Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 14 October 2020[1]

Case C-469/19

All in One Star Ltd

(Request for a preliminary ruling
from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling – Freedom of establishment – Limited company wishing to establish a branch in another Member State – Entry in the commercial register – Legislation of the host Member State requiring indication of the amount of share capital or a comparable capital value and certain declarations by the managing director)

I. Introduction

1. The two questions that the Bundesgerichtshof (Federal Court of Justice, Germany) has referred for a preliminary ruling form part of the Court's case-law on situations where a company from one Member State establishes a branch in another Member State, and the leeway available to the host Member State in such situations. Those questions therefore follow on from the *Centros*[2] and *Inspire Art*[3] judgments, among others.

2. As requested by the Court, this Opinion will analyse only the second question referred. That question concerns the obligations imposed under German law on the managing directors of companies from another Member State to provide assurances that there is no obstacle to their appointment and that they have been instructed, for example through a notary, of their unrestricted duty to provide information in that respect to the court of registration. Against that background, the referring court is uncertain whether those obligations are in conformity with EU law.

1 Original language: French.

2 Judgment of 9 March 1999 (C-212/97, EU:C:1999:126).

3 Judgment of 30 September 2003 (C-167/01, EU:C:2003:512).

II. Legal context

A. European Union law

3. Article 29 of Directive (EU) 2017/1132,[4] entitled 'Disclosure of documents and particulars relating to a branch', which is contained in Title I, Chapter III, Section 2, entitled 'Disclosure rules applicable to branches of companies from other Member States', of that directive, provides, in paragraph 1:

'Documents and particulars relating to a branch opened in a Member State by a company of a type listed in Annex II, which is governed by the law of another Member State, shall be disclosed pursuant to the law of the Member State of the branch, in accordance with Article 16.'

4. According to Annex II to Directive 2017/1132, in so far as concerns the United Kingdom, 'companies incorporated with limited liability' are among the types of company covered by Article 29(1) of that directive.

5. Article 30 of Directive 2017/1132, entitled 'Documents and particulars to be disclosed', states that:

'1. The compulsory disclosure provided for in Article 29 shall cover the following documents and particulars only:

(a) the address of the branch;

(b) the activities of the branch;

(c) the register in which the company file referred to in Article 16 is kept, together with the registration number in that register;

(d) the name and legal form of the company and the name of the branch if that is different from the name of the company;

(e) the appointment, termination of office and particulars of the persons who are authorised to represent the company in dealings with third parties and in legal proceedings:

– …

(f) – the winding-up of the company, the appointment of liquidators, particulars concerning them and their powers and the termination of the liquidation in accordance with disclosure by the company as provided for in Article 14(h), (j) and (k),

– insolvency proceedings, arrangements, compositions, or any analogous proceedings to which the company is subject;

(g) the accounting documents in accordance with Article 31;

[4] Directive of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ 2017 L 169, p. 46).

(h) the closure of the branch.

2. The Member State in which the branch has been opened may provide for the disclosure, as referred to in Article 29, of

…

(b) the instruments of constitution and the memorandum and articles of association if they are contained in a separate instrument, in accordance with points (a), (b) and (c) of Article 14, together with amendments to those documents;

…'

B. German law

1. Commercial Code

6. Paragraph 13e of the Handelsgesetzbuch (German Commercial Code) ('the HGB'), entitled 'Branches of capital companies having their registered offices in a different country', provides:

'(1) The following provisions shall apply, in addition, … to branches of … limited companies [and] of capital companies having their registered offices in a different country.

…

(3) … In relation to the statutory representatives of the company, the provisions … of the second and third sentences of Paragraph 6(2) of the Law on limited companies shall apply by analogy to the branch.

…'

7. Paragraph 13g(1) to (3) of the HGB, entitled 'Branches of limited companies having their registered offices in a different country', states:

'(1) The following provisions shall apply, in addition, … to branches of … limited companies having their registered offices in a different country.

(2) A certified copy of the statutes and, where the statutes are not in German, a certified translation in that language, shall be attached to the declaration for the purposes of registration. Paragraph 8(1), point 2, and Paragraph 8(3) and (4) of the Law on limited companies should be applied. …

(3) Registration of the establishment of a branch shall also contain the details set out at Paragraph 10 of the Law on limited companies …'

2. Law on limited companies

8. According to Paragraph 6(2) of the Gesetz betreffend die Gesellschaften mit beschränkter Haftung (Law on limited companies) (RGBl. 1898, p. 846, in the version applicable in the main proceedings; 'the GmbHG'):

'Only a natural person with full capacity to perform legal acts may be a managing director. A person may not be a managing director where that person …;

2. is prohibited by a court order or an enforceable decision by an administrative authority from performing any activity in a trade, trade sector, craft or craft sector, where the company objects relate in full or in part to the matter to which that prohibition relates;

3. has been convicted of intentionally committing one or more of the offences [described in Paragraph 6(2), second sentence, point 3(a) to (e) of the GmbHG].

   The second sentence, point 3, applies by analogy where a person has been convicted in a different country of an offence comparable to those referred to in point 3 of the second sentence.'

9. Paragraph 8 of the GmbHG, entitled 'Content of the declaration', provides in subparagraph 3:

'In the declaration, managing directors must provide an assurance that there is no obstacle to their appointment as provided for in Paragraph 6(2), second sentence, points 2 and 3, and third sentence, and that they have been instructed in relation to their unrestricted duty to provide information to the court. The information within the meaning of Paragraph 53(2) of the Bundeszentralregistergesetz (Law on the central register) may be given in writing. It may also be given by a notary, by a notary appointed abroad, by a member of a comparable legal advisory profession or by a consular officer.'

10. Under Paragraph 82(1)(5) of the GmbHG, a person who makes false declarations 'as a managing director of a limited company or as a managing director of a foreign legal person, in the assurance to be provided under the first sentence of Paragraph 8(3)', is to be liable to a custodial sentence of up to three years or a fine.

