TFEU PROVISIONS RELATED TO INTERNAL MARKET AND COMPETITION LAW

PROVISIONS ON INTERNAL MARKET

TITLE II - FREE MOVEMENT OF GOODS

Article 28 (ex Article 23 TEC)

1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

2. The provisions of Article 30 and of Chapter 3 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

Article 29 (ex Article 24 TEC)

Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.

CHAPTER 1 THE CUSTOMS UNION

Article 30 (ex Article 25 TEC)

Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

Article 31 (ex Article 26 TEC)

Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission.

Article 32 (ex Article 27 TEC)

In carrying out the tasks entrusted to it under this Chapter the Commission shall be guided by:
(a) the need to promote trade between Member States and third countries;

(b) developments in conditions of competition within the Union in so far as they lead to an improvement in the competitive capacity of undertakings;

(c) the requirements of the Union as regards the supply of raw materials and semi-finished goods; in this connection the Commission shall take care to avoid distorting conditions of competition between Member States in respect of finished goods;

(d) the need to avoid serious disturbances in the economies of Member States and to ensure rational development of production and an expansion of consumption within the Union.

CHAPTER 2 CUSTOMS COOPERATION

Article 33 (ex Article 135 TEC)

Within the scope of application of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission.

CHAPTER 3 PROHIBITION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES

Article 34 (ex Article 28 TEC)

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 35 (ex Article 29 TEC)

Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

Article 36 (ex Article 30 TEC)

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

Article 37 ((ex Article 31 TEC)

1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.
The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.

2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.

3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.

TITLE IV - FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

CHAPTER 1 - WORKERS

Article 45 (ex Article 39 TEC)

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

   (a) to accept offers of employment actually made;

   (b) to move freely within the territory of Member States for this purpose;

   (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

   (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Article 46 (ex Article 40 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular:
(a) by ensuring close cooperation between national employment services;

(b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;

(c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;

(d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

Article 47 (ex Article 41 TEC)

Member States shall, within the framework of a joint programme, encourage the exchange of young workers.

Article 48 (ex Article 42 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.

Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

(a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or

(b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.
CHAPTER 2 - RIGHT OF ESTABLISHMENT

Article 49 (ex Article 43 TEC)

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 50 (ex Article 44 TEC)

1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

(a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade;

(b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned;

(c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;

(d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities;

(e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 39(2);

(f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies,
branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in
the territory of a Member State and as regards the conditions governing the entry of personnel
belonging to the main establishment into managerial or supervisory posts in such agencies,
branches or subsidiaries;

(g) by coordinating to the necessary extent the safeguards which, for the protection of the
interests of members and others, are required by Member States of companies or firms within
the meaning of the second paragraph of Article 54 with a view to making such safeguards
equivalent throughout the Union;

(h) by satisfying themselves that the conditions of establishment are not distorted by aids
granted by Member States.

Article 51 - (ex Article 45 TEC)

The provisions of this Chapter shall not apply, so far as any given Member State is concerned,
to activities which in that State are connected, even occasionally, with the exercise of official
authority.

The European Parliament and the Council, acting in accordance with the ordinary legislative
procedure, may rule that the provisions of this Chapter shall not apply to certain activities.

Article 52 (ex Article 46 TEC)

1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice
the applicability of provisions laid down by law, regulation or administrative action providing
for special treatment for foreign nationals on grounds of public policy, public security or
public health.

2. The European Parliament and the Council shall, acting in accordance with the ordinary
legislative procedure, issue directives for the coordination of the abovemen tioned provisions.

Article 53 (ex Article 47 TEC)

1. In order to make it easier for persons to take up and pursue activities as self-employed
persons, the European Parliament and the Council shall, acting in accordance with the
ordinary legislative procedure, issue directives for the mutual recognition of diplomas,
certificates and other evidence of formal qualifications and for the coordination of the
provisions laid down by law, regulation or administrative action in Member States concerning
the taking-up and pursuit of activities as self-employed persons.

2. In the case of the medical and allied and pharmaceutical professions, the progressive
abolition of restrictions shall be dependent upon coordination of the conditions for their
exercise in the various Member States.

Article 54 (ex Article 48 TEC)

Companies or firms formed in accordance with the law of a Member State and having their
registered office, central administration or principal place of business within the Union shall,
for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

Article 55 (ex Article 294 TEC)

Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54, without prejudice to the application of the other provisions of the Treaties.

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.

CHAPTER 4 CAPITAL AND PAYMENTS

Article 63 (ex Article 56 TEC)

1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.
Article 64 (ex Article 57 TEC)

1. The provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999.

2. Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets.

3. Notwithstanding paragraph 2, only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries.

Article 65 (ex Article 58 TEC)

1. The provisions of Article 63 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties.

3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.

4. In the absence of measures pursuant to Article 64(3), the Commission or, in the absence of a Commission decision within three months from the request of the Member State concerned, the Council, may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties.
in so far as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market. The Council shall act unanimously on application by a Member State.

Article 66 (ex Article 59 TEC)

Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulted the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.

PROVISIONS ON COMPETITION

RULES APPLYING TO UNDERTAKINGS

Article 101 - (ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;

   (b) limit or control production, markets, technical development, or investment;

   (c) share markets or sources of supply;

   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

   — any agreement or category of agreements between undertakings,

   — any decision or category of decisions by associations of undertakings

   — any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102 - (ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

AIDS GRANTED BY STATES - Article 107 - (ex Article 87 TEC)

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:
(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission

Restriction to economic freedoms – The example of services

Case law – Case “Caixa” (2004)

5 October 2004 (1) Case C-442/02

REFERENCE for a preliminary ruling under Article 234 EC, from the Conseil d'État (France), made by decision of 6 November 2002, received at the Court on 5 December 2002, in the proceedings brought by Caixa-Bank France against Ministère de l'Économie, des Finances et de l'Industrie, interveners: Banque fédérale des banques populaires and Others,

THE COURT (Grand Chamber),

1 This reference for a preliminary ruling concerns the interpretation of Article 43 EC.

The national legal background

2 Under Article L. 312-3 of the Code monétaire et financier (Monetary and Financial Code), in the version applicable in the present case:

‘Notwithstanding any provisions to the contrary, it shall be prohibited for any credit establishment which receives funds from the public for sight accounts or accounts for less than five years, by any means whatever, to pay remuneration on those funds exceeding that fixed by regulation of the Committee for Banking and Financial Regulation or the minister responsible for the economy.’

3
Regulation No 86-13 of the Comité de la réglementation bancaire et financière (Committee for Banking and Financial Regulation), approved by decree of the Ministre de l'Économie et des Finances (Minister for Economic and Financial Affairs), of 14 May 1986 (JORF, 15 May 1986, p. 6330), prohibits the payment of remuneration on sight accounts.

That prohibition applies to accounts in euros opened by residents of France, whatever their nationality.

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

From 18 February 2002 Caixa-Bank France (‘Caixa-Bank’), a company governed by French law with its seat in France which is a subsidiary of Caixa Holding, a company governed by Spanish law with its seat in Spain which holds the Caixa group’s holdings in the credit institutions established under that name in Spain and in other countries of the European Union, marketed in France a sight account remunerated at the rate of 2% per annum on balances of at least EUR 1 500. By decision of the Committee for Banking and Financial Regulation of 16 April 2002, Caixa-Bank was prohibited from concluding new contracts with residents of France relating to remunerated sight accounts in euros and ordered to rescind the clauses in existing contracts which provided for the remuneration of such accounts.

Caixa-Bank appealed against that decision to the Conseil d’État, which decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

1. As Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 is silent on the point, does the prohibition by a Member State of banking institutions duly established in its territory from remunerating sight accounts and other repayable funds constitute an obstacle to freedom of establishment?
2. If the answer to the first question is in the affirmative, what kind of reasons of the public interest might in an appropriate case be relied on to justify such an obstacle?’

**The questions referred for a preliminary ruling**

It should be noted, as a preliminary point, that Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ 2000 L 126, p. 1) is not applicable in a case such as that at issue in the main proceedings, in particular because that directive does not refer to restrictions on the establishment of companies which, like Caixa-Bank, make use of freedom of establishment in a Member State as subsidiaries of credit institutions established in other Member States.

By its questions the national court essentially asks whether Article 43 EC precludes legislation of a Member State which prohibits a credit institution which is a subsidiary of a company from another Member State from remunerating sight accounts in euros opened by residents of the former Member State.

The freedom of establishment provided for in Article 43 EC, read in conjunction with Article 48 EC, is conferred both on natural persons who are nationals of a Member State and on legal persons within the meaning of Article 48 EC. Subject to the exceptions and conditions specified, it includes the right to take up and pursue all types of self-employed activity in the
territory of any other Member State, to set up and manage undertakings, and to set up agencies, branches or subsidiaries (see, inter alia, Case C-255/97 Pfeiffer [1999] ECR I-2835, paragraph 18).

10
The legal position of a company such as Caixa-Bank falls within the scope of Community law by virtue of the provisions of Article 43 EC.

11
Article 43 EC requires the elimination of restrictions on the freedom of establishment. All measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as such restrictions (see, inter alia, Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 37, Case C-108/96 Mac Quen and Others [2001] ECR I-837, paragraph 26, and Case C-79/01 Payroll and Others [2002] ECR I-8923, paragraph 26).

12
A prohibition on the remuneration of sight accounts such as that laid down by the French legislation constitutes, for companies from Member States other than the French Republic, a serious obstacle to the pursuit of their activities via a subsidiary in the latter Member State, affecting their access to the market. That prohibition is therefore to be regarded as a restriction within the meaning of Article 43 EC.

13
That prohibition hinders credit institutions which are subsidiaries of foreign companies in raising capital from the public, by depriving them of the possibility of competing more effectively, by paying remuneration on sight accounts, with the credit institutions traditionally established in the Member State of establishment, which have an extensive network of branches and therefore greater opportunities than those subsidiaries for raising capital from the public.

14
Where credit institutions which are subsidiaries of foreign companies seek to enter the market of a Member State, competing by means of the rate of remuneration paid on sight accounts constitutes one of the most effective methods to that end. Access to the market by those establishments is thus made more difficult by such a prohibition.

15
While the French Government asserted at the hearing that there are forms of account comparable to sight accounts, such as 15-day accounts, which are not covered by the prohibition of remuneration and have helped credit institutions such as Caixa-Bank to compete with French credit institutions in raising funds from the public and increasing their market share in France, the Government conceded, however, that those accounts, unlike sight accounts, do not allow the use of bank cards or cheques. The prohibition at issue therefore entails a hindrance for credit institutions such as Caixa-Bank in their activity of raising capital from the public, which the existence of other forms of account with remunerated deposits cannot remedy.

16
The restriction on the pursuit and development of the activities of those subsidiaries resulting from the prohibition at issue is all the greater in that it is common ground that the taking of deposits from the public and the granting of credits represent the basic activities of credit institutions (see, to that effect, inter alia Article 1(1) of and Annex I to Directive 2000/12).

17
It is clear from settled case-law that where, as in the case at issue in the main proceedings, such a measure applies to any person or undertaking carrying on an activity in the territory of the host Member State, it may be justified where it serves overriding requirements relating to the public interest, is suitable for securing the attainment of the objective it pursues and does
not go beyond what is necessary in order to attain it (see, inter alia, Case C-424/97 Haim [2000] ECR I-5123, paragraph 57, Mac Quen, paragraph 26, and Case C-439/99 Commission v Italy [2002] ECR I-305, paragraph 23).

18 It must therefore be examined whether the grounds put forward by the French Government meet those criteria.

19 To justify the restriction on freedom of establishment resulting from the prohibition at issue, the French Government prayed in aid both the protection of consumers and the encouragement of medium and long-term saving.

20 It submits, first, that the prohibition at issue in the main proceedings is necessary for maintaining the provision of basic banking services without charge. Introducing remuneration for sight accounts would substantially increase the operating costs of banks, which, to recover those costs, would increase charges and introduce charges for the various banking services currently provided free, in particular the issuing of cheques.

21 It must be observed, however, that while the protection of consumers is among the overriding requirements that can justify restrictions on a fundamental freedom guaranteed by the EC Treaty, the prohibition at issue in the main proceedings, even supposing that it ultimately presents certain benefits for the consumer, constitutes a measure which goes beyond what is necessary to attain that objective.

22 Even supposing that removing the prohibition of paying remuneration on sight accounts necessarily entails for consumers an increase in the cost of basic banking services or a charge for cheques, the possibility might be envisaged inter alia of allowing consumers to choose between an unremunerated sight account with certain basic banking services remaining free of charge and a remunerated sight account with the credit institution being able to make charges for banking services previously provided free, such as the issuing of cheques.

23 As regards, next, the French authorities’ concern to encourage long-term saving, it must be observed that, while the prohibition of remuneration on sight accounts is indeed suitable for encouraging medium and long-term saving, it nevertheless remains a measure which goes beyond what is necessary to attain that objective.

24 In the light of the above considerations, the answer to the questions referred for a preliminary ruling must be that Article 43 EC precludes legislation of a Member State which prohibits a credit institution which is a subsidiary of a company from another Member State from remunerating sight accounts in euros opened by residents of the former Member State.

Costs

25 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), rules as follows:
Article 43 EC precludes legislation of a Member State which prohibits a credit institution which is a subsidiary of a company from another Member State from remunerating sight accounts in euros opened by residents of the former Member State.

The justification to restrictions – The case of public order (case Josemans)

JUDGMENT OF THE COURT (Second Chamber)

16 December 2010 (*)

(Freedom to provide services – Free movement of goods – Principle of non-discrimination – Measure adopted by a local public authority which restricts access to coffee-shops to Netherlands residents – Marketing of ‘soft’ drugs – Marketing of non-alcoholic beverages and of food – Objective of combating drug tourism and the accompanying public nuisance – Public order – Protection of public health – Coherence – Proportionality)

In Case C-137/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Raad van State (Netherlands), made by decision of 8 April 2009, received at the Court on 15 April 2009, in the proceedings

Marc Michel Josemans

v

Burgemeester van Maastricht,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas (Rapporteur), A. Ó Caóimh and P. Lindh, Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 April 2010,

after considering the observations submitted on behalf of:

– Mr Josemans, by A. Beckers, advocaat,

– the Burgemeester van Maastricht, by S.A.R. Lely, advocaat,

– the Netherlands Government, by C. Wissels, M. Noort and J. Langer, acting as Agents,
– the Belgian Government, by C. Pochet and L. Goossens, acting as Agents,
– the German Government, by M. Lumma and J. Möller, acting as Agents,
– the French Government, by E. Belliard, G. de Bergues and A. Czubinski, acting as Agents,
– the European Commission, by H. van Vliet and I. Rogalski, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2010,
gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 18 EC, 29 EC and 49 EC.

2 The reference has been made in proceedings between Mr Josemans, who runs the ‘Easy Going’ coffee-shop, and the Burgemeester van Maastricht (the Mayor of the municipality of Maastricht) on the ground that the latter declared the establishment in question temporarily closed following two reports attesting that persons who are not resident in the Netherlands had been admitted to it contrary to the provisions in force in that municipality.

Legal context

European Union legislation

3 The necessity of combating drugs, inter alia by punishing the illegal trafficking in those drugs and by preventing the consumption of narcotic drugs and drug addiction, has been acknowledged by a number of measures and instruments of the European Union.


5 Article 2(1)(a) of Framework Decision 2004/757 states that each Member State is to take the necessary measures to ensure that the following intentional conduct when committed without right is punishable: the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs. Article 2(2) states that the conduct described in paragraph 1 is not included in the scope of that framework decision when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law.

6 Under Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the
European Community by the Treaty of Amsterdam, 13 Member States of the European Union, amongst them the Kingdom of the Netherlands, are authorised to establish, within the institutional and legal framework of the European Union and the EU and EC Treaties, closer cooperation among themselves within the scope of the Schengen acquis as set out in the annex to that protocol.

7 The Convention implementing the Schengen Agreement, of 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed at Schengen (Luxembourg) on 19 June 1990 is part of the Schengen acquis so set out.

8 Article 71(1) of that convention provides that the Contracting Parties undertake as regards the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions, all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.

9 Article 71(2) to (4) specifies the various measures which the Parties undertake to adopt in connection with the prevention and punishment inter alia of the illegal export and import of narcotic drugs and psychotropic substances, including cannabis, and in connection with the sale, supply and handing over of such products and substances. Article 71(5) states that the Parties are to do their utmost to prevent and combat the negative effects arising from the illicit demand for narcotic drugs and psychotropic substances.

10 Certain instruments of the European Union, such as the Council Resolution of 29 November 1996 on measures to address the drug tourism problem within the European Union (OJ 1996 C 375, p. 3) and the Joint Action of 17 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking (OJ 1996 L 342, p. 6), relate expressly to the fight against drug tourism.


