 1 June 2010 the Home Secretary certified EM's asylum claim as clearly unfounded. This too is challenged in the judicial review proceedings.

(iii) AE

18. AE fled from Eritrea because of the ill-treatment of her husband and herself by the Eritrean authorities. She was screened on arrival in Italy, placed in a hotel, interviewed and, after some three months, recognised as a refugee and granted a 5-year residence permit.

19. Following this, she was sent to (probably) Arezzo, where with others, both men and women, she was given accommodation in crowded and insanitary premises which had to be vacated during the day. She was given food vouchers which ran out, leaving her dependent on charitable handouts. After three months even this accommodation was withdrawn. After a spell of living in cramped

accommodation, shared with men, she left Italy and made her way to the United Kingdom, arriving on 19 January 2010. From here she was returned in October 2010 to Italy.

20. AE then found herself destitute in Milan, living in a squat where she was repeatedly raped by a number of men who threatened her with reprisal if she reported them. She had no money and relied on charity for food. Finally, with €100 borrowed from a fellow Eritrean, she made her way back to this country, where she was detained on arrival. A decision was made to remove her again to Italy. Her claim that to do so would violate her human rights was certified by the Home Secretary as clearly unfounded, and an application for permission to seek judicial review of the certificate failed before Holman J.

21. Following the submission of psychiatric evidence that AE was badly traumatised and suicidal at the prospect for return to Italy, the Home Secretary rejected an application to use her discretionary power to transfer AE's refugee status to the United Kingdom and confirmed the decision to remove her to Italy. Enquiries made by the Border Agency were said to have elicited an undertaking that AE would be accommodated on return in SPRAR accommodation (see below) in Prato, but her representatives, having failed to obtain disclosure, doubt this.

22. In response to a Rule 39 indication issued by the European Court of Human Rights, removal of AE has been stayed. On 10 November 2011 her renewed application for permission to apply for judicial review was refused by the Administrative Court. Her challenge to the refusal to transfer her refugee status to this country is not pursued; the challenge to the certification of her claim is.

(iv) MA

23. MA is an Eritrean woman who reached Italy in 2005 and in April 2006 was accorded refugee status there on the ground of fear of persecution as a Pentecostal Christian. In January 2008 an agent brought her three children to Italy to join her: Marta, born 16 January 1994 and now therefore an adult; Daniel, born 20 May 1998; and Yared, whose date of birth we do not know.

24. MA's evidence is that the family, despite being recognised as refugees, had to live on the streets, sleeping under bridges, lighting fires for warmth when rain permitted and relying on charitable handouts for food. After three months MA brought her children clandestinely to the United Kingdom. In the course of embarking in a lorry at Calais in the dark, she lost Yared, whose whereabouts are still not known. The other two are now settled in secondary and tertiary education here and are both doing well.

25. Because of their failure to respond to the UK's request, the Italian authorities in July 2008 were deemed under Dublin II to have accepted responsibility for MA and her children. Removal directions were set but were cancelled because the Italian police had discrepant details about the children and would not accept them. MA would not cooperate with attempts to interview her about this. Instead she sought to oppose removal by reliance on medical evidence that she was HIV positive. By July 2009 Italy had accepted responsibility and fresh removal directions were set. They were cancelled because of a new application for judicial review, which was later withdrawn. They were re-set for July 2010, but the family failed to check in. MA then made further allegations about her treatment both in Eritrea and in Italy.

26. In August 2010 the Home Secretary certified her claim as clearly unfounded. She refused to transfer MA's refugee status to the United Kingdom and re-set removal directions. These were cancelled when the present proceedings were brought.

27. MA herself has on any view displayed considerable deviousness, lacerating her fingertips to prevent identification on arrival here and using a different name in Italy. Further, it was only after a third set of removal directions was given that, for the first time, she gave an account of being serially raped in both Italy and Eritrea. But it is sufficient for present purposes to record, first, that late accounts of rape do not necessarily make them incredible and, secondly, that MA's account of the effects of her experiences is now supported by what appears to be cogent medical evidence.