3. Law on the central register

11. Paragraph 53 of the Bundeszentralregistergesetz (Law on the central register) of 21 September 1984 (BGBl. 1985 I, pp. 195 and 1229), entitled 'Obligation to disclose convictions', in the version applicable since 29 July 2017, ('the BZRG'), provides:

'(1) Persons with a conviction may declare that they have no convictions and are not obliged to disclose the facts giving rise to their conviction where the conviction

1. is not required to be shown on a certificate of good character or is required to be shown only in the certificate referred to in Paragraph 32(3) and (4); or

2. must be deleted.

(2) Where the courts or authorities have an unrestricted right to demand information, persons with convictions who have been informed of that right may not rely on any right under Paragraph 53(1)(1) in relation to those bodies.'

III. The facts, procedure before the Court of Justice and the questions referred

12. All in One Star Ltd is a private company limited by shares which was entered in the Commercial Register of Companies House in Cardiff (United Kingdom) in 2013 and has its registered office in Great Bookham (United Kingdom).

13. In 2014, All in One Star applied to the Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main, Germany), as the court of registration, to register a branch in the commercial register.

14. By an interlocutory decision, the court of registration informed the company that the application for registration could not be accepted on the grounds that, inter alia, first, the amount of the share capital had not been indicated and, secondly, although the managing director and sole shareholder of the company had indeed given an assurance in his application that there was no obstacle to his appointment as provided for in Paragraph 6(2), second sentence, points 2 and 3, and third sentence, of the GmbHG, he had not, in contrast, provided an assurance that he had been instructed by a notary, a member of a comparable legal advisory profession or a consular officer of his unrestricted duty to provide any information in that respect to the court. All in One Star appealed that decision.

15. By an order of 8 August 2017, the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main, Germany) dismissed All in One Star's appeal against those findings by the court of registration.

16. All in One Star then brought an appeal before the Bundesgerichtshof (Federal Court of Justice). That court believes that the outcome of the dispute before it depends on the interpretation to be given to Article 30 of Directive 2017/1132 and Articles 49 and 54 TFEU.

17. According to the referring court, the entry in the German commercial register of a branch of a foreign company is governed by Paragraph 13d et seq. of the HGB. As a private company limited by shares, All in One Star can, according to that court, be treated as a German limited company (*Gesellschaft mit beschränkter Haftung*), and the provisions applicable to German limited companies therefore apply by analogy to registration of All in One Star's German branch.

18. In that context, under Paragraph 13g(3) of the HGB, in conjunction with Paragraph 8(3) of the GmbHG, in order to register such a branch, the managing director of the company must, at the time of the application for registration, provide an assurance that none of the obstacles to appointment referred to in Paragraph 6(2), second sentence, points 2 and 3, and third sentence, of the GmbHG is present. In addition, under the second sentence of Paragraph 13g(2) of the HGB, in conjunction with Paragraph 8(3) of the GmbHG, the managing director must also provide an assurance that a notary, a member of a comparable profession or a consular officer has instructed the managing director of the unrestricted duty to provide information to the court.

19. The referring court explains that the duty to provide that assurance is intended to streamline the registration and supervisory procedure conducted by the court of registration. It adds that the court of registration may, in principle, request any information, without exception. Paragraph 53(2) of the BZRG adds the prerequisite that the applicant must have been instructed of his or her unrestricted duty to provide information to the court. If the applicant has not been so instructed, he or she would in certain situations be entitled to declare himself or herself exempt from any criminal penalty. By contrast, the duties arising under German law have no effect whatsoever on the managing director's actual position within the company under the foreign law on companies, which applies to that person, but prevent the managing director from applying, as an organ of that company, to register a branch in Germany.

20. Moreover, All in One Star's legal representative declared, during the appeals proceedings, that, in accordance with Paragraph 8(3) of the GmbHG, she had instructed the managing director of All in One Star, before he submitted the application to register the branch, of his duty to provide information to the court of registration. However, the referring court states that the declaration must be made personally by the managing director who has been duly instructed and must be recorded in a document certified as authentic.

21. Against that background, the referring court takes the view that, should the duty to provide an assurance in accordance with the second sentence of Paragraph 13g(2) of the HGB, in conjunction with Paragraph 8(3) of the GmbHG, fall within the scope of application of Directive 2017/1132, it would be contrary to that directive. However, the referring court notes that, when it adopted those provisions of national law, the German legislature believed that they fell outside the scope of application of Directive 89/666/EEC,[5] which was then in force.

22. Should that duty to provide an assurance not be covered by Directive 2017/1132, the question would arise as to whether it is compatible with primary law and, specifically, with the freedom of establishment guaranteed by Articles 49 and 54 TFEU. In that connection, the referring court enquires first and foremost whether that duty exceeds what is necessary to attain the objective it pursues. First, since the same duty also applies to foreign companies, whose managing directors are foreign, those companies cannot be expected to be familiar with the provisions of German law on obstacles to appointing company managing directors. Those foreign managing directors could therefore only provides a truthful assurance with great difficulty. Secondly, unless there are specific indications that a person is unsuitable to be a managing director, the duty in question serves only preventively to ensure that representatives of the company who are unsuitable under domestic law do not abuse the freedom of establishment and commit fraud.

23. In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 30 of Directive [2017/1132] preclude a national provision under which the indication of the amount of share capital or a comparable capital value is required for a branch of a limited liability company with registered office in another Member State to be entered in the commercial register?

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

(2) (a) Does Article 30 of Directive [2017/1132] preclude a national provision under which, when applying for a branch of a limited liability company with registered office in another Member State to be entered in the commercial register, the managing director of the company has to provide an assurance that there is no barrier to his personal appointment under national law in the form of a prohibition, ordered by a court or public authority, on practising his profession or trade, corresponding in whole or in part with the object of the company, or in the form of a final conviction for certain criminal offences and that, in this respect, he has been instructed of his unrestricted duty to provide information to the court by a notary, a representative of a comparable legal advisory profession or a consular officer?

(b) If Question 2(a) is answered in the negative:

Do Articles 49 and 54 TFEU preclude a national provision under which the managing director of the company has to provide such an assurance when applying for a branch of a limited liability company with registered office in another Member State to be entered in the commercial register?'

24. All in One Star, the German Government and the European Commission filed written observations. The same parties also answered, in writing, the questions put by the Court, which decided to rule on the action without holding a hearing.

