5. The first paragraph of Article 59, in any event in so far as it refers to the abolition of any discrimination based on nationality, creates individual rights which national courts must protect.

Lecourt Ó Dálaigh Mackenzie Stuart Donner Monaco
Mertens de Wilmars Pescatore Kutscher Sørensen

Delivered in open court in Luxembourg on 12 December 1974

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 24 OCTOBER 1974

My Lords,

Strictly this case is about the impact of Community law on a particular sport, namely motor-paced bicycle racing. But Your Lordships' Judgment in it will be of general importance in the world of professional sport.

The case comes to this Court by way of a reference for a preliminary ruling by the Arrondissementsrechtbank of Utrecht, and one of the difficulties I find in reminding Your Lordships of the facts of it is that one cannot readily describe what a motor-paced bicycle race is without seeming to prejudge a crucial issue of fact which, in my view, it will be for that Court to decide. On the one hand one can describe such a race as one between teams each consisting of a man on a motorcycle, known as a 'pacemaker' or 'pacer', followed by one on a bicycle, known as the 'stayer'; or one can describe it as a race between men on bicycles ('stayers') each of which is preceded by a man on a motorcycle (the 'pacemaker' or 'pacer'). What is undoubted is that the function of the pacemaker or pacer, who wears special clothing, is to create a moving vacuum for the stayer, who can thus achieve speeds — of up to 100 k.p.h. — that a man alone on a bicycle could never attain. Nor is it in doubt that both men require considerable skill.

Most, if not all, pacers are professionals. A professional pacer serves, or provides his services, under a contract with the stayer, or with a cycling association, or with a sponsor. Stayers may be either professional or amateur.

In 1900 there was founded in Paris the Union Cycliste Internationale ('UCI'), an association of national bodies concerned with cycling as a sport. In 1967 the offices of the UCI were moved to Geneva.

Under the auspices of the UCI, there are held annual World Cycling Championships, which include motor-paced races. These Championships are held in a different country each year. Thus they were held in Spain in 1973 and in Canada in 1974. They are to be held in Belgium in 1975. They are in general run by the national association of the country in which they are held, the UCI having only a supervisory role.

In November 1970 the UCI resolved to amend its rules about the conduct of the World Championships in so far as they related to motor-paced races, so as to provide that, in those races, as from 1973, a pacer should be of the same nationality as his stayer. The reason for the amendment, states the UCI, was that the World Championships are intended to be competitions between national teams.

Mr Walrave and Mr Koch, the Plaintiffs in the proceedings before the Arrondissementsrechtbank of Utrecht, are professional pacers. They are stated by the UCI to be among the best, and perhaps the best, in the world. Both are Dutch nationals and, there being, or so they say, a paucity of good Dutch stayers, they have been wont to act as pacers for stayers of other nationalities, in particular Belgians and Germans.

The Plaintiffs thus saw in the new rule adopted by the UCI a threat to their livelihood, or at all events a severe constriction of the market in which they could sell their skill. Early in 1973, having failed to secure the repeal of that rule, they initiated the proceedings in question, in which they joined as Defendants the UCI, the Dutch national cycling association and, because it was to be responsible for running the 1973 World Championships, the Spanish national association. The Spanish association, which never entered an appearance, has been dismissed from the suit. So the Defendants are now the UCI and the Dutch national association.

The substantive relief claimed by the Plaintiffs is:

1. a declaration that the amendment to the rules of the UCI is void so far as regards pacers and stayers who are nationals of any of the countries of the EEC and
2. an injunction requiring the UCI to allow the Plaintiffs to take part in races as pacers for stayers of other than Dutch nationality so long as they are nationals of a country of the EEC.

On 11 May 1973 the President of the Arrondissementsrechtbank granted the Plaintiffs an interim injunction to that effect. He came to the provisional conclusion that the contracts under which the Plaintiffs acted as pacers were contracts of service in relation to which the provisions of Community law concerning the free movement of workers applied. The Defendants had argued that, even if that were so, there was no discrimination in the sense of those provisions in requiring national teams to be composed of persons of the same nationality. The President rejected this argument, holding that, in a motor-paced race, the true competitor was the stayer, the pacer being, despite the skill he was called upon to exert, no more than an auxiliary, comparable to a manager or masseur. The President pointed out that, in a race for amateurs, it was the amateur status of the stayer that mattered, the fact that the pacer might be a professional being regarded as immaterial. The Defendants had also argued that, in any case, the provisions of Community law could not govern events that were to take place in Spain. The President rejected this argument too, on the ground that stayers tended to choose for the preliminary heats organized at national level the pacers they would have in the World Championships, so that the rules for the World Championships affected events on Community territory.

Subsequently the Gerechtshof of Amsterdam allowed an appeal by the Defendants against the President's decision and discharged his order. It

seems that it did so on the ground that the World Championships were to take place outside Community territory. An appeal and cross-appeal against the order of the Gerechtshof are now pending in the Hoge Raad of the Netherlands.

In the meantime the Arrondissementsrechtbank has referred a number of questions to this Court. These are set out verbatim in the Report for the Hearing, where they take up some 2·5 pages. I do not think, my Lords, that it is necessary for me to read them. I think it better to seek to distil from them and from the observations, both written and oral, that have been submitted to the Court, the essential points to which the case gives rise.