28. As to MA's two children, Marta, although now legally an adult, continues to form part of the mother's human rights claim. She is taking a BTEC course at Kirklees College, who speak highly of her. Daniel is at a school which has reported favourably on both his behaviour and his academic progress. Neither child has any desire to be returned to Italy, with its associations of misery and hardship, and the mother is reportedly suicidal at the prospect of enforced return.

The Home Secretary's evidence

29. The Home Secretary has put a substantial body of evidence before the court describing Italy's system for the processing, reception, accommodation and support of asylum-seekers and refugees. We will come in due course to the legal materiality both of this evidence and of the countervailing evidence of the four claimants which is summarised above. In essence, as set out in the Italian government's *Guida Practica* exhibited to the witness statement made in MA's case by Carl Dangerfield, the UK Border Agency's Italian liaison officer, it is as follows.

30. Asylum seekers are accommodated in a reception centre for long enough for the Territorial Commission to evaluate their claims. If accepted as refugees, or while awaiting a decision, they are given an international protection order and assigned to a "territorial project" which forms part of SPRAR, the national system for the protection of asylum-seekers and refugees. SPRAR will either provide accommodation or transfer the claimant to a public or private local provider. Access to SPRAR is by referral only. It provides food and lodging and courses designed to assist integration, but (with few exceptions) the limit of stay there is 6 months. On leaving, claimants can apply to charitable or voluntary providers but there is no guarantee of success. However, the international protection order affords access to free healthcare and social assistance (which does not extend to social security) equivalent to that enjoyed by nationals. This requires a fiscal code number, which in turn depends on having an address which can be verified by the police. An international protection order also allows the holder to take employment or undertake self-employment, to marry, to apply for family reunification, to obtain education, to seek recognition of foreign qualifications, to apply for public housing and, after 5 years, for naturalisation. For those denied these rights, there is, says Mr Payne, access to the Italian courts.

31. The claimants' case is that this may be the system in theory, but their own experience and that of many others, to which independent reports attest, is that it is not what happens in reality to a very considerable number both of asylum-seekers and of recognised refugees. In short, they say, Italy's system for the reception and settlement of asylum-seekers and refugees is in large part dysfunctional, with the result that anyone arriving or returned there, even if they have children with them, faces a very real risk of destitution.

The legal position

32. If the matter stopped here, we would be bound, on the evidence we have summarised, to conclude that there was a triable issue in all four cases as to whether return to Italy entailed a real risk of exposing each claimant to inhuman or degrading treatment contrary to article 3 of the ECHR. It would follow that the Home Secretary's certificates were of no effect and that an in-country appeal against removal was available, in which the nature and gravity of the risk to each claimant would be set against the legal and case-specific reasons for his or her removal. But it is the Home Secretary's case that none of this arises unless and until it can be shown that Italy is in systemic rather than sporadic breach of its international obligations, and that the requisite standard and mode of proof of this are beyond anything adduced in the present cases.

33. How this position has been reached can be tracked through three recent cases, two of them decided by the European Court of Human Rights and therefore of persuasive but not binding force, the third decided by the Court of Justice of the European Union and binding upon us.

34. *KRS v United Kingdom* [2008] ECHR 1781[1] concerned an Iranian asylum-seeker who had entered Greece before seeking asylum here and whom the Home Secretary therefore proposed to return to Greece. His removal had been halted by a Rule 39 indication, but the Fourth Section found his claim inadmissible. It noted seriously adverse reports on Greece's treatment of asylum-seekers and returnees, principally from the United Nations High Commissioner for Refugees, supported by reports from Amnesty International and from three NGOs including Greek Helsinki Monitor; but it concluded that Greece's international commitment to the European asylum system and her presumed compliance with it afforded a complete answer. The court took the view that the UNHCR's position paper of 15 April 2008, while advising member states to suspend returns to Greece under Dublin II and to use their power under article 3(2) to deal with these applications domestically, had not displaced "the presumption … that Greece will abide by its obligations" under the material Directives, in particular because Greece had no policy of refoulement to Iran and no block on access to its own courts.