National legislation

12 Under the 1976 Law on opium (Opiumwet 1976), the possession, dealing, cultivation, transportation, production, import and export of narcotic drugs, including cannabis and its derivatives, are prohibited. Those acts are subject to criminal sanctions unless the substance or product in question is used for medical, scientific or educational purposes and prior authorisation has been given.
The Kingdom of the Netherlands applies a policy of tolerance with regard to the sale and consumption of cannabis. That policy is based on a distinction between ‘hard’ drugs, which present an unacceptable risk to health, and ‘soft’ drugs, which although deemed to be ‘risky’ do not give rise to the same concerns.

The policy of tolerance has been implemented within the framework of the directives issued by the College van procureurs-general (College of public prosecutors). The competent authorities have relied on the principle of discretionary prosecution to pursue a policy of selective punishment. In the interest of the effectiveness of criminal prosecutions, the sale of cannabis, in strictly limited quantities and in controlled conditions, is tolerated, priority thus being given to the punishment of other offences which are considered to be more dangerous.

That policy of tolerance is reflected inter alia in the establishment of coffee-shops. In such establishments, which are classified as catering establishments, cannabis is sold and consumed in the same way as food and non-alcoholic beverages. The sale of alcoholic beverages is, however, prohibited.

The local authorities may authorise coffee-shops in compliance with certain criteria. Such establishments need an operating licence and must satisfy the same conditions relating to management and hygiene as are applicable to other catering establishments.

The conditions under which the marketing of cannabis in coffee-shops may be tolerated are defined, at national level, by the directives of the Openbaar Ministerie (the Public Prosecutor’s Office). Those criteria, commonly known as ‘the AHOJG criteria’, are the following:

‘A (“affichering”) drugs may not be advertised; H (“harddrugs”) no hard drugs may be sold; O (“overlast”) the coffee-shop must not cause any nuisance; J (“jeugdigen”) no drugs may be sold to minors (under the age of 18) nor may minors be admitted to the premises; G (“grote hoeveelheden”) no more than five grams per person may be sold in any one transaction. Furthermore, the commercial stock (“handelsvoorraad” of a tolerated coffee shop must not exceed 500 grams.’

The municipality of Maastricht adopted a policy on cannabis by defining, inter alia, certain strict conditions in which a limited number of coffee-shops are tolerated. At the material time in the main proceedings, that number was set at 14.

In an effort to reduce drug tourism, indeed to prevent it, the Gemeenteraad (Municipal Council) of that municipality, by decision of 20 December 2005, inserted a residence criterion in the 2006 version of the General Maastricht Municipal Regulation (Algemene plaatselijke verordening Maastricht) (‘the APV’). That amendment entered into force on 13 January 2006.

Pursuant to Article 2.3.1.3e(1) of the APV, the proprietor of an establishment as referred to in Article 2.3.1.1(1)(a)(3) of that regulation is forbidden to admit persons other than residents to the establishment or to permit them to remain in or at the establishment. The term ‘establishment’ is defined by the latter provision as a space to which the public has access and where food and/or non-alcoholic beverages are provided commercially, whether or not by means of vending machines, for consumption on the premises. Under Article 2.3.1.1(1)(d), ‘residents’ means persons who have their actual place of residence in the Netherlands.
Article 2.3.1.3e(2) of the APV provides that the Burgemeester van Maastricht may specify that the rule laid down in subparagraph (1) does not apply to one or more types of establishment referred to in that ordinance throughout the municipality or in one or more parts of the municipality designated therein. By decision of 13 July 2006, the Burgemeester von Maastricht exempted, throughout the municipality of Maastricht, certain categories of establishment from the obligation to refuse access to non-residents, namely all the establishments referred to in Article 2.3.1.1(1)(a)(3) of the APV, with the exception of coffee-shops, tearooms and the like, by whatever designation they might be known.

Pursuant to Article 2.3.1.5a(f) of the APV, the Burgemeester van Maastricht may declare an establishment as referred to in Article 2.3.1.1(1)(a)(3) of that ordinance closed for a specified or unspecified period if the proprietor of the establishment acts contrary to Article 2.3.1.3e(1).

The facts which gave rise to the dispute in the main proceedings and the questions referred for a preliminary ruling

Mr Josemans runs the ‘Easy Going’ coffee-shop in the municipality of Maastricht, an establishment in which ‘soft’ drugs, non-alcoholic beverages and food are sold and consumed.

The ‘Easy Going’ coffee-shop falls within the scope of the policy of tolerance applied by the Kingdom of the Netherlands with regard to the marketing of cannabis. The sale of cannabis, although illegal, does not give rise to criminal proceedings if it takes place in a recognised coffee-shop and if a certain number of conditions, inter alia ‘the AHOJG criteria’, are complied with.

Following two reports attesting that persons who are not resident in the Netherlands had been admitted to the coffee-shop in question contrary to Article 2.3.1.3e(1) of the APV, which establishes a criterion of residence, the Burgemeester van Maastricht, by decision of 7 September 2006, declared that establishment temporarily closed.

Mr Josemans lodged an objection against that decision. As that objection was dismissed by the Burgemeester van Maastricht by decision of 28 March 2007, Mr Josemans brought an action before the Rechtbank Maastricht (Maastricht Court). By judgment of 1 April 2008, that court annulled that decision and revoked the decision of 7 September 2006. According to that court, the prohibition set out in the APV of admitting persons who are not resident in the Netherlands to coffee-shops constitutes indirect discrimination on grounds of nationality, which is contrary to Article 1 of the Netherlands Constitution. By contrast, there is no infringement of European Union law. It considers that it is apparent from Case 289/86 Vereniging Happy Family Rustenburgerstraat [1988] ECR 3655 and Case C-158/98 Coffeeshop ‘Siberië’ [1999] ECR I-3971 that the trade in narcotic drugs is not covered by the EC Treaty.

Mr Josemans and the Burgemeester van Maastricht, on 5 and 8 May 2008 respectively, appealed against that judgment to the Raad van State (Council of State). The Burgemeester van Maastricht disputes the interpretation of the Netherlands Constitution. Mr Josemans submits that the legislation at issue in the main proceedings constitutes unjustified unequal treatment of citizens of the European Union and that, more specifically, people who are not resident in the Netherlands are denied the possibility of buying legal products in coffee-shops, which is contrary to European Union law.
In those circumstances, the Raad van State decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Does a regulation, such as that at issue in the main proceedings, concerning the access of non-residents to coffee-shops, fall wholly or partly within the scope of the EC Treaty, with particular reference to the free movement of goods and/or services, or of the prohibition of discrimination laid down in Article 12 [EC] in conjunction with Article 18 [EC]?

2. In so far as the provisions of the EC Treaty concerning the free movement of goods and/or services are applicable, does a prohibition of the admission of non-residents to coffee-shops form a suitable and proportionate means of reducing drug tourism and the public nuisance which accompanies it?

3. Is the prohibition of discrimination against citizens on grounds of nationality, as laid down in Article 12 [EC] in conjunction with Article 18 [EC], applicable to the rules on the access of non-residents to coffee-shops if and in so far as the provisions of the EC Treaty concerning the free movement of goods and services are not applicable?

4. If so, is the resulting indirect distinction between residents and non-residents justified, and is the prohibition of the admission of non-residents to coffee-shops a suitable and proportionate means of reducing drug tourism and the public nuisance which accompanies it?’

Consideration of the questions referred

Initial observations

By its reference for a preliminary ruling the national court seeks to ascertain whether European Union law precludes municipal rules, such as those forming the subject-matter of the dispute in the main proceedings, which prohibit the admission of persons who are non-resident in the Netherlands to coffee-shops situated in the municipality in question. It refers more specifically to the free movement of goods under Article 28 EC et seq., the free movement of services under Article 49 EC et seq., and the principle of non-discrimination on grounds of nationality under Article 12 EC in conjunction with Article 18 EC, which relates to citizenship of the Union.

At the outset, it must be borne in mind that, as is apparent from paragraphs 15 to 17 of this judgment, coffee-shops constitute establishments covered by the category of catering establishments in which cannabis is marketed to consumers of at least 18 years of age. Such an establishment must have an operating licence and must, moreover, satisfy all of ‘the AHOJG criteria’.

It is common ground that the cannabis sold in coffee-shops is not distributed through channels strictly controlled by the competent authorities with a view to use for medical or scientific purposes.

Although, according to the Netherlands Government, there are such establishments whose sole activity is the marketing of cannabis, the fact remains that in a number of coffee-shops non-alcoholic beverages and food are also sold and consumed. According to the order for reference, that is the case as regards the ‘Easy Going’ coffee-shop.
In such circumstances, it is necessary to assess, in the light of the provisions referred to by the reference for a preliminary ruling, first, the marketing of cannabis in coffee-shops and, secondly, the question of whether the sale of non-alcoholic beverages and food in such establishments may have an effect on the answer to be given to the national court.

**The first question**

By its first question the national court asks, in essence, whether a coffee-shop proprietor may, when marketing, first, narcotic drugs which are not distributed through channels strictly controlled by the competent authorities with a view to use for medical or scientific purposes and, secondly, non-alcoholic beverages and food, rely on Articles 29 EC, 49 EC and/or 12 EC, the latter in conjunction with Article 18 EC, to object to municipal rules such as those at issue in the main proceedings.

As regards the marketing of cannabis, Mr Josemans submits that that activity falls within the scope of European Union law and that the rules at issue in the main proceedings are contrary to the principle of non-discrimination on grounds of nationality. The Burgemeester van Maastricht and the Netherlands, Belgian, German and French Governments submit, by contrast, that the activity in question does not fall within the scope either of the freedoms of movement or of the principle of non-discrimination, in view of the existence of a prohibition on the offering for sale of narcotic drugs. The European Commission takes the view that it is not necessary, in order to give a decision on the reference for a preliminary ruling, to rule on the marketing of cannabis.

In that connection it is important to bear in mind that, since the harmfulness of narcotic drugs, including those derived from hemp, such as cannabis, is generally recognised, there is a prohibition in all the Member States on marketing them, with the exception of strictly controlled trade for use for medical and scientific purposes (see, to that effect, Case 50/80 Horvath [1981] ECR 385, paragraph 10; Case 221/81 Wolf [1982] ECR 3681, paragraph 8; Case 240/81 Einberger [1982] ECR 3699, paragraph 8; Case 294/82 Einberger [1984] ECR 1177, paragraph 15; Case 269/86 Mol [1988] ECR 3627, paragraph 15; and Vereniging Happy Family Rustenburgerstraat, paragraph 17).

That legal position complies with various international instruments which the Member States have cooperated on or acceded to, such as the United Nations Single Convention on Narcotic Drugs, concluded at New York on 30 March 1961, amended by the 1972 Protocol amending the Single Convention of 1961 (United Nations Treaty Series, Vol. 520, No 7515) (‘the Single Convention’) and the United Nations Convention on Psychotropic Substances, concluded at Vienna on 21 February 1971 (United Nations Treaty Series, Vol. 1019, No 14956). The measures provided for by those conventions were subsequently strengthened and supplemented by the Convention concluded at Vienna on 20 December 1988, to which all the Member States of the European Union are parties. Cannabis is among the substances and products referred to in those conventions.

In the preamble to the Single Convention the parties declare themselves conscious of their duty to prevent and combat addiction to narcotic drugs, whilst recognising that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes. Under Article 4 of that convention, the parties are to take all the measures necessary to limit exclusively to medical and scientific purposes the production, manufacture, export,
import, distribution of, trade in, use and possession of drugs (see *Wolf*, paragraph 9, and Case 240/81 *Einberger*, paragraph 9).

As regards more specifically European Union law, Framework Decision 2004/757 provides, in Article 2(1)(a), that each Member State is to take the necessary measures to ensure that, inter alia, the following intentional conduct when committed without right is punishable: offering, offering for sale, distribution, sale, delivery on any terms whatsoever and brokerage of drugs. Under Article 2(2) the conduct described in paragraph 1 is not to be included in the scope of that Framework Decision when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law. It is stated in Article 1(1) of that act that the term ‘drugs’ includes any of the substances covered by the Single Convention and by the United Nations Convention on Psychotropic Substances, concluded at Vienna on 21 February 1971.

Furthermore, pursuant to Article 71(1) of the Convention implementing the Schengen Agreement, of 14 June 1985, the States who are parties to that convention undertook, as regards both the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.

It follows that narcotic drugs which are not distributed through channels which are strictly controlled by the competent authorities to be used for medical and scientific purposes are, because of their very nature, subject to a prohibition on importation and offering for sale in all the Member States (see, to that effect, *Wolf*, paragraph 10; Case 240/81 *Einberger*, paragraph 10; Case 294/82 *Einberger*, paragraph 15; *Mol*, paragraphs 15 and 18; *Vereniging Happy Family Rustenburgerstraat*, paragraphs 17 and 20; and *Coffeeshop ‘Siberië’*, paragraph 14). The fact that some Member States describe a narcotic drug as a ‘soft’ drug is not capable of calling that finding into question (see, to that effect, *Vereniging Happy Family Rustenburgerstraat*, paragraph 25).

As narcotic drugs which are not distributed through such strictly controlled channels are prohibited from being released into the economic and commercial channels of the European Union, a coffee-shop proprietor cannot rely on the freedoms of movement or the principle of non-discrimination, in so far as concerns the marketing of cannabis, to object to municipal rules such as those at issue in the main proceedings.

That finding cannot be impugned by the fact that, as is apparent from paragraphs 12 to 14 of the present judgment, the Kingdom of the Netherlands applies a policy of tolerance to the sale of cannabis, even though trade in narcotic drugs is prohibited in that Member State. It is apparent from the case-law of the Court that such a prohibition is not affected by the mere fact that, in view in particular of their limited manpower and means, the national authorities responsible for implementing that prohibition give lower priority to bringing proceedings against a certain type of trade in drugs, because they consider other types to be more dangerous. Above all, such an approach cannot put illegal drugs dealing on the same footing as economic channels which are strictly controlled by the competent authorities in the medical and scientific field. The latter trade is actually legalised whereas illegal dealings, albeit tolerated, remain prohibited (see, to that effect, *Vereniging Happy Family Rustenburgerstraat*, paragraph 29).
As regards the marketing of non-alcoholic beverages and food in coffee-shops, Mr Josemans, the German Government and the Commission submit that the Court should assess the effects of the rules at issue in the main proceedings on the exercise of that activity. The German Government stresses that those goods are to be consumed on the premises. The Commission doubts that non-residents buy them with the intention of exporting them to their States of residence. Therefore, the provisions to be applied are those governing the freedom to provide services within the meaning of Article 49 EC and not those relating to the free movement of goods under Article 29 EC.

The Burgemeester van Maastricht and the Netherlands, Belgian, German and French Governments submit that the marketing of non-alcoholic beverages and food in such establishments is altogether secondary to the marketing of cannabis and cannot have any bearing on the outcome of the main proceedings.

That latter argument cannot be accepted. Although coffee-shops are primarily dedicated to the sale and consumption of cannabis, the fact remains that the marketing, in such establishments, of non-alcoholic beverages and food generally constitutes a not inconsiderable economic activity. In reply to a question asked by the Court, the Netherlands Government stated, at the hearing, that that activity generally represents between 2.5% and 7.1% of the turnover of coffee-shops in the municipality of Maastricht. As regards more specifically the economic situation of the ‘Easy Going’ coffee-shop, according to the information provided by Mr Josemans, the proportion of its turnover from the sale of such goods is in that bracket.

Consequently, it is necessary to examine whether, and, if so, to what extent, the rules at issue in the main proceedings are capable of affecting, in so far as concerns the marketing of non-alcoholic beverages and food, the exercise of the freedoms of movement governed by Articles 29 EC and 49 EC or of undermining the principle of non-discrimination ‘on grounds of nationality’ within the meaning of Article 12 EC in conjunction with Article 18 EC.

In order to ascertain whether such an activity concerns the free movement of goods or the freedom to provide services, it must be borne in mind that an establishment is defined in Article 2.3.1.1(1)(a)(3) of the APV as a space to which the public has access and where food and/or non-alcoholic beverages are provided commercially, whether or not by means of vending machines, for consumption on the premises.

In such circumstances, as the Advocate General pointed out at point 76 of his Opinion, the marketing of non-alcoholic beverages and food in coffee-shops appears to constitute a catering activity characterised by an array of features and acts in which services predominate as opposed to the supply of the product itself (see, by analogy, Case C-491/03 Hermann [2005] ECR I-2025, paragraph 27).

Since the free movement of goods aspect is entirely secondary to that of the freedom to provide services and may be considered together with it, the Court will examine the rules at issue in the main proceedings only in the light of the latter fundamental freedom (see, to that effect, Case C-275/92 Schindler [1994] ECR I-1039, paragraph 22; Case C-71/02 Karner [2004] ECR I-3025, paragraph 46; Case C-36/02 Omega [2004] ECR I-9609, paragraph 26; Case C-452/04 Fidium Finanz [2006] ECR I-9521, paragraph 34; and Case C-233/09 Dijkman and Dijkman-Laveleije [2010] ECR I-0000, paragraph 33).
As regards the applicability of Article 12 EC, which lays down a general prohibition of all discrimination on grounds of nationality, it should be noted that that provision applies independently only to situations governed by European Union law for which the EC Treaty lays down no specific rules of non-discrimination (see, inter alia, Case 305/87 Commission v Greece [1989] ECR 1461, paragraphs 12 and 13; Case C-443/06 Hollmann [2007] ECR I-8491, paragraph 28; and Case C-269/07 Commission v Germany [2009] ECR I-7811, paragraph 98).