IV. Analysis of the second question referred for a preliminary ruling

25. By its second question, the referring court asks whether Article 30 of Directive 2017/1132 or Articles 49 and 54 TFEU preclude a national provision under which, when applying for a branch of a limited liability company with registered office in another Member State to be entered in the commercial register, the person wishing to be registered as managing director of that branch has to provide an assurance, on the one hand, that there is no obstacle under national law to his or her personal appointment as managing director and, on the other hand, that, in this respect, he or she has been instructed of his or her unrestricted duty to provide information to the court of registration by a notary, a representative of a comparable legal advisory profession or a consular officer.

26. It should be noted that this question is divided into two parts: in the first it is necessary to analyse the duties that German law lays down in relation to Directive 2017/1132, and in the second to analyse those duties in the light of Articles 49 and 54 TFEU.

27. In that context, the wording of the request for a preliminary ruling might suggest that the second part of the second question arises only if the first part of that question is answered in the negative. However, it emerges from the reasons for the request for a preliminary ruling that the second part is asked only in case those duties do not fall within the scope of Directive 2017/1132. National provisions governing matters falling within the scope of a directive must be examined in the light of that directive, whereas those governing matters not falling within that scope must be examined in the light of primary law. [6]

[6] See judgment of 30 September 2003, *Inspire Art* (C-167/01, EU:C:2003:512, paragraph 73).

28. Mindful of the foregoing, after examining at the outset whether the second question referred is admissible (section A), I will examine both parts of that question in the order set by the referring court (sections B and C).

A. Admissibility

29. Although the parties have not raised doubts as to the admissibility of the questions referred, I believe it is appropriate to examine this aspect in relation to the second question.

30. It can be seen from its wording that the second question concerns two duties – and two assurances to be given in order to discharge those duties – that apply when a company from one Member State wishes to establish a branch in another Member State. The first duty is to provide an assurance that there is no obstacle under German law to the managing director of that company being appointed, and the second to provide an assurance that a notary, a member of a comparable legal advisory profession or a consular officer has instructed that person of his or her unrestricted duty to provide any information about such obstacles to the court of registration.

31. It can be seen from the reasons for the request for a preliminary ruling that, in the application to register the branch, the managing director of All in One Star gave an assurance that he was not subject to any of the statutory obstacles to his appointment. In contrast, he did not give an assurance that he had been instructed of his unrestricted duty to provide information to the court of registration.

32. The second question is therefore arguably inadmissible in so far as concerns the first duty. However, it is impossible, without interpreting national law, to determine whether, where no assurance is given in relation to the second duty, the first duty can be found to have been properly discharged in the main proceedings.

33. In any event, it is clear from the Court's consistent case-law that it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.[7] I therefore propose to find that the second question is admissible.

B. The national legislation in the light of Directive 2017/1132

34. By the first part of the second question, the referring court seeks to determine whether Directive 2017/1132 precludes both the duties applicable when a company from one Member State wishes to establish a branch in Germany. As I indicated in point 27 of this Opinion, in order to assess those duties in the light of Directive 2017/1132, it is necessary first to determine whether they fall within the scope of that directive. In that context, even before examining the scope *ratione materiae* of Directive 2017/1132, it is necessary to determine whether that directive applies *ratione temporis* to the main proceedings.

[7] Judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Societé Générale* (C-698/18 and C-699/18, EU:C:2020:537, paragraph 46 and the case-law cited).

1. Scope ratione temporis

35. The referring court states that the applicant was registered in the United Kingdom in 2013 and applied to register a branch in the German commercial register in 2014. It notes that the appeal proceedings were brought before Directive 2017/1132 entered into force, on 20 July 2017.[8] That court states that, in the appeal proceedings, it nevertheless had to apply the law in force on the date on which it issued its ruling, specifically the provisions transposing Directive 2017/1132.

36. In the same vein, the applicant and the German Government, in common with the referring court, state in reply to the Court's question that, according to German case-law, in proceedings such as the main proceedings, it is necessary to apply the provisions in force on the date on which judgment is delivered on the appeal.

37. Admittedly, in *I.G.I.*,[9] the Court held that, because the facts in the main proceedings all occurred before the date on which Directive 2017/1132 entered into force, the earlier directive applied in that case. It made a similar finding in *Miravitlles Ciurana and Others*.[10] Those findings might suggest that Directive 2017/1132 is likewise inapplicable in the main proceedings.

38. However, it should be noted, first, that both those cases concerned the provisions applicable to events that occurred before the action was brought.[11] The present case, in contrast, concerns the provisions applicable when a branch is registered and the subject matter of the main proceedings remains, in essence, the requirements imposed at the time of that registration. Accordingly, and in the light of the concurring clarifications made by the referring court and the parties as regards which provisions apply, in German law, in the appeal proceedings, I will examine the second question through the prism of Directive 2017/1132.

39. Secondly, as it states in recital 1, Directive 2017/1132 codifies the company law directives. One of the effects of that codification was to replace Article 2 of Directive 89/666 with Article 30 of Directive 2017/1132 without changing its substance. Article 166 of Directive 2017/1132 states that Directive 89/666 was repealed without prejudice to the obligations of the Member States relating to transposition of the company law directives. That article also indicates that references to the repealed directives are to be construed as references to Directive 2017/1132.

40. Thirdly and lastly, the finding that Directive 2017/1132 applies *ratione temporis* to the main proceedings is not called into question by the fact that Directive 2017/1132 has in the meantime undergone several amendments introduced by Directive 2019/1151, which are referred to by the parties in order to determine the substance of the regime applicable under Directive 2017/1132. The German Government explains in that regard that in German law it would be inconceivable to apply the amendments made to Directive 2017/1132 by Directive (EU) 2019/1151[12] to the main proceedings, because the relevant time limits for transposition indicated in Article 2 of Directive

8 See Article 167 of Directive 2017/1132.

9 See judgment of 30 January 2020 (C-394/18, EU:C:2020:56, paragraph 38).

10 See judgment of 14 December 2017 (C-243/16, EU:C:2017:969, paragraphs 3 and 9).

11 The judgment of 30 January 2020, *I.G.I.* (C-394/18, EU:C:2020:56, paragraph 38), in fact concerned an *actio pauliana* against an instrument of division, whilst the judgment of 14 December 2017, *Miravitlles Ciurana and Others* (C-243/16, EU:C:2017:969, paragraphs 3 and 9), concerned an action for liability based on a wage claim.