35. In the course of reaching this conclusion the court placed critical weight on the report of the UNHCR "whose independence, reliability and objectivity are, in its view, beyond doubt" (p.17).

36. When, therefore, the UNHCR in April 2009 pointed out that the court in *KRS* had seemingly overlooked its other criticisms of Greece, its further intervention proved decisive. In *MSS v Belgium and Greece* [2011] ECHR 108 the Grand Chamber noted the

UNHCR's letter sent to Belgium in April 2009. The letter noted that the Fourth Section of the court in *KRS* had decided that transfer to Greece did not carry a risk of refoulement, but went on:

"However, the Court did not give judgment on compliance by Greece with its obligations under international law on refugees. In particular, the Court said nothing about whether the conditions of reception of asylum-seekers were in conformity with regional and international standards of human rights protection, or whether asylum-seekers had access to fair consideration of their asylum applications, or even whether refugees were effectively able to exercise their rights under the Geneva Convention. The UNHCR believes that this is still not the case."

The High Commissioner accordingly reiterated his assessment of Greece and his recommendation that member states should suspend returns there.

37. The Greek government, as a party to the proceedings, relied on its account of the facilities provided by it for accommodation and finding work; but the Court concluded:

"251. The Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (see, *mutatis mutandis*, *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 147, ECHR 2010 ...). It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive.

252. That said, the Court must determine whether a situation of extreme material poverty can raise an issue under Article 3.

253. The Court reiterates that it has not excluded "the possibility that the responsibility of the State may be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity" (see *Budina v. Russia*, dec., no. 45603/05, ECHR 2009...).

254. It observes that the situation in which the applicant has found himself is particularly serious. He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving. It was to escape from that situation of insecurity and of material and psychological want that he tried several times to leave Greece.

255. The Court notes in the observations of the European Commissioner for Human Rights and the UNHCR, as well as in the reports of non-governmental organisations (see paragraph 160 above) that the situation described by the applicant exists on a large scale and is the everyday lot of a large number of asylum seekers with the same profile as that of the applicant. For this reason the Court sees no reason to question the truth of the applicant's allegations.

……..

258. In any event the Court does not see how the authorities could have failed to notice or to assume that the applicant was homeless in Greece. The Government themselves acknowledge that there are fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum seekers. The Court also notes that, according to the UNHCR, it is a well-known fact that at the present time an adult male asylum seeker has virtually no chance of getting a place in a reception centre and that according to a survey carried out from February to April 2010, all the Dublin asylum seekers questioned by the UNHCR were homeless. Like the applicant, a large number of them live in parks or disused buildings (see paragraphs 169, 244 and 242 above).

……..

262. Lastly, the Court notes that the situation the applicant complains of has lasted since his transfer to Greece in June 2009. It is linked to his status as an asylum seeker and to the fact that his asylum application has not yet been examined by the Greek authorities. In other words, the Court is of the opinion that, had they examined the applicant's asylum request promptly, the Greek authorities could have substantially alleviated his suffering.

263. In the light of the above and in view of the obligations incumbent on the Greek authorities under the European Reception Directive (see paragraph 84 above), the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing

desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention."

38. As to *KRS*, the Grand Chamber (at paragraph 343) took the view that it was still possible at the date that case was decided to assume that Greece was complying with its obligations in the respects identified by the Fourth Section. This, in their judgment, was no longer the case. They held:

"343. …… [In *KRS*] the Court considered that in the absence of proof to the contrary it must assume that Greece complied with the obligations imposed on it by the Community directives laying down minimum standards for asylum procedures and the reception of asylum seekers, which had been transposed into Greek law, and that it would comply with Article 3 of the Convention.

In the Court's opinion, in view of the information available at the time to the United Kingdom Government and the Court, it was possible to assume that Greece was complying with its obligations and not sending anybody back to Iran, the applicant's country of origin.