As the principle of non-discrimination has been implemented, in the area of the freedom to provide services, by Article 49 EC, Article 12 EC does not apply in circumstances such as those in the main proceedings.

As regards the applicability of Article 18 EC, that provision, which lays down generally the right for every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in the provisions guaranteeing the freedom to provide services (see, inter alia, Case C-92/01 Stylianakis [2003] ECR I-1291, paragraph 18; Case C-76/05 Schwarz and Gootjes-Schwarz [2007] ECR I-6849, paragraph 34; and Case C-56/09 Zanotti [2010] ECR I-0000, paragraph 24). As citizens of the European Union who do not reside in the Netherlands and wish to go into coffee-shops in the municipality of Maastricht to consume lawful goods there are to be regarded as ‘persons for whom’ services ‘are intended’ within the meaning of Article 49 EC, it is not necessary for the Court to rule on the interpretation of Article 18 EC.

Consequently, the answer to the first question is that, in the course of marketing narcotic drugs which are not distributed through channels strictly controlled by the competent authorities with a view to use for medical or scientific purposes, a coffee-shop proprietor may not rely on Articles 12 EC, 18 EC, 29 EC or 49 EC to object to municipal rules such as those at issue in the main proceedings, which prohibit the admission of persons who are non-resident in the Netherlands to such establishments. As regards the marketing of non-alcoholic beverages and food in those establishments, Article 49 EC et seq. may be relied on by such a proprietor.

The second question

The second question was asked in the event that the provisions governing the free movement of goods or those relating to the freedom to provide services apply in the circumstances of the dispute in the main proceedings. It relates, in essence, to whether municipal rules, such as those at issue in the main proceedings, constitute a restriction on the exercise of one of those freedoms and, if so, whether that measure may be justified by the objective of combating drug tourism and the accompanying public nuisance and, lastly, whether it constitutes a proportionate measure in relation to that objective.

Having regard to the answer to the first question, that question must be assessed solely in the light of Article 49 EC et seq. and limited to an examination of the effects of those rules on the marketing, in coffee-shops, of non-alcoholic beverages and food.

It is common ground that, under the rules at issue in the main proceedings, only ‘residents’ are admitted to coffee-shops. That term covers, under Article 2.3.1.1(1)(d) of the APV, any person who has his actual place of residence in the Netherlands. Consequently, the proprietors
of such establishments are not entitled to provide catering services to persons residing in other Member States and those persons are precluded from enjoying such services.

It is clear from the Court’s case-law that the principle of equal treatment, of which Article 49 EC embodies a specific instance, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, inter alia, Case C-388/01 Commission v Italy [2003] ECR I-721, paragraph 13; Case C-28/04 Tod’s and Tod’s France [2005] ECR I-5781, paragraph 19; and Case C-147/03 Commission v Austria [2005] ECR I-5969, paragraph 41).

That is true, in particular, of a measure under which a distinction is drawn on the basis of residence, in that that requirement is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners (see, inter alia, Case C-224/97 Ciola [1999] ECR I-2517, paragraph 14; Case C-388/01 Commission v Italy, paragraph 14; Case C-103/08 Gottwald [2009] ECR I-9117, paragraph 28; and Case C-73/08 Bressol and Others [2010] ECR I-0000, paragraph 45).

It must, however, be examined whether such a restriction may be justified by legitimate interests which European Union law recognises.

The German Government takes the view that the rules at issue in the main proceedings are justified by the derogating provisions set out in Article 46(1) EC in conjunction with Article 55 EC, namely grounds of public policy, public security or public health. The Burgemeester van Maastricht and the Belgian Government rely, in the alternative, on grounds of public policy and public security. According to the Netherlands Government, the need to combat drug tourism constitutes a public-interest objective for the purposes of the line of case-law initiated in ‘Cassis de Dijon’ (Case 120/78 Rewe-Zentral [1979] ECR 649).

While acknowledging the importance of the fight against drug tourism, the Commission submits that, as they are discriminatory, those rules can be compatible with European Union law only if they are covered by an express derogating provision, namely Article 46 EC in conjunction with Article 55 EC. The derogations provided for by those provisions should be interpreted restrictively. As regards more specifically grounds of public policy, they may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see, inter alia, Case 30/77 Bouchereau [1977] ECR 1999, paragraph 35).

In the present case, it is common ground that the rules at issue in the main proceedings are intended to put an end to the public nuisance caused by the large number of tourists wanting to purchase or consume cannabis in the coffee-shops in the municipality of Maastricht. According to the information provided by the Burgemeester van Maastricht at the hearing, the 14 coffee-shops in the municipality attract around 10 000 visitors per day and a little more than 3.9 million visitors per year, 70% of which are not resident in the Netherlands.

The Burgemeester van Maastricht and the Netherlands Government state that the problems associated with the sale of ‘soft’ drugs which arise in that commune, such as the various forms of public nuisance and crime and the increasing number of illegal points of sale of drugs, including ‘hard’ drugs, have been exacerbated by drug tourism. The Belgian, German and French Governments refer to the public order problems to which that phenomenon,
including the illegal export of cannabis, gives rise in Member States other than the Kingdom of the Netherlands, in particular in neighbouring States.

65 It must be pointed out that combating drug tourism and the accompanying public nuisance is part of combating drugs. It concerns both the maintenance of public order and the protection of the health of citizens, at the level of the Member States and also of the European Union.

66 Given the commitments entered into by the European Union and its Member States, there is no doubt that the abovementioned objectives constitute a legitimate interest which, in principle, justifies a restriction of the obligations imposed by European Union law, even under a fundamental freedom such as the freedom to provide services.

67 In that connection, it is important to bear in mind, as is apparent from paragraphs 11, 37 and 38 of this judgment, that the need to combat drugs has been recognised by various international conventions which the Member States, and even the European Union, have cooperated on or acceded to. The preambles to those instruments mention the danger to the health and well-being of individuals constituted, in particular, by demand for and the illicit traffic in narcotic drugs and psychotropic substances, as well as their harmful effects on the economic, cultural and political bases of society.

68 Furthermore, the need to fight drugs, in particular by preventing drug addiction and punishing the illicit trafficking in such products or substances, has been set out in Article 152(1) EC and in Articles 29 EU and 31 EU. As regards provisions of secondary law, the first recital in the preamble to Framework Decision 2004/757 states that illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the European Union, and to the legal economy, stability and security of the Member States. Furthermore, as is apparent from paragraph 10 of this judgment, certain instruments of the European Union relate expressly to the prevention of drug tourism.

69 However, measures which restrict the freedom to provide services may be justified by the objective of combating drug tourism and the accompanying public nuisance only if they are suitable for securing the attainment of that objective and do not go beyond what is necessary in order to attain it (see, to that effect, Omega, paragraph 36; Case C-438/05 International Transport Workers’ Federation and Finnish Seamen’s Union [2007] ECR I-10779, paragraph 75; and Case C-244/06 Dynamic Medien [2008] ECR I-505, paragraph 42).

70 In that connection it is important to bear in mind that a restrictive measure can be considered to be suitable for securing the attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner (see, to that effect, Case C-169/07 Hartlauer [2009] ECR I-1721, paragraph 55; Joined Cases C-171/07 and C-172/07 Apothekerkammer des Saarlandes and Others [2009] ECR I-4171, paragraph 42; and Case C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International [2009] ECR I-7633, paragraphs 59 to 61).

71 Mr Josemans calls into question the suitability and proportionality of the rules at issue in the main proceedings. They relate exclusively to coffee-shops. Under ‘the AHOJG criteria’, those establishments are required, unlike the illegal premises selling drugs in the municipality of Maastricht, to fight against the public nuisance caused by their customers. Furthermore, those rules are liable to drive drug tourists to use illegal channels.
The Commission expresses doubts as to the necessity of the rules at issue in the main proceedings and as to their consistency. It states that the national measures to combat the public nuisance caused by the consumption of drugs should be based on objective and non-discriminatory criteria. It refers, in that connection, to the judgment in Joined Cases 115/81 and 116/81 Adoui and Cornuaille [1982] ECR 1665, concerning the right of residence or establishment of prostitutes, and to the case-law deriving from it.

The Burgemeester van Maastricht and the Netherlands, Belgian and German Governments take the view, by contrast, that the rules at issue in the main proceedings constitute an appropriate and proportionate means of combating drug tourism and the accompanying public nuisance. The Burgemeester van Maastricht and the Netherlands Government state that the various measures adopted by municipalities applying a policy of tolerance with regard to coffee-shops in order to deal with that phenomenon have not achieved the objective pursued.

In the present case, it cannot be denied that the policy of tolerance applied by the Kingdom of the Netherlands with regard to the sale of cannabis encourages persons who are resident in other Member States to travel to that State, and more specifically to the municipalities in which coffee-shops are tolerated, in particular in border regions, in order to buy and consume that drug. Furthermore, according to the information in the case-file, some of those persons purchase cannabis in such establishments in order to export it illegally to other Member States.

It is indisputable that a prohibition on admitting non-residents to coffee-shops, such as that which is the subject-matter of the dispute in the main proceedings, constitutes a measure capable of substantially limiting drug tourism and, consequently, of reducing the problems it causes.

In that connection, it is important to point out that the discriminatory nature of the rules at issue in the main proceedings does not, on its own, mean that the way in which they pursue the intended objective is inconsistent. Although the Court took the view in Adoui and Cornuaille that a Member State cannot validly rely on grounds of public policy with regard to the behaviour of a non-national inasmuch as it does not adopt repressive measures or other genuine and effective measures with respect to the same conduct on the part of its own nationals, the fact remains that the dispute in the main proceedings is part of a different legal context.

As was pointed out in paragraph 36 of this judgment, there is, under international law and European Union law, a prohibition in all the Member States on marketing narcotic drugs, with the exception of strictly controlled trade for use for medical and scientific purposes. By contrast, prostitution, the behaviour referred to in Adoui and Cornuaille, aside from trafficking in human beings, is tolerated or regulated in a number of Member States (see, to that effect, Case C-268/99 Jany and Others [2001] ECR I-8615, paragraph 57).

It cannot be held to be inconsistent for a Member State to adopt appropriate measures to deal with a large influx of residents from other Member States who wish to benefit from the marketing – tolerated in that Member State – of products which are, by their very nature, prohibited in all Member States from being offered for sale.

As regards the scope of rules such as those at issue in the main proceedings, it is important to bear in mind that they apply only to establishments the main activity of which is the
marketing of cannabis. They do not preclude a person who is not resident in the Netherlands from going, in the municipality of Maastricht, into other catering establishments in order to consume non-alcoholic beverages and food. According to the Netherlands Government, there are more than 500 such establishments.

As regards the possibility of adopting measures which are less restrictive of the freedom to provide services, according to the case-file, in the municipalities which apply a policy of tolerance with regard to coffee-shops, various measures relating to combating drug tourism and the accompanying public nuisance have been implemented, such as a restriction on the number of coffee-shops or their opening hours, the implementation of a card system which allows customers access to them or even a reduction in the amount of cannabis per person which may be bought. According to the information provided by the Burgemeester van Maastricht and the Netherlands Government, those measures have nevertheless proved to be insufficient and ineffective in the light of the objective pursued.

As regards more specifically the possibility of granting non-residents access to coffee-shops whilst refusing to sell cannabis to them, it must be pointed out that it is not easy to control and monitor with accuracy that that product is not served to or consumed by non-residents. Furthermore, there is a danger that such an approach would encourage the illegal trade in or the resale of cannabis by residents to non-residents inside coffee-shops.

Member States cannot be denied the possibility of pursuing the objective of combating drug tourism and the accompanying public nuisance by the introduction of general rules which are easily managed and supervised by the national authorities (see, by analogy, Case C-110/05 Commission v Italy [2009] ECR I-519, paragraph 67, and Case C-142/05 Mickelsson and Roos [2009] ECR I-4273, paragraph 36). In the present case, nothing in the case-file gives grounds to assume that the objective pursued could be achieved to the extent envisaged by the rules at issue in the main proceedings by granting non-residents access to coffee-shops whilst refusing to sell them cannabis.

In such circumstances, it must be stated that rules such as those at issue in the main proceedings are suitable for attaining the objective of combating drug tourism and the accompanying public nuisance and do not go beyond what is necessary in order to attain it.

Having regard to all of the foregoing considerations, the answer to the second question is that Article 49 EC must be interpreted as meaning that rules such as those at issue in the main proceedings constitute a restriction on the freedom to provide services laid down by the EC Treaty. That restriction is, however, justified by the objective of combating drug tourism and the accompanying public nuisance.

The third and fourth questions

The third and fourth questions were asked in the alternative and relate to the application of the principle of non-discrimination on grounds of nationality laid down in Article 12 EC in conjunction with Article 18 EC, which governs the free movement of citizens of the European Union.

Having regard to the answer given to the first question, there is no need to answer those questions.
Costs

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

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

1. **In the course of marketing narcotic drugs which are not distributed through channels strictly controlled by the competent authorities with a view to use for medical or scientific purposes, a coffee-shop proprietor may not rely on Articles 12 EC, 18 EC, 29 EC or 49 EC to object to municipal rules, such as those at issue in the main proceedings, which prohibit the admission of persons who are non-resident in the Netherlands to such establishments. As regards the activity of marketing non-alcoholic beverages and food in those establishments, Article 49 EC et seq. may be relied on by such a proprietor.**

2. **Article 49 EC must be interpreted as meaning that rules such as those at issue in the main proceedings constitute a restriction on the freedom to provide services laid down by the EC Treaty. That restriction is, however, justified by the objective of combating drug tourism and the accompanying public nuisance.**

**Articulation between primary law and secondary law in the internal market**

*Case Citroen Belux NV, Case C-265/12, 18 July 2013*

*The second question*

29 By its second question, the referring court asks, in essence, whether Article 56 TFEU must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which lays down a general prohibition – save in the cases exhaustively listed by the national legislation – of combined offers to consumers where at least one of the components of those offers is a financial service.

30 As regards the admissibility of the second question, the FvF contends that it is inadmissible in so far as, when a particular sphere has been harmonised at EU level, the national measures in that sphere must be assessed, not in the light of the provisions of the TFEU, but in the light of the harmonising measure.

31 In that connection, it is true that a national measure in a sphere which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty (see, to that effect, Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 64 and the case-law cited). However, Article 3(9) of Directive 2005/29 – as indicated by recital 9 in the preamble to that directive – provides specifically that, in relation to financial services, Directive 2005/29 does not exhaustively harmonise the existing law and leaves Member States freedom of action, which they must exercise in accordance with the Treaty.
Admittedly, national legislation – such as that at issue in the main proceedings – which, as worded, applies to Belgian operators and to operators of other Member States alike is, generally, capable of falling within the scope of the provisions on the fundamental freedoms established by the Treaty only to the extent that it applies to situations connected with trade between Member States (see Joined Cases C-570/07 and C-571/07 Blanco Pérez and Chao Gómez [2010] ECR I-4629, paragraph 40, and Joined Cases C-357/10 to C-359/10 Duomo Gpa and Others [2012] ECR I-0000, paragraph 26 and the case-law cited).

In the present case, however, it is conceivable that businesses established in Member States other than the Kingdom of Belgium are interested in making, in that Member State, combined offers involving at least one financial component, such as the offer at issue in the main proceedings.

It is therefore necessary to consider whether the general prohibition on combined offers of which at least one component is a financial service is consistent with Article 56 TFEU.

As regards the substance, it is settled case-law that the free movement of services provided for in Article 56 TFEU requires not only the elimination of all discrimination on grounds of nationality against providers of services established in other Member States, but also the abolition of any restriction – even if it applies without distinction to national providers of services and to those from other Member States – which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State where he lawfully provides similar services (see, to that effect, Case C-205/99 Analir and Others [2001] ECR I-1271, paragraph 21, and Case C-439/99 Commission v Italy [2002] ECR I-305, paragraph 22).

As it is, a prohibition such as that at issue in the main proceedings and provided for in Article 72(1) of the Law of 6 April 2010 may render less attractive the provision of financial services in Belgium for businesses established in other Member States who wish to make combined offers of which at least one component is a financial service. Those businesses could not make such offers on the Belgian market and would also be obliged to check whether they comply with Belgian law, whereas such a step would not be necessary in respect of other Member States.

It is settled case-law that a restriction on the freedom to provide services is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it (see, inter alia, Case C-341/05 Laval un Partneri[2007] ECR I-11767, paragraph 101 and the case-law cited).