12 Directive of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law (OJ 2019 L 186, p. 80).

2019/1151 have not yet expired. I would also note that, unlike Directive 2017/1132, which was without prejudice to the obligations of the Member States relating to the transposition of earlier directives, Directive 2019/1151 sets dates for transposing the amendments it introduces.

41. It is therefore now necessary to determine whether Directive 2017/1132 applies *ratione materiae* to the main proceedings.

2. *Scope* ratione materiae

42. Article 1 of Directive 2017/1132 provides that it lays down measures concerning, inter alia, the disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another Member State.[13] The provisions relating to those measures are contained in Title I, Chapter III, Section 2, entitled 'Disclosure rules applicable to branches of companies from other Member States'.

43. In that context, under Article 29(1) of Directive 2017/1132, documents and particulars relating to a branch opened in a Member State by a company of a type listed in Annex II, which is governed by the law of another Member State, are to be disclosed pursuant to the law of the Member State of the branch. The referring court states that, as a private company limited by shares, the applicant is one of the United Kingdom companies referred to in Annex II to Directive 2017/1132 (companies incorporated with limited liability). This means that, as the referring court believes to be the case here, documents and particulars relating to a branch of the applicant are subject to the disclosure rules in Section 2 of that directive, including those established in Article 30.

44. The question arises nevertheless of whether the assurances relating to the duties under German law constitute documents or particulars covered by the disclosure obligation contained in Article 29 et seq. of Directive 2017/1132.

(a) *Positions of the parties*

45. The applicant claims that, according to Article 30(1)(e) of Directive 2017/1132, the appointment, termination of office and particulars of the persons who are authorised to represent the company must be disclosed at the time of registering a branch in the commercial register. It infers from that article that Directive 2017/1132 exhaustively governs the personal details of managing directors. It argues that recital 8 of the directive confirms its interpretation, stating as it does that disclosure should enable third parties to ascertain, especially, the particulars of the persons who are authorised to bind the company.

46. In contrast, according to the German Government, on a contrary interpretation, Article 30(1)(e) of Directive 2017/1132 shows that the directive concerns solely the appointment, termination of office and particulars of the company's representative. Furthermore, according to that government, the obligation to provide an assurance that managing directors have been duly

[13] It should be noted that, at least until the end of the transition period laid down in the withdrawal agreement, the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union does not affect the applicability of Directive 2017/1132 in relation to the main proceedings. For the purposes of applying that directive the applicant must still be regarded as a company from another Member State.

instructed of their unrestricted duty to provide information to the court of registration relates to the part of the companies register procedure pertaining to registration of a branch. That obligation is laid down by a procedural rule.

47. In the same vein, the Commission contends that the assurance that must be provided in respect of the personal suitability of the managing director does not constitute disclosure of the determining characteristics of a branch, but is an administrative and procedural requirement imposed by German companies law.

(b) Analysis

48. In order to provide a reply to the first part of the second question referred that will be of use to the referring court, it is necessary to determine whether the obligations imposed in German law are disclosure obligations within the meaning of Article 30 of Directive 2017/1132 or – as the German Government and the Commission, in essence, contend – requirements for creating or registering a company or branch of a company.

49. The *Inspire Art* [14] judgment provides useful guidance in that context.

50. It can be seen from that judgment, first, that a national provision requiring the address of the sole member to be recorded in the commercial register of the host Member State falls under Article 2 of Directive 89/666 and would, therefore, fall under Article 30 of Directive 2017/1132. The Court in fact held in that judgment that Article 2 of Directive 89/666 precluded a provision according to which the branch of a company incorporated in accordance with the legislation of another Member State had an obligation of that nature, since Directive 89/666 contained no such obligation. [15] However, if Directive 89/666 is to preclude such an obligation, that obligation must fall within the scope *ratione materiae* of that directive.

51. Article 2(1)(e) of Directive 89/666 provided – as Article 30(1)(e) of Directive 2017/1132 now provides – that the disclosure obligation concerned documents and particulars relating to the appointment, termination of office and *particulars* [in the French version, literally, '*identity*'] of the persons who are authorised to represent the company in dealings with third parties and in legal proceedings. According to recitals 8 and 16 of Directive 2017/1132, the disclosure obligation serves to protect third parties who deal with companies through the intermediary of branches. Knowing the address of the company's representative is not, in principle, relevant to protecting those third parties. Accordingly, disclosure relating to the address of a representative, although it does indeed relate to the representative and, as a disclosure obligation, falls under Directives 89/666 and 2017/1132, does not, as such, make it possible to identify that representative. That disclosure cannot therefore be treated as the disclosure of 'particulars' within the meaning of those directives.

52. Secondly, it emerges from the *Inspire Art* [16] judgment that Directive 89/666 did not apply, in contrast, to national provisions under which the opening of a branch in a host Member State was subject to a number of rules laid down in that Member State in respect of company formation. The same must apply to Directive 2017/1132.

14 Judgment of 30 September 2003 (C-167/01, EU:C:2003:512).

15 Judgment of 30 September 2003, *Inspire Art* (C-167/01, EU:C:2003:512, paragraphs 65 and 73).

16 Judgment of 30 September 2003 (C-167/01, EU:C:2003:512, paragraphs 65, 73, 101 and 105).

53. When the lessons from the *Inspire Art*[17] judgment are transposed to the present case, doubts arise as to whether an obligation to provide an assurance regarding circumstances capable of disqualifying a company's representative can be treated as a disclosure obligation. Indeed, it can be seen from Paragraph 6(2) of the GmbHG that the assurance in question relates to circumstances which, in particular at the time a company is formed in Germany, primarily determine a person's capacity to be registered as its managing director. Further, the referring court states that in the absence of an assurance that a notary, a member of a comparable legal advisory profession or a consular officer has instructed the managing director of his or her unrestricted duty to provide information to the court, 'no entry in the commercial register [can take] place'. In certain circumstances, provision of that latter assurance also determines whether criminal penalties can be imposed on a managing director. Obliging a managing director to provide those two assurances is therefore comparable not to subjecting the opening of a branch in a host Member State to disclosure obligations but to subjecting it to certain rules laid down in that Member State relating to the formation of a company.