Nor was there any reason to believe that persons sent back to Greece under the Dublin Regulation, including those whose applications for asylum had been rejected by a final decision of the Greek authorities, had been or could be prevented from applying to the Court for an interim measure under Rule 39 of the Rules of Court.

….

347. The Court observes first of all that numerous reports and materials have been added to the information available to it when it adopted its *K.R.S.* decision in 2008. These reports and materials, based on field surveys, all agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect *refoulement* on an individual or a collective basis.

348. The authors of these documents are the UNHCR and the European Commissioner for Human Rights, international non-governmental organisations like Amnesty International, Human Rights Watch, Pro-Asyl and the European Council on Refugees and Exiles, and non-governmental organisations present in Greece such as Greek Helsinki Monitor and the Greek National Commission for Human Rights (see paragraph 160 above). The Court observes that such documents have been published at regular intervals since 2006 and with greater frequency in 2008 and 2009, and that most of them had already been published when the expulsion order against the applicant was issued.

349. The Court also attaches critical importance to the letter sent by the UNHCR in April 2009 to the Belgian Minister in charge of immigration. The letter, which states that a copy was also being sent to the Aliens Office, contained an unequivocal plea for the suspension of transfers to Greece (see paragraphs 194 and 195 above).

350. Added to this is the fact that since December 2008 the European asylum system itself has entered a reform phase and that, in the light of the lessons learnt from the application of the texts adopted during the first phase, the European Commission has made proposals aimed at substantially strengthening the protection of the fundamental rights of asylum seekers and implementing a temporary suspension of transfers under the Dublin Regulation to avoid asylum seekers being sent back to Member States unable to offer them a sufficient level of protection of their fundamental rights (see paragraphs 77-79 above).

351. Furthermore, the Court notes that the procedure followed by the Aliens Office in application of the Dublin Regulation left no possibility for the applicant to state the reasons militating against his transfer to Greece. The form the Aliens Office filled in contains no section for such comments (see paragraph 130 above).

352. In these conditions the Court considers that the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof. On the contrary, it considers it established that in spite of the few examples of application of the sovereignty clause produced by the Government, which, incidentally, do not concern Greece, the Aliens Office systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception.

353. The Belgian Government argued that in any event they had sought sufficient assurances from the Greek authorities that the applicant faced no risk of treatment contrary to the Convention in Greece. In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention (see, *mutatis mutandis*, *Saadi v. Italy* [GC], no. 37201/06, § 147, ECHR 2008 ...).

….

358. In the light of the foregoing, the Court considers that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him.

359. The Government argued that the applicant had not sufficiently individualised, before the Belgian authorities, the risk of having no access to the asylum procedure and being sent back by the Greek authorities. The Court considers, however, that it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3. The fact that a large number of asylum seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable (see, *mutatis mutandis*, *Saadi*, cited above, § 132)."

39. Two things can be said of this jurisprudence, which for the present has placed Greece outside the Dublin II system. One is that the assessment of risk on return is seen by the Strasbourg court as depending on a combination of personal experience and systemic shortcomings which in total may suffice to rebut the presumption of compliance. The other is that in this exercise the UNHCR's judgment remains pre-eminent and possibly decisive.

The UNHCR

40. Why should this be? After all, knowledgeable and powerful evidence was before the Strasbourg court from such respected bodies as Amnesty International and the AIRE Centre. Why might this not be enough, at least if it was not controverted?

41. It seems to us that there was a reason for according the UNHCR a special status in this context. The finding of facts by a court of law on the scale involved here is necessarily a problematical exercise, prone to influence by accidental factors such as the date of a report, or its sources, or the quality of its authorship, and conducted in a single intensive session. The High Commissioner for Refugees, by contrast, is today the holder of an internationally respected office with an expert staff (numbering 7,190 in 120 different states, according to its website), able to assemble and monitor information from year to year and to apply to it standards of knowledge and judgment which are ordinarily beyond the reach of a court. In doing this, and in reaching his conclusions, he has the authority of the General Assembly of the United Nations, by whom he is appointed and to whom he reports. It is intelligible in this situation that a supranational court should pay special regard both to the facts which the High Commissioner reports and to the value judgments he arrives at within his remit.