In the present case, the objective pursued by Article 72 of the Law of 6 April 2010 is to protect the interests of consumers, as is moreover apparent from the very title of that law. The protection of consumers is recognised in the case-law as an overriding reason of public interest, capable of justifying a restriction on the freedom to provide services (see Case 286/81 Oosthoek’s Uitgeversmaatschappij [1982] ECR 4575, paragraph 16, and Case 220/83 Commission v France [1986] ECR 3663, paragraph 20).

As regards the appropriateness of Article 72 of the Law of 6 April 2010, it must be stated, first, that financial services are, by nature, complex and entail specific risks with regard to which the consumer is not always sufficiently well informed. Secondly, a combined offer is, in itself, such as to generate on the part of the consumer the idea of a price advantage. It follows that a combined offer of which one component is a financial service is more likely to be lacking in transparency as regards the conditions, the price and the exact content of that service. Accordingly, such an offer may well mislead consumers as to the true content and actual
characteristics of the combination offered and, at the same time, deprive them of the opportunity of comparing the price and quality of that offer with other corresponding services from other economic operators.

40 In those circumstances, legislation which prohibits combined offers involving at least one financial service is of such a nature as to contribute to consumer protection.

41 As regards the proportionality of the restriction, Article 72(2) of the Law of 6 April 2010 allows for exceptions to the general prohibition of combined offers of which at least one component constitutes a financial service. The existence of those exceptions indicates that the Belgian legislature took the view that, in certain cases, it was not necessary to provide the consumer with additional protection.

42 Accordingly, the general prohibition of combined offers of which at least one component is a financial component, such as that laid down in Article 72 of the Law of 6 April 2010, does not go beyond what is necessary to achieve the high level of consumer protection intended by Directive 2005/29 and, more specifically, it does not go beyond what is necessary to protect the economic interests of consumers in the financial services sphere.

43 In the light of the foregoing considerations, the answer to the second question is that Article 56 TFEU must be interpreted as not precluding a national provision, such as that at issue in the main proceedings, which lays down a general prohibition – save in the cases exhaustively listed by the national legislation – of combined offers to consumers where at least one of the components of those offers is a financial service.

Costs

44 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 (First Chamber) hereby rules:


Notion d’entreprise – Case Höfner

In Case C-41/90,
REFERENCE to the Court under Article 177 of the EEC Treaty by the Oberlandesgericht Muenchen, Federal Republic of Germany, for a preliminary ruling in the proceedings pending before that court between

Klaus Hoefer and Fritz Elser and Macrotron GmbH; on the interpretation of Articles 7, 55, 56, 59, 86 and 90 of the EEC Treaty.

THE COURT (Sixth Chamber).

Grounds

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

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

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

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

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

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

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

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

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

10 Whilst the activities of recruitment consultants are thus to some extent tolerated by the Bundesanstalt, the fact remains that any legal act which infringes a statutory prohibition is void under Paragraph 134 of the German Civil Code and, according to German case-law, that prohibition applies to employment procurement activities carried out in breach of the AFG.
11 The dispute in the main proceedings concerns the compatibility of the recruitment contract concluded between Messrs Hoefner and Elser, on the one hand, and Macrotron, on the other, with the AFG. As required by the contract, Messrs Hoefner and Elser presented Macrotron with a candidate for the post of sales director. He was a German national who, according to the recruitment consultants, was perfectly suitable for the post in question. However, Macrotron decided not to appoint that candidate and refused to pay the fees stipulated in the contract.

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

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

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

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

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

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

14 In its first three questions and the part of its fourth question concerning Article 59 of the Treaty, the national court seeks essentially to determine whether the Treaty provisions on the free movement of services preclude a statutory prohibition of the procurement of employment for business executives by private recruitment consultancy companies. The fourth question is concerned essentially with the interpretation of Articles 86 and 90 of the Treaty, having regard to the competitive relationship existing between those companies and a public employment agency enjoying exclusive rights in respect of employment procurement.

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

The interpretation of Articles 86 and 90 of the EEC Treaty

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

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

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

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

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

21 It must be observed, in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity.

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

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

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

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

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

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

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

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

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

31 A Member State creates a situation in which the provision of a service is limited when the undertaking to which it grants an exclusive right extending to executive recruitment activities is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind and when the effective pursuit of such activities by private companies is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void.

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

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

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

- the exclusive right extends to executive recruitment activities;
- the public employment agency is manifestly incapable of satisfying demand prevailing on the market for such activities;
- the actual pursuit of those activities by private recruitment consultants is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void;
- the activities in question may extend to the nationals or to the territory of other Member States.

The interpretation of Article 59 of the EEC Treaty

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

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

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

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

39 Such a situation displays no link with any of the situations envisaged by Community law. That finding cannot be invalidated by the fact that a contract concluded between the recruitment consultants and the undertaking
concerned includes the theoretical possibility of seeking German candidates resident in other Member States or nationals of other Member States.

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

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

Operative part

On those grounds,

THE COURT (Sixth Chamber),

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

1. A public employment agency engaged in employment procurement activities is subject to the prohibition contained in Article 86 of the Treaty, so long as the application of that provision does not obstruct the performance of the particular task assigned to it. A Member State which has conferred an exclusive right to carry on that activity upon the public employment agency is in breach of Article 90(1) of the Treaty where it creates a situation in which that agency cannot avoid infringing Article 86 of the Treaty. That is the case, in particular, where the following conditions are satisfied:
   - the exclusive right extends to executive recruitment activities;
   - the public employment agency is manifestly incapable of satisfying demand prevailing on the market for such activities;
   - the actual pursuit of those activities by private recruitment consultants is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void;
   - the activities in question may extend to the nationals or to the territory of other Member States.

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

The origin of public compensation

Article 106 (ex Article 86 TEC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.
Corbeau case – Parties - In Case C-320/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal Correctionnel de Liège (Belgium) for a preliminary ruling in the criminal proceedings before that court against

Paul Corbeau, Civil party claiming damages: Régie des Postes (The Post Office), on the interpretation of Articles 86 and 90 of the EEC Treaty,

THE COURT, Grounds

1 By judgment of 13 November 1991, received at the Court on 11 December 1991, the Tribunal Correctionnel de Liège (Criminal Court, Liège) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Articles 86 and 90 of the Treaty in order to enable it to determine the compatibility with those articles of the Belgian rules on the postal monopoly.

2 The questions were raised in criminal proceedings before that court against Paul Corbeau, a businessman from Liège, charged with infringing the Belgian legislation on the postal monopoly.

3 In Belgium the Law of 26 December 1956 on the postal service (Moniteur Belge of 30-31 December 1956, p. 8619) and the Law of 6 July 1971 establishing the Régie des Postes (Moniteur Belge of 14 August 1971, p. 9510) confer on the Régie des Postes, a legal person under public law, an exclusive right to collect, carry and distribute throughout the Kingdom all correspondence of whatever nature, and lay down penalties for any infringement of that exclusive right.

4 It may be seen from the documents in the main proceedings which have been sent to the Court, from the written observations submitted and from the oral argument presented at the hearing, that Mr Corbeau provides, within the City of Liège and the surrounding areas, a service consisting in collecting mail from the address of the sender and distributing it by noon on the following day, provided that the addressee is located within the district concerned. As regards correspondence destined for addressees outside that district, Mr Corbeau collects it from the sender’s address and sends it by post.

5 Upon complaint from the Régie des Postes, the Tribunal Correctionnel de Liège decided, in view of its doubts with regard to the compatibility of the Belgian rules in question with Community law, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
(a) To what extent is a postal monopoly, such as that organized under the Belgian Law of 26 December 1956 on the postal monopoly, in conformity, as Community law now stands, with the rules of the Treaty of Rome (and in particular with Articles 90, 85 and 86) and with the rules of derived law in force which are applicable in this area?

(b) To what extent, if at all, must such a monopoly be modified in order to comply with the Community obligations imposed on the Member States in this area, and in particular with Article 90(1), and with the rules of derived law applicable in this area?

(c) Is an undertaking in which a statutory monopoly is vested and which enjoys exclusive rights analogous to those described in the Belgian Law of 26 December 1956, subject to the rules of European competition law (and in particular to Articles 7 and 85 to 90 inclusive) by virtue of Article 90(2) of the EEC Treaty?

(d) Does such an undertaking hold a dominant position in a substantial part of the common market within the meaning of Article 86 of the Treaty of Rome, a position deriving either from a statutory monopoly or from the particular circumstances?

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

7 With regard to the facts in the main proceedings, the questions referred to the Court must be understood as meaning that the national court is substantially concerned with the question whether Article 90 of the Treaty must be interpreted as meaning that it is contrary to that article for the legislation of a Member State which confers on a body such as the Régie des Postes the exclusive right to collect, carry and distribute mail to prohibit an economic operator established in that State from offering, under threat of criminal penalties, certain specific services on that market.

8 To reply to that question, as thus reformulated, it should first be pointed out that a body such as the Régie des Postes, which has been granted exclusive rights as regards the collection, carriage and distribution of mail, must be regarded as an undertaking to which the Member State concerned has granted exclusive rights within the meaning of Article 90(1) of the Treaty.
Next it should be recalled that the Court has consistently held that an undertaking having a statutory monopoly over a substantial part of the common market may be regarded as having a dominant position within the meaning of Article 86 of the Treaty (see the judgments in Case C-179/90 Merci Convenzionali Porto di Genova [1991] ECR I-5889 at paragraph 14 and in Case C-18/88 RTT v GB-Inno-BM [1991] ECR I-5941 at paragraph 17).

However, Article 86 applies only to anti-competitive conduct engaged in by undertakings on their own initiative, not to measures adopted by States (see the RTT v GB-Inno-BM judgment, cited above, paragraph 20).

The Court has had occasion to state in this respect that although the mere fact that a Member State has created a dominant position by the grant of exclusive rights is not as such incompatible with Article 86, the Treaty none the less requires the Member States not to adopt or maintain in force any measure which might deprive those provisions of their effectiveness (see the judgment in Case C-260/89 ERT [1991] ECR I-2925, paragraph 35).

Thus Article 90(1) provides that in the case of public undertakings to which Member States grant special or exclusive rights, they are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty with regard to competition.

That provision must be read in conjunction with Article 90(2) which provides that undertakings entrusted with the operation of services of general economic interest are to be subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

That latter provision thus permits the Member States to confer on undertakings to which they entrust the operation of services of general economic interest, exclusive rights which may hinder the application of the rules of the Treaty on competition in so far as restrictions on competition, or even the exclusion of all competition, by other economic operators are necessary to ensure the performance of the particular tasks assigned to the undertakings possessed of the exclusive rights.

As regards the services at issue in the main proceedings, it cannot be disputed that the Régie des Postes is entrusted with a service of general economic interest consisting in the obligation to collect, carry and distribute mail on behalf of all users throughout the territory of the Member State concerned, at uniform tariffs and on similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each individual operation.

The question which falls to be considered is therefore the extent to which a restriction on competition or even the exclusion of all competition from other economic operators is
necessary in order to allow the holder of the exclusive right to perform its task of general interest and in particular to have the benefit of economically acceptable conditions.

17 The starting point of such an examination must be the premise that the obligation on the part of the undertaking entrusted with that task to perform its services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings where the economically profitable sectors are concerned.

18 Indeed, to authorize individual undertakings to compete with the holder of the exclusive rights in the sectors of their choice corresponding to those rights would make it possible for them to concentrate on the economically profitable operations and to offer more advantageous tariffs than those adopted by the holders of the exclusive rights since, unlike the latter, they are not bound for economic reasons to offset losses in the unprofitable sectors against profits in the more profitable sectors.

19 However, the exclusion of competition is not justified as regards specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal service, such as collection from the senders’ address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit, in so far as such specific services, by their nature and the conditions in which they are offered, such as the geographical area in which they are provided, do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right.

20 It is for the national court to consider whether the services at issue in the dispute before it meet those criteria.

21 The answer to the questions referred to the Court by the Tribunal Correctionnel de Liège should therefore be that it is contrary to Article 90 of the EEC Treaty for legislation of a Member State which confers on a body such as the Régie des Postes the exclusive right to collect, carry and distribute mail, to prohibit, under threat of criminal penalties, an economic operator established in that State from offering certain specific services dissociable from the service of general interest which meet the special needs of economic operators and call for certain additional services not offered by the traditional postal service, in so far as those services do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right. It is for the national court to consider whether the services in question in the main proceedings meet those criteria.

22 The costs incurred by the Spanish, United Kingdom and Irish Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.
On those grounds, THE COURT, in answer to the questions referred to it by the Tribunal Correctionnel de Liège by judgment of 13 November 1991, hereby rules:

It is contrary to Article 90 of the EEC Treaty for legislation of a Member State which confers on a body such as the Réie des Postes the exclusive right to collect, carry and distribute mail, to prohibit, under threat of criminal penalties, an economic operator established in that State from offering certain specific services dissociable from the service operated of general interest which meet the special needs of economic operators and call for certain additional services not offered by the traditional postal service, in so far as those services do not compromise the economic stability of the service of general economic interest performed by the holder of the exclusive right. It is for the national court to consider whether the

**State Aid – Market economy private investor test**

In Joined Cases C-533/12 P and C-536/12 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice, lodged on 22 November 2012,

**Société nationale maritime Corse-Méditerranée (SNCM) SA**, represented by A. Winckler and F.-C. Laprévote, avocats,

appellant,

the other parties to the proceedings being:

**Corsica Ferries France SAS**, established in Bastia (France), represented by S. Rodrigues and C. Bernard-Glanz, avocats,

defendant at first instance,

**European Commission**, 

defendant at first instance,

**French Republic**, represented by G. de Bergues, N. Rouam and J. Rossi, acting as Agents,

intervener at first instance (C-533/12 P),

and

**French Republic**, represented by G. de Bergues, D. Colas, N. Rouam and J. Rossi, acting as Agents,

appellant,

the other parties to the proceedings being:
Corsica Ferries France SAS, established in Bastia, represented by S. Rodrigues and C. Bernard-Glanz, avocats,

applicant at first instance,

European Commission,

defendant at first instance,

Société nationale maritime Corse-Méditerranée (SNCM) SA, represented by A. Winckler and F.-C. Laprévote, avocats,

intervener at first instance (C-536/12 P),

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), A. Rosas, D. Šváby and C. Vajda, Judges,

Advocate General: M. Wathelet,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 6 November 2013,

after hearing the Opinion of the Advocate General at the sitting on 15 January 2014,

gives the following

Judgment

1 By their respective appeals the Société nationale maritime Corse Méditerranée (SNCM) SA (‘SNCM’) and the French Republic ask the Court of Justice to set aside the judgment of the General Court of the European Union in Corsica Ferries France v Commission (T-565/08, EU:T:2012:415) (‘the judgment under appeal’), in so far as it annulled the second and third paragraphs of Article 1 of Commission Decision 2009/611/EC of 8 July 2008 concerning the measures C 58/02 (ex N 118/02) which France has implemented in favour of the Société nationale maritime Corse-Méditerranée (SNCM) (OJ 2009 L 225, p. 180; ‘the decision at issue’).

Background to the dispute and the decision at issue

2 The General Court made the following findings:

‘Shipping companies at issue

1 ... Corsica Ferries France SAS [“Corsica Ferries”] is a shipping company operating regular services to Corsica from mainland France (Marseilles, Toulon and Nice) and Italy.
[SNCM] is a shipping company operating regular services to Corsica from mainland France (Marseilles, Toulon and Nice) and to North Africa (Algeria and Tunisia) from France and services to Sardinia. One of the main subsidiaries of SNCM is the Compagnie méridionale de navigation which is wholly owned by SNCM …

In 2002, SNCM was 20% held by the Société nationale des chemins de fer (French National Railways) and 80% held by the Compagnie générale maritime et financière (“CGMF”), which in turn were wholly owned by the French State. When it opened its capital in 2006, two purchasers, Butler Capital Partners … and Veolia Transport …, assumed control of 38% and 28% of the capital, respectively, whilst CGMF maintained a presence with 25%, and 9% of the capital was reserved for the employees. Since then, [Butler Capital Partners] has transferred its shares to [Veolia Transport].

Administrative procedure

By Decision 2002/149/EC of 30 October 2001 on the State aid awarded by France to [Société nationale maritime Corse-Méditerranée (SNCM)] (OJ 2002 L 50, p. 66 …), the Commission of the European Communities found that aid of EUR 787 million granted to SNCM, during the period from 1991 to 2001, by way of public service compensation, was compatible with the common market under Article 86(2) EC. No action for annulment of that decision has been brought before the General Court.

By letter of 18 February 2002, the French Republic notified the Commission of a plan to grant aid for the restructuring of SNCM in an amount of EUR 76 million (“the 2002 Plan”).