54. In addition, Directive 2019/1151 also bears out the fact that assurances relating to circumstances concerning personal capacity fall completely outside the subject matter of Directive 2017/1132.

55. As the German Government states, Directive 2019/1151 introduced provisions relating to 'disqualified directors' into Directive 2017/1132. The Commission, for its part, refers in particular to Article 13i(2) of Directive 2017/1132, as amended by Directive 2019/1151, according to which 'Member States may require that persons applying to become directors declare whether they are aware of any circumstances which could lead to a disqualification in the Member State concerned' and that 'Member States may refuse the appointment of a person as a director of a company where that person is currently disqualified from acting as a director in another Member State'.

56. In that context, the only amendment that Directive 2019/1151 made to Article 1 of Directive 2017/1132, which defines the subject matter of that directive,[18] was to insert a sentence to the effect that the directive also establishes measures concerning 'the rules on online formation of companies, on online registration of branches and on online filing of documents and information by companies and branches'. It can therefore be inferred that national provisions relating to the declarations – referred to in Article 13i of Directive 2017/1132, as amended by Directive 2019/1151 – by persons applying to become directors in respect of obstacles to appointment as company managing directors, are, to the EU legislature, rules relating to the formation of companies or the registration of branches. To the EU legislature, such provisions do not, on the other hand, relate to 'disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State', to borrow the original wording of Article 1 of Directive 2017/1132.

57. It must therefore be found that the duties addressed in the second question referred do not fall within the scope *ratione materiae* of Directive 2017/1132. In view of the considerations set out in point 27 of this Opinion, it is now necessary to examine whether those obligations comply with Articles 49 and 55 TFEU.

[17] Judgment of 30 September 2003 (C-167/01, EU:C:2003:512).

[18] See point 42 of this Opinion.

C. The national legislation in the light of freedom of establishment

58. The referring court itself is of the view that the obligations under German law on the managing director of a company from another Member State who wishes to establish a branch in another Member State amount to a restriction on freedom of establishment.

59. In that regard, as the referring court notes, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by primary law must fulfil four conditions in order to comply with that law. The measures must, first, be applied in a non-discriminatory manner, secondly, be justified by imperative requirements in the public interest, thirdly, be suitable for securing the attainment of the objective which they pursue and, fourthly, must not go beyond what is necessary in order to attain that objective. [19]

60. The referring court advances that, according to the German legislature, the obligations relating to the assurances addressed in the second question referred are justified by the imperative need to protect trading from unsuitable company representatives. The objective is to ensure that persons who would be unsuitable under German law do not register a branch in Germany, as representatives of a foreign company, thereby circumventing the obstacles to the appointment of company managing directors in force in that Member State. The referring court states that, in its view, those obligations serve imperative requirements in the public interest, namely creditor protection and the protection of fair trading from unsuitable representatives of a company.

61. Nevertheless, the referring court is of the view that the obligations at issue go beyond what is necessary to achieve the objectives sought, in so far as the duty to declare imposed on the managing directors of the foreign company is accompanied by criminal penalties. Foreign managing directors cannot be expected to have in-depth knowledge of the domestic law applicable to the obstacles to their appointment.

62. Further, the only purpose of establishing such requirements is preventively to ensure that obstacles to appointment arising under German law are not circumvented by the establishment of a branch. This is therefore a matter of preventing representatives of companies who are unsuitable under German law from committing fraud and abuses of freedom of establishment. However, in the light of the *Centros* judgment, [20] that objective cannot justify a refusal to register a branch.

1. Positions of the parties

63. All the parties – including the applicant in the event that those obligations do not fall within the scope of Directive 2017/1132 – concede that, in the light of Articles 49 and 54 TFEU, the obligations addressed in the second question referred constitute a restriction on freedom of establishment.

64. The applicant concurs with the referring court's position and is of the view that the restriction on freedom of establishment in the present case goes beyond what is necessary to achieve its objectives. In the same vein, the Commission observes that the assurances at issue have to be provided even where the managing director has already been properly appointed as a managing

[19] Judgment of 30 September 2003, *Inspire Art* (C-167/01, EU:C:2003:512, paragraph 133).

[20] Judgment of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraph 38).

director of a company in another Member State. Managing directors are therefore required a second time to provide attestations of their suitability to be managing directors. According to the Commission this infringes the principle of proportionality, which seeks in particular to prevent the duplication of formalities, that is to say, the need to perform once again formalities already completed in another Member State.

65. In contrast, the German Government argues that Articles 49 and 54 TFEU do not preclude the obligation at issue, which is in its view justified by an imperative reason in the public interest, namely the protection of fair trading. According to that government, the obligation at issue is not discriminatory, appropriately enables attainment of the objective pursued and is proportionate. Investigations conducted by the German court of registration itself to determine the existence of any grounds for disqualification would not be so appropriate to securing achievement of that objective. Such investigations would only be possible if there were a pre-existing system for automatically exchanging information between the registers of the Member States, which was only envisaged for the first time in Article 13i of Directive 2017/1132, introduced by Directive 2019/1151. The obligation to provide the assurance under Article 8 of the GmbHG is also appropriate, since it seeks preventively to ensure that companies do not circumvent the national grounds for disqualification by establishing branches of companies established in another Member State.

2. Analysis

(a) Application of the obstacles to the appointment of company managing directors to branches of companies established in other Member States

66. It should be noted at the outset that the obligations addressed in the second question referred are imposed, preventively and across the board, on companies already formed in accordance with the law of another Member State and on the managing directors of those companies, even where they are registered as managing directors of those companies in their Member State of establishment. Those obligations are therefore imposed on the managing directors of companies established in other Member States on the premiss that the obstacles to the appointment of company managing directors laid down in German law apply to those managing directors. [21]

67. In the light of the considerations advanced in point 56 of this Opinion, in the mind of the EU legislature, those obstacles are linked to the requirements for the formation of companies or, potentially, registration of their branches.