42. This said, we also take note of what the Grand Chamber of the ECtHR said recently in *Hirsi v Italy* (27765/09; 23 February 2012), at paragraph 118:

"[A]s regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources …."

The Court of Justice of the European Union

43. Because the Dublin system is now enshrined in EU Regulations, it is justiciable, with binding effect, before the judicial organs of the Community. The consequent dual sovereignty – the EU's in relation to Council Regulations, the Council of Europe's in relation to human rights – is capable of giving rise to conflicting decisions. Although this is a risk of which both courts are very conscious and which they strive to avoid, the decision of the Grand Chamber of the CJEU in *NS v Secretary of State for the Home Department* [2011] EUECJ C-411/10 and C-493/10, handed down in December 2011, might have posed such a problem for us were it not for the fact that it alone binds us.

44. *NS* concerned applications by two asylum-seekers, one against the United Kingdom and one against Ireland, for a preliminary ruling on a series of questions which for present purposes amounted to this: in deciding whether to exercise the power under art. 3(2) of the Dublin II Regulation to examine a claim which is the responsibility of another state, is a member state required to presume conclusively that the other state's arrangements are compliant with its international obligations, or is it obliged to examine whether transfer would bring a risk of violation either of Charter rights or of the EU's minimum standards?

45. The Court concluded that a presumption of compliance existed but was rebuttable[2]. Rebuttal, however, required proof that the receiving state was aware that there were in the state of first arrival "systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers … [which] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment…" (paragraph 106). This conclusion followed an analysis of *MSS* which concluded (paragraphs 88-9) that the extent of Greece's default established in that case amounted to "a systemic deficiency". The Court then said:

"90. In finding that the risks to which the applicant was exposed were proved, the European Court of Human Rights took into account the regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency of the system and the effective protection of fundamental rights (*M.S.S.* v *Belgium and Greece*, § 347-350)."

46. The Court took care (paragraphs 81-2) to distinguish a true systemic deficiency from "operational problems", even if these created "a substantial risk that asylum seekers may … be treated in a manner incompatible with their fundamental rights".

47. It appears to us that what the CJEU has consciously done in *NS* is elevate the finding of the ECtHR that there was in effect, in Greece, a systemic deficiency in the system of refugee protection into a sine qua non of intervention. What in *MSS* was held to be a sufficient condition of intervention has been made by *NS* into a necessary one. Without it, proof of individual risk, however grave, and whether or not arising from operational problems in the state's system, cannot prevent return under Dublin II.

48. We have no choice but to approach the present claims on the same footing. Although questions were raised in the course of argument as to whether the return to Italy of a claimant already granted refugee status there would fall under Dublin II, the reasoning of the CJEU in *NS* plainly calls for a uniform approach to the present cases.

The situation in Italy

49. Ms Carss-Frisk QC, for the four claimants, has seen this problem coming and done her excellent best to meet it. She has submitted that the presumption of state compliance can be rebutted by adequate evidence of personal risk, predicated typically but not necessarily on that person's own experience. There is no magic, she submits, in a UNHCR report. It is simply part of a body of evidence, which may legitimately go beyond what the High Commissioner reports. Given the apparent prevalence of the inhuman and degrading conditions described by her clients, it is perfectly reasonable to infer that the Italian system, like the Greek, is not merely functioning erratically but is truly dysfunctional.

50. In July 2012 the UNHCR published *Recommendations on Important Aspects of Refugee Protection in Italy*. It sets out some recent figures for inward migration to a country which until the 1960s was a source of net emigration: between 4 and 5 million in a population of 60 million are migrants, 61,000 of them refugees. But its report, in contrast to the reports on Greece, does not suggest that the asylum system is systemically deficient. In fact it asks Italy to use article 3(2) to avoid returning asylum seekers to Greece. It notes improvements in legal and procedural protection, while calling for further improvements. It also notes a recognition rate of the order of 30%.