By Decision 2004/166/EC of 9 July 2003 on aid which France intends to grant for the restructuring of [the Société nationale maritime Corse Méditerranée (SNCM)] (OJ 2004 L 61, p. 13; “the 2003 Decision”), the Commission approved, with conditions attached, two tranches of restructuring aid paid to SNCM in a total amount of EUR 76 million, one of EUR 66 million, payable immediately, and the other of a maximum amount of EUR 10 million, depending on the net result from disposals relating to, in particular, SNCM’s vessels.

[Corsica Ferries] brought an action for annulment of the 2003 Decision before the General Court on 13 October 2003 [(judgment of the General Court in Corsica Ferries France v Commission, T-349/03, EU:T:2005:221)].

By Decision 2005/36/EC of 8 September 2004 amending Decision [2004/166/EC on aid which France intends to grant for the restructuring of Société Nationale Maritime Corse-Méditerranée (SNCM)] (OJ 2005 L 19, p. 70 …), the Commission amended one of the conditions imposed by Article 2 of the 2003 Decision. This concerned the condition relating to the maximum number of 11 ships of which SNCM was authorised to dispose. In [Decision 2005/36], the Commission authorised the replacement of one of those ships, the *Aliso*, by another, the *Asco*.

By decision of 16 March 2005, the Commission approved the payment of a second tranche of aid for restructuring, in an amount of EUR 3 327 400, on the basis of the 2003 Decision (“the 2005 Decision”).

By its judgment in … Corsica Ferries France v Commission [(EU:T:2005:221)], the General Court annulled the 2003 Decision on the ground of an erroneous assessment of the minimal nature of the aid, due principally to calculation errors in the net proceeds from disposals,
while rejecting all the other pleas in law alleging an insufficient statement of reasons and an infringement of Article 87(3)(c) EC and of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2; “the Guidelines”).

11 By letter dated 7 April 2006, the French authorities called on the Commission to find that, by reason of its nature as public service compensation, part of the restructuring aid agreed to under the 2002 Plan, in an amount of EUR 53.48 million, was not to be classified as a measure taken under a restructuring plan but as a measure not constituting aid in accordance with the judgment [in Altmark Trans and Regierungspräsidium Magdeburg (C-280/00, EU:C:2003:415)] or as a measure independent of the 2002 Plan pursuant to Article 86(2) EC.


13 On 13 September 2006, the Commission decided to initiate the procedure under Article 88(2) EC in regard to the new measures carried out in favour of SNCM while incorporating the 2002 Plan (OJ 2006 C 303, p. 53 …).

15 By [the decision at issue], the Commission found that the measures of the 2002 Plan constituted unlawful State aid within the meaning of Article 88(3) EC but were compatible with the common market under Article 86(2) EC and Article 87(3)(c) EC and that the measures of the 2006 privatisation plan (“the 2006 Plan”) did not constitute State aid within the meaning of Article 87(1) EC.

**Measures in question**

16 The decision [at issue] concerns the following measures:

– under the 2002 Plan: the capital contribution of CGMF to SNCM for the sum of EUR 76 million in 2002, including EUR 53.48 million for public service obligations and the balance for restructuring aid;

– under the 2006 Plan:

– the negative sale price of SNCM by CGMF for the sum of EUR 158 million;

– the capital contribution of CGMF of EUR 8.75 million;

– the current account advance from CGMF for an amount of EUR 38.5 million for staff made redundant by SNCM in the event of a new social plan.

**The decision [at issue]**

17 In the decision [at issue], in particular at recitals 37 to 54, the Commission found that the operation of passenger transport services to Corsica was a market characterised by the fact
that it was seasonal and concentrated. The competitive structure of the market had changed significantly following the arrival of [Corsica Ferries] in 1996. Since 2000, SNCM and [Corsica Ferries] constituted a de facto duopoly holding over 90% of the market share. In 2007, [Corsica Ferries] clearly overtook SNCM and transported an additional million passengers, in a market increasing steadily by 4% per annum. SNCM, together with [Compagnie méridionale de navigation], on the other hand, retained a near-monopoly in respect of freight transport.

The Commission found, at recitals 219 to 225 of the decision [at issue], that all the contributions received by SNCM through CGMF were financed via State resources, that they threatened to distort competition and that they had an effect on trade between Member States. Accordingly, it found that three of the four criteria of Article 87(1) EC had been fulfilled. It then examined, for each measure, the existence of a selective economic advantage and its possible compatibility with the common market.

As regards the EUR 76 million notified in 2002, the Commission took the view, at recital 236 of the decision [at issue], that EUR 53.48 million could be considered to be public service compensation. In accordance with paragraph 320 of the judgment [in Corsica Ferries France v Commission (EU:T:2005:221)], the Commission evaluated that contribution in the light of the judgment in Altmark [Trans and Regierungspräsidium Magdeburg, (EU:C:2003:415)] and found, at recital 257 of the decision [at issue], that it indeed constituted State aid but was nevertheless compatible with the common market in accordance with Article 86(2) EC. The remaining EUR 22.52 million then had to be considered in terms of restructuring aid.

As regards the 2006 Plan, the Commission next applied, at recitals 267 to 352 of the decision [at issue], the market economy private investor test (“the private investor test”) to the negative sale price of EUR 158 million. In order to do so, it evaluated whether a hypothetical private investor, in the place of and instead of CGMF, would have preferred to recapitalise [SNCM] for that amount or place the company in liquidation and bear the costs thereof. It was therefore necessary to assess a minimum cost of liquidation.

The Commission took the view, at recitals 267 to 280 of the decision [at issue], that the cost of liquidation had necessarily to include the cost of a social plan, namely the cost of additional redundancy payments in addition to statutory obligations and obligations under agreements, in order to comply with the practice of large groups of undertakings today and to not harm the brand image of the holding company to which it belongs and its ultimate shareholder. It therefore calculated, with the help of an independent expert, the cost of those additional redundancy payments by carrying out a comparison with social plans implemented recently in France by groups of undertakings such as Michelin and Yves Saint-Laurent.

At recital 350 of the decision [at issue], the Commission found that the negative sale price was the result of an open, transparent, unconditional and non-discriminatory selection procedure, and that, in that regard, it constituted a market price. Consequently, accepting the premiss of the cost of liquidation being limited to redundancy payments alone, it concluded, at recital 352 of that decision, that the cost of liquidation was higher than the negative sale price and that the capital contribution of EUR 158 million did not therefore constitute State aid within the meaning of Article 87(1) EC.

As regards the capital contribution of EUR 8.75 million from CGMF, the Commission took the view, at recitals 356 to 358 of the decision [at issue], that since the contribution of the
private purchasers was significant and concurrent, it could be automatically excluded that this
was in the nature of aid. Next, it stated that the fixed rate of profitability constituted an
adequate return on the capital invested and that the existence of a clause to cancel the sale was
not such as to call into question the equal treatment. It concluded, at recital 365 of that
decision, that CGMF’s capital contribution, in an amount of EUR 8.75 million, did not
constitute aid within the meaning of Article 87(1) EC.

24 Next, the Commission observed, at recitals 372 to 378 of the decision [at issue], that the
measures involving aid to individuals, up to EUR 38 million, deposited in an escrow account
would be carried out should a new social plan be implemented by the purchasers and that the
measures did not reflect the implementation of the staff reductions provided for under the
2002 Plan. According to the Commission, that aid could be paid only to individuals whose
employment contract with SNCM had been terminated prematurely. Those measures did not
therefore constitute charges arising out of the normal application of the social legislation
applicable to cases where employment contracts have been terminated. The Commission
concluded that that aid to individuals, approved of by the State in the exercise of its public
authority and not by the State in its capacity as shareholder, therefore fell within the Member
States’ social policy and by the same token did not constitute aid within the meaning of
Article 87(1) EC.

25 As regards the balance of EUR 22.52 million notified under restructuring aid, namely the
balance of EUR 76 million notified under the 2002 Plan and of the EUR 53.48 million
considered to be compatible with the common market pursuant to Article 86(2) EC …, the
Commission found, at recital 381 of the decision [at issue], that this constituted State aid
within the meaning of Article 87(1) EC. Next, it assessed the compatibility of that measure
with the Guidelines.

26 The Commission stated, at recitals 387 to 401 of the decision [at issue], that, in 2002, SNCM
was indeed a firm in difficulty within the meaning of point 5(a) and of point 6 of the
Guidelines and that the 2002 Plan was capable of helping the company restore its viability, in
accordance with points 31 to 34 of the Guidelines.

27 In respect of the avoidance of undue distortions of competition (points 35 to 39 of the
Guidelines), the Commission took the view, at recital 404 of the decision [at issue], that there
was no excess capacity on services by sea to Corsica and that it was therefore not necessary to
contribute to its improvement. It considered next, at recital 406 of the contested decision, that
the restructuring plan significantly reduced the firm’s presence on the market. The criteria
relating to the prevention of undue distortions of competition was therefore also satisfied.

28 At recitals 410 to 419 of the decision [at issue], the Commission observed that the need for
aid, calculated at the minimum under points 40 and 41 of the Guidelines, was limited to
EUR 19.75 million on 9 July 2003, subject to the net proceeds of the disposals provided for
by the 2003 Decision. To that end, the Commission began by calculating SNCM’s cash-flow
requirements for its restructuring plan. According to the Commission, the cost of the
restructuring plan was determined at EUR 46 million. Next, it deducted all the disposals made
between 18 February 2002 (date of notification of the 2002 Plan) and 9 July 2003 (date of
adoption of the 2003 Decision), namely EUR 26.25 million, to arrive at an amount of
EUR 19.75 million.

29 As regards the compensatory measures, the Commission found that almost all the conditions
provided for under the 2003 Decision concerning the acquisitions, the use of the fleet, the
disposal of assets, the prohibition on offering lower fares than those of each of its competitors … and the limitation on the number of round trips on routes departing from Corsica had been complied with. In so far as those conditions had been satisfied and the amount of the aid notified was substantially less than the amount approved in 2003, the Commission did not consider it appropriate to impose additional obligations. Accordingly, after having taken account of the amount of the additional disposals provided for under the 2003 Decision, the Commission found, at recital 434 of the decision [at issue], that the final restructuring balance, established at EUR 15.81 million, was State aid compatible with the common market pursuant to Article 87(3)(c) EC.

The enacting terms of the decision [at issue] read as follows:

“Article 1

The compensation of EUR 53.48 million for public service obligations paid by the French State to SNCM for the period 1991-2001 constitutes unlawful State aid for the purpose of Article 88(3) of the EC Treaty but is compatible with the common market under Article 86(2) thereof.

The negative sale price of SNCM of EUR 158 million, the EUR 38.5 million in social measures aimed at employees and borne by CGMF, as well as the related and concurrent recapitalisation of SNCM by CGMF for the sum of EUR 8.75 million do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

The EUR 15.81 million in restructuring aid operated by France to benefit [SNCM] constitutes illegal aid within the meaning of Article 88(3) of the EC Treaty but is compatible with the common market under Article 86(2) thereof.

Article 2

This Decision is addressed to the French Republic.”

The action before the General Court and the judgment under appeal

By application lodged at the Registry of the General Court on 17 December 2008, Corsica Ferries asked the General Court to annul the decision at issue. The applicant put forward essentially two pleas in law in support of its application.

The first plea in law alleges an interpretation of Article 287 EC that is too broad, which results in an inadequate statement of reasons for the decision at issue as well as in an infringement of the rights of the defence and of the right to an effective legal remedy. The second to sixth pleas in law allege an infringement of Articles 87 EC and 88 EC and of the Guidelines. Those pleas concern, respectively, the capital contribution of EUR 53.48 million as public service compensation, the disposal of SNCM at a negative price of EUR 158 million, the capital contribution from CGMF of EUR 8.75 million, the aid measures to individuals of EUR 38.5 million and the balance of EUR 22.52 million notified as restructuring aid.
The General Court upheld the third to sixth pleas adduced by Corsica Ferries in support of its annulment action and annulled the second and third paragraphs of Article 1 of the decision at issue.

**Forms of order sought and procedure before the Court**

6 By its appeal, SNCM claims that the Court should:

- set aside, in part, the judgment under appeal on the basis of Article 265(1) TFEU and Article 61 of the Statute of the Court of Justice of the European Union, in so far as it annuls the second and third paragraphs of Article 1 and of the decision at issue; and
- order Corsica Ferries to pay the costs.

7 Corsica Ferries contends that Court should:

- declare the appeals in these joint actions to be unfounded and dismiss them; and
- order the appellants to pay all the costs.

8 The French Republic claims that the Court should:

- set aside the judgment under appeal in so far as it annulled the second and third paragraphs of Article 1 of the decision at issue;
- give final judgment in the matter itself, or refer the case back to the General Court; and
- order the respondent to pay the costs.

9 By order of the President of the Court of 24 January 2013, Cases C-533/12 P and C-536/12 P were joined for the purposes of the written and oral procedure and the judgment.

**The appeals**

10 SNCM, in Case C-533/12 P, and the French Republic, in Case C-536/12 P, both contest the judgment under appeal with four grounds which largely overlap. It is therefore appropriate to deal with them together.

*The first ground of appeal: errors of law relating to the disposal of SNCM at a negative sale price*

- Arguments of the parties

11 By its first ground of appeal, relating to the disposal of SNCM at a negative price of EUR 158 million, SNCM claims that the General Court erred in law in failing to have regard to the Commission’s margin of assessment and, in its interpretation contrary to Article 345 TFEU of the market economy private investor test, it distorted the decision at issue and failed to fulfil its obligation to state reasons.
Failure to have regard to the Commission’s margin of assessment and the scope of the General Court’s powers of review

12 According to SNCM, the General Court disregarded the discretion which the Commission enjoys when it applies the market economy private investor test. In the decision at issue, in establishing that there was no aid in the negative price, the Commission made a comparison between the negative price of the disposal and the additional redundancy payments which would have been granted by the State in the event of SNCCM’s liquidation. That calculation is based on information provided by the parties and by an independent expert. By calling into question the Commission’s conclusions, the General Court disregarded the margin of assessment which the Commission enjoys when assessing complex economic issues and therefore erred in law.

13 Corsica Ferries claims that, as regards the classification of State aid and the scope of Article 107(1) TFEU, the European Union judicature must, in principle, carry out a comprehensive review in this area.

Findings of the Court

14 As regards the Commission’s margin of assessment and judicial review, the General Court, in paragraph 88 of the judgment under appeal, referred to settled case-law on the scope and nature of its review of the term ‘State aid’.

15 According to that case-law, ‘State aid’, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the European Union judicature must in principle, having regard both to the specific features of the case before it and to the technical or complex nature of the Commission’s assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU. The European Union judicature must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see judgments in France v Ladbroke Racing and Commission, C-83/98 P, EU:C:2000:248, paragraph 25; Commission v Scott, C-290/07 P, EU:C:2010:480, paragraphs 64 and 65; and BNP Paribas and BNL v Commission, C-452/10 P, EU:C:2012:366, paragraph 100 and the case-law cited).

16 The General Court, in paragraphs 90 to 108 of the judgment under appeal, was right to carry out a review of the objective factors taken into consideration by the Commission in the decision at issue in order to ensure a proper application of Article 107 TFEU in accordance with the case-law cited in the preceding paragraph.

17 Moreover, as the Advocate General stated in point 39 of his Opinion, it must be observed that, contrary to the claims of SNCM, the General Court did not in any way call into question the work of the independent expert which afforded the basis of the decision at issue.

18 After considering that decision, the General Court found that the Commission had not sufficiently substantiated its reasoning and that it had relied on factors which were neither objective nor verifiable. SNCM’s argument that the General Court disregarded the
Commission’s margin of assessment or substituted its own reasoning for that of the expert appointed by the Commission must therefore be rejected.

19 It follows from the foregoing that the General Court correctly carried out the full review required of it for the purposes of the case-law cited in paragraph 15 above.

The market economy private investor test

– Arguments of the parties

20 Concerning the interpretation of the market economy private investor test, SNCM alleges that the General Court imposed on the Commission an obligation to define the economic activities of the Member State concerned, ‘in particular at the geographic and sectoral level’, in order to verify that the conduct of that Member State was that which a market economy investor would have adopted. SNCM claims that the relevant criterion taken from the case-law for establishing that test is that of the size of the investor and not the size of the sector in which the investor operates. The General Court thus disregarded the fundamental principle of non-discrimination with reference to the system of property ownership, laid down in Article 345 TFEU, which forms the basis of the private investor test.

21 Corsica Ferries claims that the General Court cannot be criticised for having required a sectoral and geographical definition of the economic activities in question in order to be able to establish whether the Commission had indeed based its assessment of the measures in question on ‘all the relevant information’.

22 The French Republic claims that the General Court erred in law in finding that in principle the Commission could not take into account the risk that the brand image of the State, as a global economic actor in the private sector, would be adversely affected in the context of the reasonable private investor test. It also submits that, by requiring the existence of a sufficiently well-established, or even settled practice among the investors of the sector concerned on the basis of objective and verifiable factors, the General Court imposed a requirement which goes beyond what is necessary for the proper application of the private investor test as laid down by the case-law.