68. The companies or firms to which Article 54 TFEU relates are entitled to carry on their business in another Member State through, inter alia, a branch, and, for those companies, the location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular Member State. [22] The freedom of establishment for those companies or firms includes, inter alia, the right to set up and manage such companies or firms under the conditions laid down, by the legislation of the Member State

[21] By the same token, in reply to the Court's question, the Commission stated that the obligations addressed in the second question referred have the effect of rendering the German law on the disqualification of directors applicable to the directors of companies registered in other Member States where those companies wish to open a branch in Germany. In addition, referring to the documents produced during the legislative procedure, the German Government states that 'the sole objective here is to prevent persons who are unsuitable according to German law – for example those who could not become managing directors of a limited company – from registering a branch in Germany, as representatives of a foreign company'.

[22] See judgment of 30 September 2003, *Inspire Art* (C-167/01, EU:C:2003:512, paragraph 97 and the case-law cited).

where such establishment is effected, for its own companies or firms. It should be noted in that respect that the obstacles to the appointment of company managing directors under German law do not appear to be applied on the basis of a belief that, because a branch is located in Germany, a company is entirely connected with the legal system of that Member State. [23]

69. That being so, it is indeed the case that the fact of subjecting the registration of a branch to additional requirements that erect such obstacles in the law of a Member State other than that of the Member State where the company is established, where the company has a connection with that law, is not tantamount to an outright negation of freedom of establishment. [24] Nevertheless, that fact makes registering at the very least more difficult and therefore constitutes a restriction on freedom of establishment. [25]

70. It is also true that the requirements at issue relate directly to the personal suitability of the managing director of a company rather than to the company itself. Nevertheless, if those requirements are not satisfied, a branch of that company will be refused registration. It is therefore appropriate to find that the obstacles to the appointment of company managing directors under German law are not applied in connection with the companies' business in the strict sense but do, in contrast, relate to the formation of a company or its subsequent establishment in another Member State. [26]

71. Moreover, in *Segers*, [27] the Court held that discrimination in connection with a director's social security protection on the basis of where the company he or she ran had its registered office indirectly restricts the freedom of companies of another Member State to establish themselves through an agency, branch or subsidiary in the Member State concerned. With all the more reason, imposing additional requirements that erect obstacles to the appointment of company managing directors likewise restricts that freedom.

72. In that context, a Member State in which an application has been made to register a branch may adopt measures in order to prevent attempts by certain of its nationals improperly to evade domestic legislation by having recourse to the possibilities offered by the Treaty. [28] It is therefore necessary to determine whether the obstacles to the appointment of company managing directors in force in that Member State can justifiably be applied to the branches of companies established in other Member States, having regard to that objective.

[23] According to the referring court, the obligations addressed in the second question referred are also imposed on 'foreign companies established abroad with foreign management staff and also maintaining an actual main establishment there'. On that issue, see Avout, L., 'L'entreprise et les conflits internationaux de lois', *Collected Courses of the Hague Academy of International Law*, 2019, vol. 397, p. 264.

[24] See, arguing from the contrary, in relation to the right of one Member State, where a company validly incorporated under the law of another in whose territory it has its registered office is found to have moved its centre of administration to that first State, to deny legal capacity to that company, judgment of 5 November 2002, *Überseering* (C-208/00, EU:C:2002:632, paragraph 93). See also, by analogy, my Opinion in *McCarthy and Others* (C-202/13, EU:C:2014:345, points 138 and 139).

[25] See, to that effect, in relation to the application of obstacles to appointment in the case of branches of companies established in another Member State, Ebke, W.F., 'The "Real Seat" Doctrine in the Conflict of Corporate Laws', *The International Lawyer*, 2002, vol. 36, p. 1031, footnote 112; Gerner-Beuerle, C., Mucciarelli, F., Schuster, E., Siems, M., 'Study on the Law Applicable to Companies. Final Report', *Publications Office of the European Union*, 2016, Luxembourg, p. 139; Sørensen, K.E., 'Branches of Companies in the EU: Balancing the Eleventh Company Law Directive, National Company Law and the Right of Establishment', *European Company and Financial Law Review*, 2014, vol. 11(1), p. 83; and Tridimas, T., 'Abuse of Rights in the EU Law: Some Reflections with Particular Reference to Financial Law', in de la Feria, R. and Vogenauer, S. (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Hart Publishing, Oxford – Portland, 2011, p. 178.

[26] See, for the reverse situation, judgment of 10 December 2015, *Kornhaas* (C-594/14, EU:C:2015:806, paragraph 28). In that judgment, the Court found that the application of a provision of national law which in no way concerned the formation of a company in a given Member State or its subsequent establishment in another Member State but which, conversely, did apply in connection with that company's business could not have any bearing on freedom of establishment.

[27] Judgment of 10 July 1986 (79/85, EU:C:1986:308, paragraph 15).

[28] See, to that effect, judgment of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 39).

(b) Combating abuse of freedom of establishment

73. It emerges from the Court's case-law that the concept of 'abuse of rights' is an autonomous concept of EU law, according to which 'a finding of abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the [EU] rules, the purpose of those rules has not been achieved. It requires, secondly, a subjective element consisting in the intention to obtain an advantage from the [EU] rules by creating artificially the conditions laid down for obtaining it'. [29]

74. In a context in which courts must have regard to the objectives pursued by the provisions of EU law of which an individual must not improperly or fraudulently take advantage, in *Centros* [30] the Court seemed to draw a distinction, within the national provisions whose application those individuals were seeking to evade, between, first, rules governing the formation of companies and, secondly, rules on the carrying on of certain trades, professions or businesses. In that regard, the Court held that the national provisions at issue fell squarely within the first category and that, in the circumstances of the case, their application could not be justified in the interests of combating abuse of freedom of establishment. Academic commentators have inferred from the foregoing that it may be easier to invoke abuse where the intention is to evade the application of rules relating to the carrying on of certain trades, professions or businesses. [31]