51. The report goes on to describe the reception system which is outlined earlier in this judgment. It records that in 2011 the system was deemed insufficient, and that in consequence central and local government reached an agreement for the relocation of up to 50,000 persons within Italy. Having expressed "appreciation for the improvements to the reception system", the UNHCR sets out a number of concerns about Italy's inability to cope with sudden influxes, the uneven quality of provision and the care offered to the vulnerable. The report also records that the 6-month time limit in reception centres (something that does not quite correspond with the government guidance referred to earlier in this judgment) is being dropped. It goes on to make a series of recommendations, none of which is suggestive of repairing a systemic dysfunction rather than improving a functioning one.

52. It may be said that such a report is an essay in diplomacy rather than a critical or objective appraisal; but it means inexorably that the kind of support which was available to the claimant in *MSS* is lacking here. Can the gap then be filled by a combination of individual testimony and NGO reports? While we have sought to explain why the UNHCR's view has in the recent past proved critical in this kind of inquiry, we accept that it cannot be said to be a legal necessity. The question is whether Ms Carss-Frisk's further material can fill the gap.

53. Its high point may be the report of Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights, issued in September 2011 following a formal visit to Italy the previous May. The report pays a good deal of attention to the situation of refugees and asylum-seekers. Its opening summary reads:

"The sharp increase in arrivals from the coasts of Northern Africa has put the Italian system of reception of migrants, including asylum-seekers, under strain. The Italian authorities are encouraged to ensure that that their reception arrangements can respond effectively to fluctuating trends in arrivals and asylum applications, notably by extending the capacity of the housing schemes administered by SPRAR, a publicly-funded network of local authorities and non-profit organisations. Progress is also needed to ensure that in all centres where they are accommodated, asylum seekers have adequate access to legal aid and psycho-social assistance. Special measures to identify and cater for the needs of vulnerable individuals should be effectively implemented. Lack of clarity concerning the nature of the centres where migrants are kept and the regime applicable to them (including detention or not) have contributed to jeopardising the rights of migrants.

….

There is a need to make progress on the front of establishing a reliable system to support the integration of refugees and other beneficiaries of international protection in Italian society. Noting that these persons sometimes become destitute or homeless, the Commissioner calls for a strengthening of local authorities' capacity to provide accommodation and services, notably through the channelling of more funds and the involvement of more regions and municipalities. Further useful measures include a comprehensive review of laws and regulations that impact on refugee integration and the introduction of positive action measures, for instance on the labour market, that support integration at the initial stages following status recognition…."

54. The report goes on (paragraph 44) to stress that the unexpected migration caused by unrest in Tunisia and Libya does not relieve Italy of its human rights obligations – "a responsibility which in the Commissioner's view has not been met fully". It gives chapter and verse for the recommendations summarised in the passage we have quoted, and notes (paragraph 69) that "the lack of a reliable system to support the integration of refugees" is "[a] longstanding concern voiced by organisations dealing with the rights of asylum seekers and refugees in Italy". It attributes the problem in part to obstacles created by Italian law and administrative practice, and points out that:

"As a result, several hundred refugees are reported to live in destitute conditions or squat illegally around the country, with some becoming homeless" (paragraph 70).

55. Ms Carss-Frisk has also shown us reports from Juss-Buss (deriving from a joint Swiss and Norwegian NGO visit to Italy in October 2010); from NOAS (a Norwegian NGO, based on the same visit in October 2010); from Pro-Asyl (a German NGO which visited Italy at about the same time); from Caritas (in a report entitled *Metropolitan Mediations*, sponsored by the EU and the Italian Ministry of the Interior, undated in origin but updated – evidently as to its statistics - to May 2012); from a specialist lawyer, Gianluca Vitale (June 2011); and from two other specialist lawyers, Salvatore Fachile and Loredana Leo (*Critical Aspects of the International Protection System in Italy,*June 2012).