23 Like the French Republic, SNCM considers that by setting out, in paragraphs 86, 87, 95 and 96 of the judgment under appeal, criteria entirely of its own making, such as the carrying out of a sectoral and geographical analysis, the demonstration of a sufficiently well-established practice and a standard of proof which is too high for the purpose of demonstrating that there is a probability of indirect material benefit, the General Court erred in law in its interpretation of the market economy private investor test.

24 SNCM claims in addition that, in finding, in paragraphs 101 to 108 of the judgment under appeal, that the Commission has not demonstrated that the French State’s conduct was motivated by a reasonable probability of obtaining an indirect material benefit, even in the long term, the General Court required an excessively high standard of proof. In order to determine whether the privatisation of a public undertaking for a negative sale price includes elements of State aid, it is necessary to assess whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been led to make capital contributions of the same size or whether it would instead have chosen to wind it up.
25 According to SNCM, the indirect benefit which the French State is capable of obtaining from the measure in question must be regarded as having been established by the comparison between the likely costs of a liquidation and the negative price of the disposal.

26 Furthermore, according to SNCM, the General Court required a standard of proof that was practically impossible to meet. SNCM claims that it was impossible to quantify precisely the damage suffered in the event of the deterioration of the brand image of the Member State concerned. Such quantification relies inherently on information that is difficult to predict in advance, in particular because it has to rely on the reaction of other economic actors, such as the customers, users, suppliers or staff of SNCM, and also other public undertakings.

27 According to Corsica Ferries, the General Court gave full effect to the prudent private investor test, which is based on the premiss that it can be demonstrated that the conduct of the Member State is guided by prospects of long-term profitability, that is to say, the long-term economic rationale of the conduct of the State in question can be demonstrated. Consequently, the General Court found against the Commission because it had failed to establish, to the requisite legal standard in the decision at issue, the reasonable probability that the French State would obtain indirect material benefit, even in the long term, from the operation in question.

28 Concerning the definition of the French State’s economic activities, SNCM also claims that the General Court distorted the decision in that it found that the Commission did not define, to the requisite legal standard, the State’s economic activities in relation to which it was necessary to assess the economic rationale of the measures at issue. As regards the terms ‘sufficiently well established practice’ and ‘settled practice’, according to SNCM, the judgment under appeal is characterised by an inadequate statement of reasons, as the General Court did not define those terms.

– Findings of the Court

29 It is settled case-law that investment by public authorities in the capital of undertakings, in whatever form, may constitute State aid, for the purposes of Article 87 EC, where the conditions of that article have been fulfilled (judgments in Spain v Commission, C-278/92 to C-280/92, EU:C:1994:325, paragraph 20, and Italy and SIM 2 Multimedia v Commission, C-328/99 and C-399/00, EU:C:2003:252, paragraph 36 and the case-law cited).

30 However, it is also settled case-law that it follows from the principle of equal treatment of public undertakings and private undertakings that capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid (judgment in Italy and SIM 2 Multimedia v Commission, EU:C:2003:252, paragraph 37 and the case-law cited). Thus, the conditions which a measure must meet in order to be treated as ‘aid’ for the purposes of Article 107 TFEU are not met if the recipient public undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which has been made available to it through State resources. In the case of public undertakings, that assessment is made by applying, in principle, the private investor test (see judgment in Commission v EDF, C-124/10 P, EU:C:2012:318, paragraph 78 and the case-law cited).

31 According to the case-law of the Court of Justice, it is necessary to distinguish between, on the one hand, the role of a Member State as shareholder of an undertaking and, on the other,
that of the State acting as a public authority. The applicability of the private investor test ultimately depends on the Member State concerned having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an undertaking (see judgments in Spain v Commission, EU:C:1994:325, paragraph 22, and Commission v EDF, EU:C:2012:318, paragraphs 80 and 81).

Therefore, it is necessary to assess whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been led to make capital contributions of the same size (judgment in Italy and SIM 2 Multimedia v Commission, EU:C:2003:252, paragraph 38 and the case-law cited).

For that purpose it is necessary to assess whether the measure would have been adopted in normal market conditions by a private investor in a situation as close as possible to that of the Member State concerned, and only the benefits and obligations linked to the situation of the State as shareholder — to the exclusion of those linked to its situation as a public authority — are to be taken into account (judgment in Commission v EDF, EU:C:2012:318, paragraph 79).

Moreover, if there is no possibility of comparing the situation of a public authority with that of a private undertaking, ‘normal market conditions’ must be assessed by reference to the objective and verifiable elements which are available (judgments in Chronopost and Others v Ufex and Others, C-83/01 P, C-93/01 P and C-94/01 P, EU:C:2003:388, paragraph 38, and Commission v EDF, EU:C:2012:318, paragraphs 101 and 102).

For the purposes of the assessment of the private investor test, the General Court considered in paragraph 86 of the judgment under appeal that it is for the Commission to define the economic activities of the Member State concerned, in particular at the geographic and sectoral level, in relation to which the long-term economic rationale of that Member State’s conduct has to be assessed. In addition, in paragraphs 95 to 100 of that judgment, the General Court held that it is only a ‘sufficiently well-established practice’ or a ‘settled practice’ of private undertakings which can be used to apply that test.

In that regard, it must be stated that those requirements are not absolute, but, in some circumstances, they may identify a private investor comparable to the public undertaking to which the private investor test is applied.

In using those terms, the General Court did not impose specific requirements with regard to the nature of the evidence with which it may be demonstrated that a rational private investor in a situation as close as possible to that of the public undertaking would have made the capital contribution at issue, but found, in paragraphs 93 and 94 of the judgment under appeal, that the Commission had not defined, to the requisite legal standard, the French State’s economic activities in relation to which it was necessary to assess the economic rationale of the measures at issue in the present case, and that it was impossible for the General Court to review the long-term economic rationale of the negative sale price at issue in the present case.

The General Court correctly identified the criterion of the long-term economic rationale of a decision of a Member State to confer an economic advantage on an undertaking as a criterion which must, in any event, be fulfilled in order to pass the private investor test. In doing so, it did not infringe Article 345 TFEU.
According to the case-law, when contributions of capital by a public investor disregard any prospect of profitability, even in the long term, such contributions must be regarded as aid within the meaning of Article 107 TFEU, and their compatibility with the common market must be assessed on the basis solely of the criteria laid down in that provision (see, to that effect, judgment in *Italy v Commission*, C-303/88, EU:C:1991:136, paragraph 22).

Contrary to what the French Republic maintains, the General Court, in paragraph 85 of the judgment under appeal, did not rule out, as a matter of principle, that the protection of the brand image of a Member State as a global investor in the market economy could, under specific circumstances and with a particularly cogent reason, constitute justification for demonstrating the long-term economic rationale of the assumption of additional costs such as additional redundancy payments.

However, the General Court was right to find, in paragraph 85 of the judgment under appeal, that summary references to the brand image of a Member State, as a global player, are not enough to support a finding that there is no aid, for the purposes of EU law.

The first ground of appeal of SNCM cannot be upheld either in that it criticises the General Court for having imposed on the Commission, in paragraphs 101 to 108 of the judgment under appeal, an excessive standard so far as concerns proof of the fact that the conduct of the French State was motivated by a reasonable probability of obtaining a material benefit, even in the long term. It is clear from the judgment under appeal that the Commission merely stated that the brand image of the French State would be affected due to social problems. Given what has been stated, in particular in paragraph 41 above, such arguments cannot be upheld.

Thus the General Court was entitled to find, in paragraph 108 of the judgment under appeal, that the French State’s long-term economic rationale has not been demonstrated to the required legal standard.

So far as concerns the allegation of distortion, SNCM has not demonstrated that the General Court distorted the Commission’s decision, that is to say, that its interpretation was clearly erroneous.

So far as concerns SNCM’s criticism that the General Court failed to fulfil its obligation to state reasons, in that it did not define the terms ‘sufficiently well-established practice’ or ‘settled practice’, it must be stated, as the Advocate General did in point 62 of his Opinion, that those terms are clear and refer to a factual assessment, and that it is easy to see that only one or a few examples do not constitute a ‘sufficiently well-established practice’ or a ‘settled practice’.

Accordingly, the first ground of appeal must be rejected in its entirety.

*Second ground of appeal: errors of law relating to the capital contribution of EUR 8.75 million*

Arguments of the parties

SNCM claims that the General Court distorted the decision at issue in failing to take account of all the relevant factors, in particular the issues of the fixed yield and the effect of the
48 According to SNCM, the issue of the fixed yield was examined by the Commission in paragraphs 361 to 363 of the decision at issue. The Commission thus found that a fixed yield of 10% of the French State’s capital investment in SNCM constituted, for a private investor, an adequate long-term profitability of the capital invested.

49 Furthermore, according to SNCM, the Commission did in fact state why it considered that the cancellation clause could not call into question the equal treatment of the concurrent investors. Contrary to what the General Court found in paragraph 127 of the judgment under appeal, the Commission in fact stated that that clause concerned the complete disposal of SNCM to the private purchasers, and not the investments made simultaneously by the private purchasers and the State in the privatised SNCM. The cancellation clause thus concerns the disposal of SNCM and must be analysed in that context, and in those circumstances it cannot be taken into account in the analysis of the simultaneous investment of the State and of the private purchasers made following that disposal.

50 SNCM submits that when SNCM was disposed of a value was placed on the cancellation clause in the negative price of EUR 158 million. Since that disposal of SNCM took place at the market price, the cancellation clause had a value in that disposal price and could not be regarded as having conferred an advantage on the purchasers. Therefore, that clause should no longer be taken into account when assessing whether the French State’s simultaneous investment is in keeping with the principle of equal treatment of investors; otherwise the value attributed to that clause would be counted twice.

51 As regards taking account of the context of the undertaking’s privatisation in which the capital contribution of EUR 8.75 million to SNCM is set, SNCM submits that the commitments relating to the measures adopted by the French State in the course of the privatisation of SNCM, that is to say, the negative price of EUR 158 million and the current account advance of EUR 38.5 million, must not be taken into account a second time when assessing that capital contribution. Taking account of the negative price and the capital contribution again when assessing the current account advance is tantamount to double counting that price and that contribution.

52 The French Republic claims that the General Court erred in law in that it infringed Article 87(1) EC when it found that the Commission had not considered all the relevant factors in its analysis of the comparability of the capital contribution of CGMF, a public shareholder in SNCM, for an amount of EUR 8.75 million, and that of the private purchasers for an amount of EUR 26.25 million, and that the Commission should have taken into account the sale cancellation clause granted to those private buyers in the course of the privatisation of SNCM.

53 Corsica Ferries claims that the placing of a value on the cancellation clause in the negative price of EUR 158 million at the time of the disposal has no bearing on the General Court’s reasoning or on the fact that the Commission refrained from conducting a thorough analysis of the economic impact of that clause in the decision at issue, so that, if a value had been placed on it in that negative price, *quod non*, the Commission should have explained this clearly and succinctly.
Findings of the Court

54 It must be observed that the General Court, in paragraph 117 of the judgment under appeal, was right to find that the mere fact that a capital contribution was made jointly and concurrently with private investors does not automatically exclude it from being classified as State aid. Other factors, in particular the equal treatment of public and private shareholders, must also be taken into account.

55 In paragraph 130 of the judgment under appeal, the General Court found that the sale cancellation clause is, at the least, capable of removing any uncertainty for the private purchasers in the event of the occurrence of one of the triggering events and that that clause, consequently, has an actual financial value. The General Court considered that that clause is therefore liable to alter the risk profiles of the capital contributions of the private purchasers and of CGMF and therefore to call into question the comparable nature of the investment conditions.

56 It must be stated that the appellants have failed to prove that the General Court erred in law in that regard.

57 The argument that the value of the cancellation clause was included in SNCM’s sale price and that that clause could no longer be taken into account when assessing the comparability of the capital contributions of the public and private shareholders must be rejected.

58 As the General Court states in paragraph 111 of the judgment under appeal, the joint and concurrent subscription in question had already been provided for in the memorandum of understanding concerning the sale in question. Consequently, it is clear that the capital contribution in question was provided for in the context of the partial privatisation of SNCM.

59 As the French Republic acknowledges, if the sale cancellation clause is exercised, the original shareholder which has transferred its shares to the purchaser must reimburse him his capital contribution, and thus, unlike the original shareholder, the purchaser has the opportunity to recover his capital contribution in the event that the cancellation clause is exercised and to end his involvement with the public undertaking concerned.

60 In those circumstances, it is clear that the cancellation clause may produce effects on the conditions of that recapitalisation and affect the comparability conditions.

61 Since the General Court found evidence of those effects, it was right to conclude that, in the decision at issue, the Commission could not therefore refrain from conducting a thorough analysis of the economic impact of the sale cancellation clause. As the Advocate General observed in point 115 of his Opinion, the General Court was right to find that the Commission did not, or did not sufficiently, support its decision on the equal treatment of the public and private investments in SNCM.

62 Consequently, the second ground of appeal must be rejected and there is no need to examine the issue of the assessment of the yield from CGMF’s capital contribution.

Third ground of appeal: error in law relating to the aid to individuals in the amount of EUR 38.5 million
Arguments of the parties

According to SNCM, the General Court distorted the decision at issue in finding that the Commission had claimed that the fact that the measure in question does not result from strict statutory obligations was, by its nature, liable to exclude its being in the nature of State aid within the meaning of Article 87(1) EC.

The General Court erred in law by encroaching on the Commission’s margin of assessment in assessing complex economic situations. In finding, in paragraph 144 of the judgment under appeal, that ‘the existence of the escrow account is such as to create an inducement for SNCM employees to leave the company or, at least, to leave it without negotiating their departure, particularly in view of the possible grant of additional redundancy payments … all of which created an indirect economic advantage for SNCM’, the General Court went beyond the review of a manifest error of assessment that is required in the case of an examination of complex economic situations.

The General Court did not give sufficient reasons for its decision regarding the advantage to SNCM. Its analysis of the escrow account in paragraph 144 of the judgment under appeal does not make it possible to understand the reasons why the Commission committed a manifest error of assessment by not classifying the measures involving aid to individuals as ‘State aid’.

In addition, SNCM and the French Republic claim that the judgment under appeal is vitiated by a failure to state reasons. The General Court did not examine the Commission’s finding that ‘even when the amount of EUR 38.5 million is added to the State’s capital contribution of EUR 142.5 million, the adjusted negative selling price of EUR 196 million is still well below the cost of compulsory liquidation of SNCM’. The Commission established that the liquidation costs for the French State would have been higher than the negative price, even if the amount of the aid to individuals were added.

In that regard, by classifying the measures involving aid to individuals in the amount of EUR 38.5 million as ‘State aid’, for the purposes of Article 87(1) EC, without ascertaining, in the alternative, whether those measures met the reasonable private investor test, the General Court did not state the reasons for its decision to the requisite legal standard.

Corsica Ferries claims that it is precisely because the Commission was not able to determine the normal application of the additional social compensation for termination of the contract of employment through the escrow account mechanism that it was criticised by the General Court.

Findings of the Court of Justice

On the basis of the considerations set out in paragraphs 14 to 16 above, the Court of Justice considers that the examination carried out by the General Court in paragraph 144 of the judgment under appeal is in keeping with the requisite level of review.

As regards the argument of SNCM and the French Republic that the General Court should have ascertained, in the alternative, whether the amount of EUR 38.5 million was justified by the private investor test, it must be stated that the Court of Justice has not upheld the first
ground of appeal concerning the classification of the additional redundancy payments in the amount of EUR 158 million.

71 As the Advocate General stated in point 132 of his Opinion, the amount of EUR 38.5 million in the escrow account is also intended to be paid, where appropriate, as additional redundancy payments.

72 However, the applicants do not raise any arguments that demonstrate that the nature of that sum of EUR 38.5 million is different from the sum of EUR 158 million assessed in the examination of the first ground of appeal concerning the application of the private investor test.

73 As regards, the reasons advanced by the Advocate General in points 122 to 137 of his Opinion, the Court of Justice considers that the General Court, in its analysis of the findings and arguments resulting from that plea, did not distort the decision at issue, and it provided reasons to the requisite legal standard for the judgment under appeal.

74 Consequently the third ground of appeal must be rejected.

The fourth ground of appeal: error in law relating to the balance for restructuring of EUR 15.81 million

Arguments of the parties

75 SNCM and the French Republic claim that the General Court’s reasoning concerning the balance for restructuring of EUR 15.81 million is erroneous.

76 The applicants claim that the General Court’s reasoning in paragraphs 148 to 153 of the judgment under appeal is based on the premiss that the Commission considered that the 2006 Plan was free of the elements that constitute State aid. Thus, by their appeals, the applicants seek to demonstrate that the General Court erred in law in its analysis of the measures of the 2006 Plan and failed to fulfil its obligation to state reasons.

Findings of the Court

77 It is clear from the applicants’ pleadings that the fourth ground of appeal depends on the Court upholding the previous grounds advanced in support of their appeals.