75. However, the obstacles to the appointment of company managing directors under German law apply to any trade, profession or business carried on through a branch and, in the light of the changes brought about by Directive 2019/1151, are linked to the requirements relating to the formation of companies or the registration of branches. [32]

76. It is also apparent from the case-law that it cannot be assumed systematically and in all cases that there is abuse or fraud. Denial of the right to enjoy freedom of establishment on grounds of abusive or fraudulent conduct must be on a case-by-case basis. [33]

77. There is no factor, whether objective or subjective, suggesting that the application to register a branch in the commercial register in the main proceedings constitutes abusive or fraudulent conduct. Moreover, according to the referring court, there is no certainty in the present case that any obstacle exists under German law to the appointment of the managing director and there is nothing to indicate any such prohibition. It would seem therefore that the obstacles under German law to the appointment of company managing directors and the obligations addressed in the second question referred and intended to combat abuse of freedom of establishment are applied preventively and in all cases on the premiss that any registration of a branch in Germany is undertaken in order to evade those obstacles. Accordingly, in the light of the considerations set out in the preceding point, neither the application of those conditions nor the imposition of those obligations can be found to comply with Articles 49 and 54 TFEU on that account.

[29] See judgment of 14 December 2000, *Emsland-Stärke* (C-110/99, EU:C:2000:695, paragraphs 52 and 53).

[30] See judgment of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraph 25 and the case-law cited).

[31] See, to that effect, Sørensen, K.E., 'The fight against letterbox companies in the internal market', *Common Market Law Review*, 2015, vol. 25(1), p. 92, and Munari, F., Terrile, P., 'The *Centros* case and the rise of an EC market for corporate law', in Ferrarini, G., Hopt, K.J. and Wymeersch, E. (eds), *Capital Markets in the Age of the Euro*: *Cross-Border Transactions, Listed Companies and Regulation*, Kluwer Law International, The Hague, London, New York, 2002, p. 47.

[32] See point 56 of this Opinion.

[33] See, to that effect, judgment of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126, paragraph 25). See, also, Tridimas, T., 'Abuse of Rights in the EU Law: Some Reflections with Particular Reference to Financial Law', in de la Feria, R. and Vogenauer, S. (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law*?, Hart Publishing, Oxford – Portland, 2011, p. 178.

78. For the sake of completeness, I note that the German Government contends that the changes made by Directive 2019/1151 in relation to disqualified directors [34] demonstrate that, under that directive, the Member States retain their discretion to define for themselves the personal suitability required of company representatives. According to that government, there is no reason why the Member States cannot have recourse to the tool available in the form of the preventive control of abuse.

79. However, those changes – which do not apply in the main proceedings – do not cast doubt on the findings made in the preceding points of this Opinion.

80. Admittedly, recital 3 of Directive 2019/1151 states that the directive is intended to provide the necessary safeguards against abuse and fraud. In that context, recital 23 of that directive allows the Member States to refuse the appointment of a person as a director of a company, taking into account not only the former conduct of that person in their own territory, but, where so provided under national law, also information provided by other Member States. In the same vein, recital 24 states that, to ensure that all persons interacting with companies or branches are protected and that fraudulent or other abusive behaviour is prevented, the competent authorities in Member States must be able to verify whether the person to be appointed as a director is not prohibited from performing the duties of a director.

81. According to the explanatory memorandum of the proposal for Directive 2019/1151, [35] Article 13i of Directive 2017/1132, as amended by Directive 2019/1151, establishes a legal framework for Member States to request information from other Member States concerning disqualified directors. According to that article, Member States may check with other Member States if a person to be registered as a director of a company is disqualified from acting as a director in another Member State on the basis of the national law of that Member State.

82. The basic premiss of Directive 2019/1151 is that, under that legal framework, it is in the Member State where the company is established that abusive or fraudulent conduct consisting of forming a company in another Member State in order to circumvent a prohibition on acting as a director can be prevented systematically and across the board. In that context, a Member State may, under the second sentence of Article 13i(2) of Directive 2017/1132, as amended by Directive 2019/1151, refuse the appointment of a person as a director of a company where that person is disqualified from acting as a director in another Member State.

83. An analysis of the other provisions introduced by Directive 2019/1151 bears out that finding.

84. As the Commission notes, under Article 13g(3)(f) of Directive 2017/1132, as amended by Directive 2019/1151, the detailed rules for the online formation of companies to be laid down by the Member States include rules on the 'procedures to verify the appointment of directors'. Article 28a of that directive contains similar provisions relating to the online registration of

[34] According to Article 13i of Directive 2017/1132, as amended by Directive 2019/1151, 'directors' means at least the persons referred to in point (i) of Article 14(d) of Directive 2017/1132, that is to say, the persons who, either as a body constituted pursuant to law or as members of any such body, are authorised to represent the company in dealings with third parties and in legal proceedings. In that respect, it can be seen from the request for a preliminary ruling that, according to the terminology used by the referring court, a 'managing director of the company' is in fact the statutory representative of that company. That person can therefore be regarded as a 'director' within the meaning of the above-referred provisions.

[35] Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, COM/2018/239 final, p. 15.

branches. However, the list, in Article 28a(3) of that directive, of the aspects in relation to which the Member States must lay down detailed rules, whilst very similar to the list in Article 13g, does not refer to the procedures for verifying directors.

85. It is also necessary to determine whether a restriction on freedom of establishment arising from application of the obstacles under German law to the appointment of company managing directors may be justified by other reasons adduced both by the referring court and by the German Government, that is to say, creditor protection and the protection of fair trading.

(c) Creditor protection and the protection of fair trading

86. Even though creditor protection and the protection of fair trading are imperative reasons in the public interest,[36] measures justified on that basis must also satisfy the criteria of being non-discriminatory, effective and proportionate, set out in point 59 of this Opinion.

87. First of all, since obstacles to the appointment of company managing directors under German law are also applied to companies established in Germany, nothing suggests that those conditions are applied in a discriminatory manner.