56. The Juss-Buss report records:

"Italian stakeholders agree that the system does not work, due to a lack of capacities … [T]here is a lack of political will to upgrade the system in order to meet the actual demands … [N]o budgetary changes are planned until 2013. The already insufficient capacities will remain the same".

57. The NOAS report concludes:

"During the last decade, Italian authorities have responded to the measures towards a common European asylum system by introducing initiatives and reforms to improve the asylum mechanism in Italy. However, the basic well-being of asylum seekers and refugees is far from properly secured.

The most striking characteristic of the Italian asylum system is the lack of support, in terms of accommodation and integration, for the majority of the granted a permit. The situation leaves thousands of refugees – including many considered vulnerable – without proper means for taking care of themselves."

58. Pro-Asyl reports that fewer than half of those leaving SPRAR accommodation succeed in finding work and accommodation.

59. Caritas judges the Italian reception system to be "insufficient in terms of numbers and, in particular, to be widely inconsistent inasmuch as various parallel systems can be identified with little coordination between them." It goes on to record that, pursuant to a prime ministerial decree of February 2011, the Department of Civil Protection had implemented a special reception system for migrants which was currently assisting over 21,000 individuals. But it judges that because of "chronic insufficiency" the Italian reception system still "does not provide adequate reception facilities to all those who are entitled to it" because it is "too fragmented and incomplete".

60. Of the two lawyers' reports, Mr Vitale's draws explicitly on personal experience in concluding that the system's shortcomings represent "a pathology of the Italian reception system rather than an exception to the norm". That of Mr Fachile and Ms Leo speaks of a "systematic lack of places available" and cites in support the suggestion in Amnesty International's 2011 report that this lack, with the influx of refugees from North Africa, had led to "summary expulsions, violations of the ban on refoulement and illegal detentions". The report goes on to speak of "a veritable reception gap", both for initial arrivals and for "Dubliners" – those returned from other EU states because their first landfall was made in Italy. It suggests that something like two thirds of asylum seekers who are accorded refugee status fall into this gap.

Discussion

61. This material gives a great deal of support to the accounts given by three of the claimants of their own experiences of seeking asylum in Italy. If the question were, as Ms Carss-Frisk submits it is, whether each of the four claimants faces a real risk of inhuman or degrading treatment if returned to Italy, their claims would plainly be arguable and unable to be certified. But we are unable to accept that this is now the law. The decision of the CJEU in *NS v United Kingdom* has set a threshold in Dublin II and cognate return cases which exists nowhere else in refugee law. It requires the claimant to establish that there are in the country of first arrival "systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers … [which] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment…".

62. In other words, the sole ground on which a second state is required to exercise its power under article 3(2) Regulation 343/2003 to entertain a re-application for asylum or humanitarian protection, and to refrain from returning the applicant to the state of first arrival, is that the source of risk to the applicant is a systemic deficiency, known to the former, in the latter's asylum or reception procedures. Short of this, even powerful evidence of individual risk is of no avail.

63. The totality of the evidence about Italy, although it is extremely troubling and far from uncritical, does not in our judgment come up to this mark. While undoubtedly at a number of points it either overtly alleges or powerfully suggests systemic failure, it is neither unanimously nor compellingly directed to such a conclusion. At least equal, if not greater, weight has to be accorded to the far more sanguine – and more recent - UNHCR report, echoed as it is, albeit more faintly, by the Hammarberg report. While what amounts to a systemic deficiency must to a considerable degree be a matter of judgment, perhaps even of vocabulary, the evidence does not demonstrate that Italy's system for the reception of asylum seekers and refugees, despite its many shortcomings and casualties, is itself dysfunctional or deficient. This is so whether one focuses on the body of available reports on Italy or the comparative findings in *MSS* about Greece.

64. It has to follow that the four claims before the court, despite their supporting testimony of individual risk, are incapable of succeeding under article 3 on the present evidence, and that the Home Secretary is therefore justified in that respect in certifying them. The same necessarily applies to any distinct argument raised by AE and EH under article 8 by reference to the effect of conditions in Italy on their mental health.