78 In paragraphs 39, 55 and 66 above, the Court has rejected the first, second and third grounds of appeal and upheld the judgment under appeal.

79 In those circumstances, the fourth ground of appeal must be rejected as ineffective, and it is not necessary to examine the arguments put forward by the appellants.

80 Since none of the grounds of appeal raised by the appellants have been upheld, the appeals in Cases C-533/12 P and C-536/12 P must be dismissed.

Costs
In accordance with the first paragraph of Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court shall 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 Corsica Ferries has applied for costs against SNCM and the French Republic and the latter have been unsuccessful in their pleas, they must be ordered to pay the costs.

On those grounds, the Court (Fifth Chamber) hereby

1. **Dismisses the appeals;**

2. **Orders Société nationale maritime Corse-Méditerranée (SNCM) SA and the French Republic to bear their own costs and to pay those incurred by Corsica Ferries France SAS in equal shares.**

**Network industries**

In Case C-375/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour constitutionnelle (Belgium), made by decision of 16 June 2011, received at the Court on 15 July 2011, in the proceedings

**Belgacom SA,**

**Mobistar SA,**

**KPN Group Belgium SA**

v

**Belgian State,**

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, Acting President of the Fourth Chamber, J.-C. Bonichot, C. Toader, A. Prechal and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 11 June 2012, after considering the observations submitted on behalf of:
Belgacom SA, by N. Cahen and I. Mathy, avocates,

Mobistar SA, by V. Vanden Acker, avocate,

KPN Group Belgium SA, by A. Verheyden and K. Stas, avocats,

the Belgian Government, by T. Materne and M. Jacobs, acting as Agents, assisted by D. Lagasse, avocat,

the Cypriot Government, by D. Kalli, acting as Agent,

the Lithuanian Government, by D. Kriauciunas and A. Svinkunaitė, acting as Agents,

the Netherlands Government, by C. Wissels and C. Schillemans, acting as Agents,

the European Commission, by C. Vrignon, L. Nicolae and G. Braun, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2012,
gives the following

Judgment


Legal context

European Union law


‘1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all
reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.

Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral.

…

2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:

…

(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;

(c) encouraging efficient investment in infrastructure, and promoting innovation; and

(d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.

…'

4 Recitals 32 and 33 in the preamble to the Authorisation Directive state:

‘(32) In addition to administrative charges, usage fees may be levied for the use of radio frequencies and numbers as an instrument to ensure the optimal use of such resources. Such fees should not hinder the development of innovative services and competition in the market. This Directive is without prejudice to the purpose for which fees for rights of use are employed. Such fees may for instance be used to finance activities of national regulatory authorities that cannot be covered by administrative charges. Where, in the case of competitive or comparative selection procedures, fees for rights of use for radio frequencies consist entirely or partly of a one-off amount, payment arrangements should ensure that such fees do not in practice lead to selection on the basis of criteria unrelated to the objective of ensuring optimal use of radio frequencies. The Commission may publish on a regular basis benchmark studies with regard to best practices for the assignment of radio frequencies, the assignment of numbers or the granting of rights of way.

(33) Member States may need to amend rights, conditions, procedures, charges and fees relating to general authorisations and rights of use where this is objectively justified. Such changes should be duly notified to all interested parties in good time, giving them adequate opportunity to express their views on any such amendments.’

5 Article 3(1) and (2) of the Authorisation Directive, entitled ‘General authorisation of electronic communications networks and services’, is worded as follows:

‘1. Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive. To this end, Member States shall not prevent an undertaking from providing electronic
communications networks or services, except where this is necessary for the reasons set out in Article 46(1) of the Treaty.

2. The provision of electronic communications networks or the provision of electronic communications services may, without prejudice to the specific obligations referred to in Article 6(2) or rights of use referred to in Article 5, only be subject to a general authorisation. …'

6 Article 12 of the Authorisation Directive, entitled ‘Administrative charges’, provides:

‘1. Any administrative charges imposed on undertakings providing a service or a network under the general authorisation or to whom a right of use has been granted shall:

(a) in total, cover only the administrative costs which will be incurred in the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations as referred to in Article 6(2), which may include costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection; and

(b) be imposed upon the individual undertakings in an objective, transparent and proportionate manner which minimises additional administrative costs and attendant charges.

2. Where national regulatory authorities impose administrative charges, they shall publish a yearly overview of their administrative costs and of the total sum of the charges collected. In the light of the difference between the total sum of the charges and the administrative costs, appropriate adjustments shall be made.’

7 Article 13 of that directive, entitled ‘Fees for rights of use and rights to install facilities’, provides:

‘Member States may allow the relevant authority to impose fees for the rights of use for radio frequencies or numbers or rights to install facilities on, over or under public or private property which reflect the need to ensure the optimal use of these resources. Member States shall ensure that such fees shall be objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and shall take into account the objectives in Article 8 of [the Framework Directive].’

8 Article 14 of the Authorisation Directive, entitled ‘Amendment of rights and obligations’, states:

‘1. Member States shall ensure that the rights, conditions and procedures concerning general authorisations and rights of use or rights to install facilities may only be amended in objectively justified cases and in a proportionate manner. Notice shall be given in an appropriate manner of the intention to make such amendments and interested parties, including users and consumers, shall be allowed a sufficient period of time to express their views on the proposed amendments, which shall be no less than four weeks except in exceptional circumstances.

2. Member States shall not restrict or withdraw rights to install facilities before expiry of the period for which they were granted except where justified and where applicable
in conformity with relevant national provisions regarding compensation for withdrawal of rights.’

9 Part B of the Annex to the Authorisation Directive provides:

‘Conditions which may be attached to rights of use for radio frequencies

...

Usage fees in accordance with Article 13 of this Directive.

...


‘1. Member States shall ensure that the rights, conditions and procedures concerning general authorisations and rights of use or rights to install facilities may only be amended in objectively justified cases and in a proportionate manner, taking into consideration, where appropriate, the specific conditions applicable to transferable rights of use for radio frequencies. Except where proposed amendments are minor and have been agreed with the holder of the rights or general authorisation, notice shall be given in an appropriate manner of the intention to make such amendments and interested parties, including users and consumers, shall be allowed a sufficient period of time to express their views on the proposed amendments, which shall be no less than four weeks except in exceptional circumstances.

2. Member States shall not restrict or withdraw rights to install facilities or rights of use for radio frequencies before expiry of the period for which they were granted except where justified and where applicable in conformity with the Annex and relevant national provisions regarding compensation for withdrawal of rights.’

11 Article 5(1) of Directive 2009/140 provides:

‘Member States shall adopt and publish by 25 May 2011 the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of such provisions.

They shall apply those measures from 26 May 2011.

...

Belgian law

12 Article 30 of the Law of 13 June 2005 provided as follows:

‘1. Rights of use referred to in Articles 11 [rights to use a number] and 18 [rights to use radio frequencies] may be subject to fees in order to guarantee optimal use of those resources. The fees shall be recovered by the [Belgian Institute of Postal Services and Telecommunications (Institut belge des services postaux et des télécommunications) (‘the IBPT’)].

2. The King, after having heard the views of the [IBPT], shall fix the amount and detailed rules for the fees referred to in paragraph 1.’
Article 2 of the Law of 15 March 2010 provides:

‘1. Article 30 of the Law of 13 June 2005 … is amended as follows:

(1) Between paragraphs 1 and 2, the following paragraphs 1/1, 1/2, 1/3 and 1/4 are inserted:

"1/1. For the purpose referred to in paragraph 1, operators authorised to hold rights of use for radio frequencies in order to operate a network and to provide mobile electronic communications services to the public shall pay, at the beginning of the period of validity of the rights of use, a one-off fee.

The one-off fee shall be determined when frequencies are assigned.

The one-off fee shall be:

(1) EUR 51 644 per MHz per month for frequency bands 880-915 MHz and 925-960 MHz. Acquisition of the rights of use for frequency bands 880-915 MHz and 925-960 MHz also implies acquisition of rights of use for frequency bands 1710-1785 and 1805-1880 MHz: the amount of radio spectrum allocated in bands 1710-1785 and 1805-1880 MHz shall be equal to twice the amount of radio spectrum allocated in bands 880-915 MHz and 925-960 MHz, rounded off to a multiple of 5 MHz higher. By way of derogation from the foregoing, until 26 November 2015, the one-off fee for the amount of radio spectrum allocated as at 1 January 2010 in bands 880-915 MHz and 925-960 MHz shall also apply to the maximum amount of radio spectrum which could be allocated on 1 January 2010 in bands 1710-1785 and 1805-1880 MHz;

(2) EUR 20 833 per MHz per month for frequency bands 1920-1980 MHz and 2110-2170 MHz, except where the total quantity of spectrum held by the operator in those frequency bands does not exceed 2 x 5 MHz. In that case, the one-off fee is EUR 32 000 per MHz per month;

(3) EUR 2 778 per MHz per month for frequency bands 2500-2690 MHz.

Where frequencies are assigned by auction, the minimum amount of the one-off fee referred to in this paragraph shall constitute the candidates' opening bid.

1/2. In respect of each period of renewal of an authorisation, operators shall pay a one-off fee.

The amount of the one-off fee shall correspond to the one-off fee referred to in the first subparagraph of paragraph 1/1.

In calculating the amount of the one-off fee, account shall be taken of the particular rights of use which the operator wishes to retain following renewal.

If an operator wishes to assign spectrum, it must be in a continuous block.

1/3. The payment of the one-off fee shall be made, as the case may be, within 15 days following the start of the validity period referred to in the first subparagraph of paragraph 1/1 and within 15 days following the start of the validity period referred to in the first subparagraph of paragraph 1/2.

By way of derogation from the preceding subparagraph, the operator shall be allowed to make the payment as follows:
the operator shall pay on a pro rata basis the number of months remaining until
the following calendar year, as the case may be, within 15 days following the start
of the validity period referred to in the first subparagraph of paragraph 1/1 and
within 15 days following the start of the validity period referred to in the first
subparagraph of paragraph 1/2;

moreover, the operator shall pay by 15 December at the latest all of the one-off
fee for the coming year. If the authorisation expires during the coming year, the
operator shall pay on a pro rata basis the number of months remaining until the
expiration of the rights of use;

the legal interest rate, calculated in accordance with Article 2(1) of the Law of 5
May 1865 on interest-bearing loans, shall be applicable, as the case may be,
from the 16th day following the start of the validity period referred to in the first
subparagraph of paragraph 1/1 or from the 16th day following the start of the
validity period referred to in the first subparagraph of paragraph 1/2;

simultaneously with the payment of the one-off fee, the operator shall pay the
interest on the outstanding amount payable.

The operator shall inform the [IBPT] of its choice within two working days following, as
the case may be, the start of the validity period referred to in the first subparagraph of
paragraph 1/1 or the start of the validity period referred to in the first subparagraph of
paragraph 1/2.

In no case shall the one-off fee be reimbursed in whole or in part.

1/4. If an operator does not pay the one-off fee in whole or in part for the
respective frequency bands as provided for in paragraph 1/1 (1), (2) or (3), it shall lose
all rights of use for the respective frequency bands.

2. The words ‘except as provided for in paragraphs 1/1, 1/2, and 1/3’ shall be added
to paragraph 2.”

14 Article 3 of the Law of 15 March 2010 provides:

‘As a transitional measure, if the deadline for declining tacit renewal of an authorisation
has already expired by the time the present law enters into force, operators may
nevertheless decline renewal of their rights of use up to the first day of the new,
extended period of rights of use, without being required to pay the one-off fee relating
to that new period.’

15 Article 4 of the Law of 15 March 2010 provides:

‘The present law shall enter into force the day it is published in the Moniteur
belge [Moniteur belge of 25 March 2010, p. 18849].’

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

16 Belgacom, Mobistar and KPN Group Belgium are operators of mobile telephone
networks holding various authorisations with rights of use for radio frequencies 900
MHz, 1800 MHz and 2000 to 2600 MHz in Belgium.
The Law of 12 December 1994 (\textit{Moniteur belge} of 22 December 1994, p. 31624) liberalised the mobile telephone sector in Belgium by allowing the Council of Ministers (Conseil des ministres) to grant to operators other than the former public operator individual authorisations for the supply of mobile telephone services on frequency band 900 MHz for a period of 15 years from the date of issue of the authorisations.

On 27 November 1995, the Council of Ministers granted authorisation to Mobistar whilst on 2 July 1996 Belgacom Mobile was granted authorisation, with retroactive effect to 8 April 1995, to operate a network for the 900 MHz channels, which it used already under a management contract with the Belgian State. In return, both operators each had to pay a one-off licence fee of approximately BEF 9 billion (EUR 223 104 172.30) and annual fees to the IBPT for the use of the frequencies.

In 1997, the Belgian Government decided to open up the DCS-1800 MHz band for use in order to allow for a third or possible fourth operator on the market. The Royal Decree of 24 October 1997 relating to the establishment and operation of DCS-1800 GSM mobile telephony networks laid down the procedure for obtaining an authorisation for the establishment and operation of DCS-1800 GSM mobile telephony networks by providing that such an authorisation would be valid for a 15-year period from the date of issue of the operating authorisation. On 2 July 1998, KPN Group Belgium (formerly KPN Orange SA, then BASE SA) obtained authorisation for the 1800 MHz band in return for the payment of a one-off licence fee of BEF 8005 billion (EUR 198 438 766.50) and annual fees for the use of the frequencies.

Given the disadvantages of using the 1800 MHz frequencies compared to the 900 MHz frequencies, including the weaker range of the base stations which requires the installation of a greater number of antenna sites to achieve the same coverage, the IBPT decided in 2003 to assign certain 900 MHz channels to KPN Group Belgium and, in exchange, to also assign certain 1800 MHz channels to Belgacom and Mobistar. Consequently, since 2003, KPN Group Belgium has enjoyed additional 900 MHz frequencies, in return for Belgacom and Mobistar having 1800 MHz band frequencies. The balance of the channels thus allocated to each of those three operators should stay in place until 2015.

The Royal Decree of 18 January 2001 established a procedure for granting authorisations for 3G UMTS systems using frequency bands 1885 to 2025 MHz and 2110-2200 MHz. Belgacom, Mobistar and KPN Group Belgium applied for and obtained authorisation to operate those systems in return for a one-off licence fee of EUR 150 million paid by each of those operators for a 20-year period with possible extension by royal decree for five-year periods.

At the moment of each granting of those authorisations, Belgacom, Mobistar and KPN Group Belgium undertook to pay in return:

\begin{itemize}
  \item a one-off licence fee;
  \item an annual fee for making the frequencies available; and
  \item an annual fee for managing the authorisations.
\end{itemize}

By decision of 25 November 2008, the IBPT declined the tacit renewal of the authorisations to use second generation (2G) radio frequencies that had been given to Belgacom, Mobistar and KPN Group Belgium, in order to impose a new fee and put in place a spectrum policy that was as efficient as possible.
Belgacom, Mobistar and KPN Group Belgium challenged that decision before the Cour d'appel de Bruxelles, which annulled it by judgment of 20 July 2009 in respect of Belgacom and by judgment of 22 September 2009 in respect of Mobistar. Following those judgments, the IBPT decided to withdraw its decision of 25 November 2008 concerning KPN Group Belgium, in order to ensure identical treatment of all three operators.

Following those judgments by the Cour d'appel de Bruxelles, on 15 March 2010 the Belgian legislature adopted a law modifying Article 30 of the Law of 13 June 2005. It is apparent from Articles 2 and 3 of the Law of 15 March 2010, referred to in paragraphs 13 and 14 of this judgment, that it provides for:

– a one-off fee to replace the former one-off licence fee charged to mobile telephone operators in order to guarantee optimal use of those radio frequencies, which is due not only at the time of granting those authorisations and the right to use radio frequencies, but equally at each renewal of an existing authorisation;

– an amount of one-off fee varying according to the radio frequency concerned and calculated on the basis of the one-off licence fee paid by the operators when they received their authorisation for the first time, at the end of either a comparative tendering procedure or a sale by auction;

– the option for mobile telephone operators to renounce their rights of use before start of the period of validity of their rights of use without being required to pay the one-off fee for the renounced rights; and

– in addition to the one-off fee, the obligation for operators holding an authorisation to pay two fees each year: a fee aimed at covering the cost of making the frequencies available and a fee intended to cover the costs of managing the authorisation.

Belgacom, Mobistar and KPN Group Belgium brought an action before the Constitutional Court (Cour constitutionnelle) seeking annulment of Articles 2 and 3 of the Law of 15 March 2010. In support of their claims they argued inter alia that those provisions are contrary to Articles 3 and 12 to 14 of the Authorisation Directive. More specifically, they object to the fact that the one-off fee is payable not only at the time authorisation is granted, but also when it is renewed and is in addition to the fee for making the frequencies available, which they pay annually. Belgacom, Mobistar and KPN Group Belgium also contest the amount and detailed rules for calculating the one-off fee, in that it is calculated not according to the economic value of the frequencies, but rather according to their market value for operators.