88. Thereafter, as regards creditor protection and the protection of fair trading, admittedly, the fact that a person who has lawfully been appointed as a managing director of a company established in another Member State falls foul of the obstacles to appointment under Paragraph 6(2), second sentence, points 2 and 3, and third sentence of the GmbHG does not necessarily mean that such a person is not empowered, through a branch, to represent a company in dealings with third parties.

89. Nevertheless, in German law, the obstacles to the appointment of company managing directors take the form, first, of a prohibition, ordered by a court or public authority, on practising a profession or trade corresponding to the business of the branch. Such prohibitions are ordered precisely in order to protect trading. Secondly, the obstacles to the appointment of company managing directors also include those in the form of convictions for certain intentional offences, that is to say, insolvency offences and those consisting of fraud or of filing false or inaccurate business information. Those are the only convictions that can effectively reflect an intention to protect the fairness of commercial transactions.

90. Lastly, as regards whether they are proportionate, in my view applying the obstacles under German law to the appointment of company managing directors does not go beyond what is necessary to achieve the objective pursued by application of those obstacles. Although those obstacles also apply to persons already lawfully registered as company managing directors in other Member States, since such obstacles are not harmonised at EU level, it cannot be assumed that every Member State has laid down similar obstacles and that applying the obstacles under German law to the appointment of company managing directors would therefore lead to a duplication of obstacles or formalities. Moreover, at the time of forming a company it is impossible to anticipate all the decisions it will make relating to the registration of its branches. It is therefore not inconceivable that the company's Member State of establishment may not be able to ensure in all respects that it has complied with the obligations relating to appointment in force

[36] See judgment of 12 July 2012, *VALE* (C-378/10, EU:C:2012:440, paragraph 39 and the case-law cited). See also, to that effect, judgment of 30 September 2003, *Inspire Art* (C-167/01, EU:C:2003:512, paragraph 140).

in the host Member State of its branches. Furthermore, application of those obstacles ensures that effect is given to any prohibitions ordered by a court or public authority on practising a profession or trade in the territory of the European Union.

91. In short, subjecting the registration of a branch to additional conditions laid down by the law of a Member State other than that of the Member State of establishment, which erect obstacles to the appointment of company managing directors, as German law does, does therefore constitute a restriction on freedom of establishment. However, that restriction may be justified in the interests of creditor protection and the protection of fair trading.

92. It is now necessary to determine whether the foregoing also applies to the obligations addressed in the second question referred. The fact that the application of obstacles to the appointment of company managing directors, under national legislation, may be compatible with EU law does not mean that the same necessarily applies to any measure intended to verify, in accordance with that legislation, that no such obstacles exist.

(d) Justification of the obligations at issue on grounds of creditor protection and the protection of fair trading

93. Since the obligations addressed by the second question referred apply on the same terms as the obstacles under German law to the appointment of company managing directors, there is nothing to suggest that those obligations are applied in a discriminatory manner.

94. As regards the efficacy of the obligation to provide an assurance that no such obstacles exist, Directive 2019/1151 acknowledges that the obligation effectively protects creditors and fair trading. Article 13i(2) of Directive 2017/1132, introduced by Directive 2019/1151, read in conjunction with recitals 23 and 24 of Directive 2019/1151, provides that, in order to ensure that all persons interacting with companies are protected, Member States may require that 'persons applying to become directors declare whether they are aware of any circumstances which could lead to a disqualification in the Member State concerned'.

95. Since there is no system for the automatic exchange of information on obstacles to the appointment of company managing directors, that obligation does not appear to go beyond what is necessary to achieve the objective of creditor protection and the protection of fair trading without imposing an unreasonable burden on the persons concerned. Nor does it seem that an exceptionally in-depth study of German law is necessary in order to be familiar with the overriding mandatory provisions of the Member State of registration of a branch, which erect obstacles relating to trustworthiness in business such as those laid down in German law.

96. Although the obligation to provide an assurance that there are no obstacles to the appointment of managing directors is justified, the same is not so of the obligation to provide an assurance that a notary, a member of a comparable legal advisory profession or a consular officer has instructed the managing director of his or her unrestricted duty to provide information to the court in this connection.

97. There is nothing to justify a requirement that the assurance must be provided by a managing director and may not be provided by the person who has instructed the managing director of the obligation to provide information to the court of registration. The obligation to provide that assurance in fact flows from the national law rules on criminal liability. If there were no such assurance, the person concerned would be entitled not to disclose certain convictions and the

penalties laid down for false declarations in relation to those convictions would not apply to that person. A Member State's interest in widening the scope of the criminal liability of managing directors to include declarations concerning the existence of obstacles to their appointment is not necessarily the same as an interest in protecting creditors. It would be sufficient for managing directors not to be exempted, as a matter of principle, from the requirement to disclose those convictions.

98. For the sake of completeness, the foregoing does not prejudge whether or not the criminal penalties attaching to the obligations addressed in the second question referred are in conformity with EU law.

V. Conclusion

99. In the light of the foregoing, I propose that the Court of Justice should reply as follows to the second question from the Bundesgerichtshof (Federal Court of Justice, Germany):

(1) Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law must be interpreted as meaning that 'compulsory disclosure' within the meaning of Article 30 of that directive does not include the obligations under which, when applying for a branch of a limited liability company with registered office in another Member State to be entered in the commercial register, the managing director of the company has to provide an assurance that there is no barrier to his or her personal appointment under national law in the form of a prohibition, ordered by a court or public authority, on practising his or her profession or trade, corresponding in whole or in part with the object of the company, or in the form of a final conviction for certain criminal offences and that, in this respect, he or she has been instructed of his or her unrestricted duty to provide information to the court by a notary, a representative of a comparable legal advisory profession or a consular officer.

(2) Articles 49 and 54 TFEU do not preclude a national provision under which the managing director of the company has to provide an assurance that there are no such barriers to his or her appointment, when applying for a branch of a limited liability company with registered office in another Member State to be entered in the commercial register.

(3) Articles 49 and 54 TFEU do preclude a national provision under which the managing director of that company must provide an assurance that a notary, a member of a comparable legal advisory profession or a consular officer has instructed the managing director of his or her unrestricted duty to provide information to the court.