MA's claim

65. Ms Carss-Frisk bases her fallback case for MA on the two children who are still with her and are doing well in secondary and tertiary education here. Their best interests, she submits, plainly consist in remaining in the United Kingdom with their mother, giving all three tenable article 8 grounds for resisting removal.

66. No attempt has been made to separate Marta's interests, now that she is an adult, from her mother's and brother's. This may help them, but it does not help her. We approach the mother's claim, accordingly, on the assumption which we have been invited to make that removing her will mean also removing both Daniel and his older sister. It follows that the material interference will be with their private rather than their family life.

67. We accept for present purposes the favourable account we have been given of the children's response to education and their unwillingness to be parted from it: indeed, we would have assumed it to be so. We also accept as real their fear of returning to the state of street homelessness in which the family previously found itself in Italy.

68. It is uncontentious that, in gauging for the purposes of article 8(2) the proportionality of an interference with private life, the interests of children are a paramount consideration, though not a trump card: *ZH (Tanzania) v Home Secretary* [2011] UKSC 4, *HH v Deputy Prosecutor, Genoa* [2012] UKSC 25. More specifically, we have the guidance of Baroness Hale in the first of these cases at paragraph 29:

"… what is encompassed in the "best interests of the child"? As the UNHCR says, it broadly means the well-being of the child. Specifically, as Lord Bingham indicated in *EB (Kosovo),* it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away."

69. Langstaff J at first instance concluded (at paragraph 67):

"An immigration judge would be bound to hold that the essential interests of the children and the claimant would be preserved and not adversely affected by any move to Italy."

His reasons for so holding, set out in his previous paragraph, are an amalgam of the admittedly disruptive effect of removal on the children's education and social support and what the judge regarded as "the very great difficulties in regarding the claimant herself as giving credible or reliable evidence", together with the unlikelihood that any repetition of abuse or hardship in Italy would go unremedied.

70. Ms Carss-Frisk suggests with some cogency that the judge has rolled too many disparate factors into that paragraph and may have lost sight of the case-specific elements which alone go to determine the best interests of the children. She is able in this regard to point to his acceptance (in paragraph 61) of Mr Payne's submission that "it can confidently be said that an immigration judge would be most unlikely to regard the claimant's account as trustworthy unless corroborated…" – a test which both sets the threshold of certification too low and bases it on matter not obviously related to the children's best interests. But Ms Carss-Frisk has still to face the formidable fact that the children's position in this country, albeit through no fault of theirs, is both fortuitous and highly precarious, with no element whatever of entitlement.

Conclusions

71. Making every allowance for her counsel's critique of Langstaff J's decision, we still have to consider whether there is any real possibility of MA's article 8 claim being upheld on an in-country appeal to an immigration judge. We are satisfied that there is none. Her daughter is now an adult and cannot legitimately have her interests aggregated with MA's. Her son, now 14, is settled in school; but he is here only because his mother has been able for four years to resist removal. As Ms Carss-Frisk's submissions implicitly recognise, if her case has reached this point it is because we are required to deem conditions for refugees in Italy (so far as they can enter at all into the article 8(2) exercise) to be compliant with the state's international obligations, whatever the evidence to the contrary. This being so, the case against removal of MA, albeit with her son, is too exiguous to stand up in any legal forum when set against the history of her entry and stay here and the legal and policy imperatives for returning her to Italy.

72. For the reasons set out earlier in this judgment, the appeals of EM and MA against the refusal of judicial review, and the applications of EH and AE for judicial review, will therefore be dismissed.

PART E: OTHER MATERIALS

NB. Please be aware that these are not binding sources of EU law and should not be cited as such

1951 Geneva Convention Relating to the Status of Refugees (Extracts only)

Article 1: Definition of the term "refugee"

A.
For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;
Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B.
(1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either:
(a) "events occurring in Europe before 1 January 1951"; or
(b) "events occurring in Europe or elsewhere before 1 January 1951",
and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:
(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
(2) Having lost his nationality, he has voluntarily re-acquired it; or
(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
(6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D.
This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E.
This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F.
The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.