The national court indicates that it is apparent from the travaux préparatoires for the Law of 15 March 2010 that the one-off fee is compensation for the use of the frequencies and pursues the same objective as the annual fees for making the frequencies available, whilst not being a substitute for those fees. It adds that it is also apparent from the travaux préparatoires that the legislature considered that Articles 2 and 3 of the Law of 15 March 2010, the validity of which is challenged before that court, comply with the Authorisation Directive, since they provide for a split of the compensation owing for the fees payable for the rights of use comprising a one-off part and an annual part. The one-off fee in fact covers the right to use the frequencies and corresponds to the value of the spectrum as a scarce resource, whilst the annual fee covers the cost of using those frequencies, that is, the control, coordination, examination and other activities of the competent authority.
In those circumstances, the Constitutional Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Do Articles 3, 12 and 13 of [the Authorisation Directive], as they currently apply, permit Member States to charge operators holding individual rights to use mobile phone frequencies for a period of 15 years, in the context of authorisations to install and operate on their territory mobile phone networks issued under the scheme instituted under the former legal framework, a one-off fee for the renewal of their individual rights to use frequencies the amount of which, relating to the number of frequencies and months to which the rights of use relate, is calculated on the basis of the former one-off licence fee that was associated with the issuance of the aforementioned authorisations, when that one-off fee is additional to both an annual fee for making frequencies available (intended first and foremost to cover the costs of making frequencies available while at the same time also partially reflecting the value of frequencies, the purpose of the one-off fee and the annual fee being to encourage optimal use of the frequencies) and a fee covering the cost of managing the authorisation?

2. Do Articles 3, 12 and 13 of the same Authorisation Directive permit the Member States to charge operators hoping to acquire new rights to use mobile phone frequencies a one-off fee the amount of which is determined at auction on the assignment of frequencies, in order to reflect the value of frequencies, when that one-off fee is additional to both an annual fee for making frequencies available (intended first and foremost to cover the costs of making frequencies available while at the same time also partially reflecting the value of frequencies, the purpose of the one-off fee and the annual fee being to encourage optimal use of the frequencies) and an annual fee for the management of authorisations to install and operate mobile phone networks issued under the scheme instituted under the former legal framework?

3. Does Article 14(2) of the same Authorisation Directive permit the Member States to charge mobile phone operators, in respect of a new renewal period of their individual rights to use mobile phone radio frequencies, to which certain of them were already entitled, before the beginning of that new period, a one-off fee relating to the renewal of the rights to use frequencies they enjoyed at the start of that new period, intended to encourage optimal use of the frequencies by way of reflecting their value, when that one-off fee is additional to both an annual fee for making frequencies available (intended first and foremost to cover the costs of making frequencies available while at the same time also partially reflecting the value of frequencies, the purpose of the one-off fee and the annual fee being to encourage optimal use of the frequencies) and an annual fee for the management of authorisations to install and operate mobile phone networks issued under the scheme instituted under the former legal framework?

4. Does Article 14(1) of the same Authorisation Directive permit the Member States to add, as a condition of acquiring and renewing rights to use frequencies, a one-off fee that is determined at auction, without limit, when that one-off fee is additional to both an annual fee for making frequencies available (intended first and foremost to cover the costs of making frequencies available while at the same time also partially reflecting the value of frequencies, the purpose of the one-off fee and the annual fee being to encourage optimal use of the frequencies) and an annual charge for the management of authorisations to install and operate mobile phone networks issued under the scheme instituted under the former legal framework?

The questions referred for a preliminary ruling
The first two questions

Admissibility

29 The Cypriot Government questions the admissibility of the second question referred, arguing that an answer to that question is not objectively necessary to resolve the dispute in the main proceedings. The second question concerns the granting of new rights of use for radio frequencies, whilst the order for reference indicates that the dispute concerns the renewal of rights of use for radio frequencies.

30 It should be borne in mind that, according to the Court's settled case-law, questions on the interpretation of European Union law referred by a national court, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, C-378/10 VALE Építési [2012] ECR I-0000, paragraph 18 and the case-law cited).

31 In the present case, the second question referred concerns the interpretation of the Authorisation Directive in terms of whether it allows Member States to charge a one-off fee to mobile telephone operators hoping to acquire new rights to use radio frequencies. It is, moreover, apparent from the case-file that Articles 2 and 3 of the Law of 15 March 2010, which are the subject-matter of the actions for annulment in the main proceedings, provide for a one-off fee not only for the renewal of rights of use for radio frequencies but also for new acquisitions of rights of use for radio frequencies.

32 In those circumstances, the interpretation sought cannot be regarded as bearing no relation to the actual facts of the main action or its purpose. Consequently, the second question referred for a preliminary ruling must be considered admissible.

Substance

33 By its first two questions, which will be examined together, the national court asks, in essence, whether Articles 3, 12 and 13 of the Authorisation Directive must be interpreted as precluding Member States from charging mobile telephone operators holding rights of use for radio frequencies a one-off fee for both a new acquisition of rights of use for radio frequencies and for the renewal of those rights, when that one-off fee is in addition to both an annual fee for making frequencies available, intended first and foremost to cover the costs of making frequencies available while at the same time also partially reflecting the value of frequencies, the purpose of the one-off fee and the annual fee being to encourage optimal use of the scarce resource that radio frequencies are, and a fee covering the cost of managing the authorisation.

34 It also asks about the compliance with those provisions with the Authorisation Directive, the detailed rules for fixing the amount of the one-off fee for the rights of use for radio frequencies, which is determined either by reference to the former one-off licence fee calculated on the basis of the number of frequencies and months to which the rights of use relate, or through auction when the frequencies are assigned.

35 As a preliminary point, it is clear that Articles 3 and 12 of that directive, which relate to the Member States’ obligation to ensure the freedom to provide electronic
communications networks and services and the detailed rules for levying ‘administrative charges’ respectively, are not intended to apply to a fee such as that at issue in the main proceedings, which does not come within either of those two situations.

36 As is apparent from the first two questions, the national court is asking the Court to interpret the Authorisation Directive as it concerns, firstly, the issue whether Member States may charge a one-off fee to mobile telephone operators and, secondly, the detailed rules for fixing the amount of the one-off fee for both the granting and the renewal of the rights of use for radio frequencies.

37 Regarding the charging of a one-off fee, it is clear, as a preliminary observation, that the Authorisation Directive refers only to the procedure for granting rights of use for radio frequencies and does not contain any specific provision laying down the conditions for the procedure for renewing previously-allocated rights of use for radio frequencies.

38 As pointed out by the Advocate General in point 40 of his Opinion, however, as individual rights of use are granted by a Member State for a limited period, renewal of an authorisation must be regarded as a granting of new rights for a new period.

39 Consequently, it must be held that under the Authorisation Directive, the procedure for granting rights of use for radio frequencies and the procedure for renewal of those rights must be subject to the same scheme. Accordingly, Article 13 of the Authorisation Directive must be applied in the same way to both procedures.

40 It should be noted that, according to settled case-law, within the framework of the Authorisation Directive, Member States may not levy any fees or charges in relation to the provision of networks and electronic communication services other than those provided for by that directive (see, by analogy, Case C-339/04 Nuova società di telecomunicazioni [2006] ECR I-6917, paragraph 35; Case C-85/10 Telefónica Móviles España [2011] ECR I-1575, paragraph 21; and Joined Cases C-55/11, C-57/11 and C-58/11 Vodafone España and France Telecom España [2012] ECR I-0000, paragraph 28).

41 As is apparent from the order for reference, in the main proceedings the national court is asking, in essence, whether Article 13 of the Authorisation Directive must be interpreted as precluding Member States from charging operators a one-off fee for the ‘rights of use for radio frequencies’ such as that at issue in the main proceedings, when they are already charged an annual fee for making the frequencies available and a fee covering the cost of managing the authorisation.

42 It should be borne in mind that Article 13 of the Authorisation Directive authorises Member States to set, in addition to charges designed to cover administration costs, a supplementary charge for the rights of use for radio frequencies with the purpose of ensuring optimal use of those resources (see, to that effect, Joined Cases C-327/03 and C-328/03 ISIS Multimedia Net and Firma O2 [2005] ECR I-8877, paragraph 23, and Telefónica Móviles España, paragraph 24).

43 Moreover, Article 13 of the Authorisation Directive does not provide expressly for either the specific form that fee charged for the use of the radio frequencies must have or how frequently it is to be charged.
However, recital 32 in the preamble to the Authorisation Directive does state that the fees for the use of radio frequencies may be charged as a lump sum or in periodic amounts.

Furthermore, it is apparent from the Court’s case-law that the Authorisation Directive does not circumscribe the purpose for which such fees must be collected (see, to that effect, Telefónica Móviles España, paragraph 33).

Article 13 of that directive does, however, require Member States to ensure that fees for the use of radio frequencies are objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and take into account the objectives, including the promotion of competition and efficient use of radio frequencies, as laid down in Article 8 of the Framework Directive.

It is also apparent from Article 13 of and recital 32 in the preamble to the Authorisation Directive that a fee charged to operators of telecommunications services for the use of resources must pursue the purpose of ensuring optimal use of such resources and not hinder the development of innovative services and competition on the market.

Articles 12 and 13 of the Authorisation Directive do not, therefore, preclude national legislation, such as that at issue in the main proceedings, which provides for the charging of a fee intended to favour optimal use of frequencies, even when it is in addition to another annual fee which also pursues in part the same objective, provided that all those fees satisfy the conditions set out in paragraphs 46 and 47 of the present judgment, which it is for the national court to determine.

As regards the detailed rules for fixing the amount of a one-off fee for rights of use for radio frequencies such as that at issue in the main proceedings, it should be noted that the Authorisation Directive lays down the requirements with which Member States must comply in determining the amount of a fee for the use of radio frequencies, without thereby expressly providing a specific method for determining the amount of such a fee (Telefónica Móviles España, paragraph 25).

It should be remembered that the authorisation to use public property which constitutes a scarce resource enables the holder of that authorisation to make significant economic gains and grants that holder advantages as compared with other operators who are also seeking to use and exploit that resource, which justifies imposing a charge which reflects, inter alia, the value of the use of the scarce resource at issue (Telefónica Móviles España, paragraph 27).

In those circumstances, the purpose of ensuring that operators make optimal use of scarce resources to which they have access means that the charge must be set at an appropriate level to reflect inter alia the value of the use of those resources, which requires account to be taken of the economic and technical situation of the market concerned (Telefónica Móviles España, paragraph 28).

It follows, as observed by the Advocate General in points 54 and 55 of his Opinion, that the fixing of a fee for rights of use for radio frequencies by reference either to the amount of the former one-off licence fee calculated on the basis of the number of frequencies and months to which the rights of use relate, or to the amounts raised through auction, may be an appropriate method for determining the value of the radio frequencies.
It would appear, in the light of the principles applied by the Kingdom of Belgium in fixing the amount of the former one-off licence fee, that either method can be used to obtain amounts which bear some relation to the foreseeable profits from the radio frequencies concerned. The Authorisation Directive does not preclude the use of such a criterion for the fixing of the amount of those fees.

In the light of all the foregoing considerations, the answer to the first two questions is that Articles 12 and 13 of the Authorisation Directive must be interpreted as not precluding a Member State from charging mobile telephone operators holding rights of use for radio frequencies a one-off fee payable for both a new acquisition of rights of use for radio frequencies and for renewals of those rights, in addition to an annual fee for making the frequencies available, intended to encourage optimal use of the resources while at the same time also covering the cost of managing the authorisation, provided that those fees genuinely are intended to ensure optimal use of the resource made up of those radio frequencies and are objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and take into account the objectives in Article 8 of the Framework Directive, which it is for the national court to assess.

Subject to that same condition, the fixing of the amount of a one-off fee for rights of use for radio frequencies by reference either to the amount of the former one-off licence fee calculated on the basis of the number of frequencies and months to which the rights of use relate, or to the amounts raised through auction, may be an appropriate method for determining the value of the radio frequencies.

The fourth question

By its fourth question, which should be answered before the third question, the national court asks, in essence, whether Article 14(1) of the Authorisation Directive must be interpreted as precluding a Member State from charging a mobile telephone operator a fee such as that at issue in the main proceedings.

It should be observed that Article 14(1) of the Authorisation Directive provides that a Member State may amend the rights, conditions and procedures concerning rights of use for radio frequencies in objectively justified cases and in a proportionate manner. Moreover, notice is to be given in an appropriate manner of the intention to make such amendments and interested parties must be allowed a sufficient period, which is to be no less than four weeks, in which to express their views.

It is, moreover, apparent from point 6 of Part B in the Annex to the Authorisation Directive that the charging of fees for rights of use for radio frequencies pursuant to Article 13 of that directive is one of the conditions which may be attached to rights of use for radio frequencies.

It follows that the charging of a one-off fee such as that at issue in the main proceedings is an amendment to the conditions applicable to operators holding rights of use for radio frequencies. Consequently, a Member State is required to ensure that conditions put in place for amending the scheme of fees charged to mobile telephone operators holding rights of use for radio frequencies are observed.

Consequently, it should be observed that a Member State wishing to amend the fees applicable to previously-granted rights of use for radio frequencies must ensure that that amendment complies with the conditions laid down in Article 14(1) of the Authorisation Directive, that is to say, it must be objectively justified and effected in a
proportionate manner, and notice must have been given to all interested parties in order to enable them to express their views. It is for the national court to assess, in the light of the circumstances at issue in the main proceedings, whether the conditions laid down in Article 14(1) of the Authorisation Directive have been observed.

61 It should be noted in that context that the introduction of a fee in accordance with the conditions laid down in Article 13 of the Authorisation Directive, as referred to in paragraphs 46 and 47 of this judgment, must be considered to be objectively justified and effected in a proportionate manner.

62 In the light of the foregoing, the answer to the fourth question is that Article 14(1) of the Authorisation Directive must be interpreted as not precluding a Member State from charging a mobile telephone operator a fee such as that at issue in the main proceedings, provided that that amendment is objectively justified and effected in a proportionate manner and notice has been given to all interested parties in order to enable them to express their views, which it is for the national court to assess in the light of the circumstances at issue in the main proceedings.

The third question

63 By its third question, the national court asks, in essence, whether Article 14(2) of the Authorisation Directive must be interpreted as precluding a Member State from charging a mobile telephone operator a fee such as that at issue in the main proceedings.

64 It should be noted that, under Article 14(2) of the Authorisation Directive, a Member State may not restrict or withdraw rights of use for radio frequencies, except where justified and, where applicable, in conformity with the Annex to the Authorisation Directive and with relevant national provisions regarding compensation for withdrawal of rights.

65 It is apparent in that regard that, unlike Article 14(1), in Article 14(2) of the Authorisation Directive the concepts of restriction and withdrawal of rights of use for radio frequencies cover only situations where the content and scope of those rights may be amended.

66 In acknowledging that, even given the period allowed for transposition, the Authorisation Directive was in any event applicable to the facts at issue in the main proceedings, the fact of charging mobile telephone operators fees such as those at issue in the main proceedings is not liable to influence the content and scope of those rights. Consequently, the amendment to the fees scheme is not a restriction or withdrawal of the rights of use for radio frequencies for the purposes of Article 14(2) of the Authorisation Directive.

67 In the light of the foregoing, the answer to the third question is that Article 14(2) of the Authorisation Directive must be interpreted as not precluding a Member State from charging a mobile telephone operator a fee such as that at issue in the main proceedings.

Costs

68 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 (Fourth Chamber) hereby rules:

1. **Articles 12 and 13 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), must be interpreted as not precluding a Member State from charging mobile telephone operators holding rights of use for radio frequencies a one-off fee payable for both a new acquisition of rights of use for radio frequencies and for renewals of those rights, in addition to an annual fee for making the frequencies available, intended to encourage optimal use of the resources while at the same time also covering the cost of managing the authorisation, provided that those fees genuinely are intended to ensure optimal use of the resource made up of those radio frequencies and are objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and take into account the objectives in Article 8 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), which it is for the national court to assess.**

   Subject to that same condition, the fixing of the amount of a one-off fee for rights of use for radio frequencies by reference either to the amount of the former one-off licence fee calculated on the basis of the number of frequencies and months to which the rights of use relate, or to the amounts raised through auction, may be an appropriate method for determining the value of the radio frequencies.

2. **Article 14(1) of Directive 2002/20 must be interpreted as not precluding a Member State from charging a mobile telephone operator a fee such as that at issue in the main proceedings, provided that that amendment is objectively justified and effected in a proportionate manner and notice has been given to all interested parties in order to enable them to express their views, which it is for the national court to assess in the light of the circumstances at issue in the main proceedings.**

3. **Article 14(2) of Directive 2002/20 must be interpreted as not precluding a Member State from charging a mobile telephone operator a fee such as that at issue in the main proceedings.**