A point that clearly exercises the mind of the Arrondissementsrechtbank is whether the contracts into which the Plaintiffs enter, to act as pacers, are contracts of service or contracts for services. The Arrondissementsrechtbank conceives, in my opinion rightly, that, if they are contracts of service, the relevant Article of the EEC Treaty is Article 48 whereas, if they are contracts for services, it is Article 59.

No one doubts that Article 48 has direct effect in the legal systems of the Member States. The Court has so decided: Case 167/73 *Commission v French Republic* [1974] ECR 359, p. 371. Nor does anyone doubt that that Article is binding, not only on the Member States and on public authorities in the Member States, but also on private persons within the Community. The Defendants and the Commission seem to suggest that this is because of the terms of Article 7 (4) of Regulation (EEC) No 1612/68 of the Council. But that, in my opinion, cannot be so: a Regulation cannot widen the scope of the provisions of the Treaty that it is adopted to implement. The reason why Article 48 binds everyone is that its provisions are in general terms.

But the Court has never yet had to decide whether Article 59 has direct effect or whom it binds. The Arrondissementsrechtbank expressly asks the first question and implicitly asks the second.

My Lords, I have no doubt that Article 59 has direct effect. Everyone agrees upon that who has submitted observations in this case, namely the Plaintiffs, the Defendants, the Commission and the United Kingdom (the last by reference to its observations in Case 33/74, the *Binsbergen* case). Moreover the reasoning that led Mr Advocate-General Mayras and Your Lordships to hold in Case 2/74, the *Reyners* case (not yet reported), that Article 52, has direct effect leads, in my opinion, inevitably to the conclusion that the same must be true of Article 59. Despite some observations to the contrary submitted by Ireland in the *Binsbergen* case, I do not think that any valid distinction can be drawn between the two Articles.

The Defendants however query whether Article 59 binds private persons, and the Commission submits that it does not. Counsel for the Commission explained at the hearing, in answer to a question of mine, that this submission rested on two grounds, first the terms themselves of the Treaty and second the way in which the Treaty had generally been interpreted, in particular by the authors of the General Programme adopted by the Council on 18 December 1961 pursuant to Article 63(1) of the Treaty.

My Lords, I would reject that submission.

I can find nothing in the terms of the Treaty that compels the conclusion that Article 59 is binding only on Member States and on public authorities in Member States. It is true that there are in some of the Articles that follow it references to restrictions imposed by Member States. But Articles 59 and 63 are in general terms, apt to relate to restrictions imposed by anyone. Moreover, as the Commission itself points out, Article 59 is, by virtue of the definition in Article 60, a residuary provision, designed to apply to all services '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.' It would be odd indeed if such a residuary provision bound a narrower category of persons than one of the specific provisions, Article 48, that it follows.

Nor am I impressed by the reference to the General Programme. It did not lie within the power of the Council, by the General Programme, to narrow the scope of Article 59 — any more than it lay within its power to widen it. In any case, the Council did not purport to do any such thing. The General Programme was on any view incomplete: it dealt only with restrictions imposed by a Member State on nationals of other Member States and did not, for instance, deal with the abolition of restrictions imposed by a Member State on its own nationals established in another Member State.

I conclude that Articles 48 and 59 are, in every material respect, parallel and that, Article 59 being residuary, if the Plaintiffs' contracts are not of a kind to which Article 48 relates, they must be of a kind to which Article 59 relates. That being so, the question whether they are contracts of service or contracts for services loses, to my mind, much of its importance. At all events, the Arrondissementsrechtbank, quite properly, does not ask this Court to decide it.

The next point is one expressly raised by the Defendants and implicitly raised by the Arrondissementsrechtbank. It is whether Articles 48 and 59 can invalidate a provision contained in the rules of an international association covering many countries that are not Member States of the Community. To explain their point, the Defendants state that the UCI is now composed of two international federations, one amateur and the other professional, to which the national associations are in turn affiliated. There are 108 national associations affiliated to the amateur federation and 18 affiliated to the professional federation. How, ask the Defendants, can a provision of Community law invalidate a rule that is applicable in over 100 countries? The answer, I think, is that any sovereign state is entitled to enact that a particular type of provision in the rules of an international association of private persons shall be deemed unlawfull in its territory and shall not be applied there. One is familiar with enactments of that sort in the field of competition law. In my opinion what is true for a sovereign state is true also for the Community. If the argument of the Defendants were right, an international association of traders, who thought it in their interests to agree not to 'poach' each other's staff, would be free, despite Article 48, to adopt, and to enforce within the Community, a rule (say) that no member should employ anyone who was not a national of the country where that member was established.

A related point is one expressly raised by the Arrondissementsrechtbank when it asks-

'Does it... matter whether the world championships in question are held on the territory of a Member State of the EEC or outside such territory, bearing in mind that the world championships cast their shadow, as it were, in that they also determine the choice of a pacemaker in selection competitions and other competitions at the national level?'

That question is so framed as to contain a finding of fact: that the world championships determine the choice of a pacemaker in competitions held at national level. My Lords, if that be so, it means that the rules of the UCI have an effect on Community territory, even in a year when the world championships are held outside Community territory. Your Lordships cannot of course answer the question directly, for that would be to cross the hedge between the field of interpretation of Community law and the field of its application. But two things are, in my opinion, certain. One is that a restriction on the freedom of

movement of workers, to be incompatible with Article 48, or a restriction on the freedom to provide services, to be incompatible with Article 59, need not take the form of an absolute prohibition. It is enough that it should have the effect of placing the nationals of one Member State at a disadvantage compared with those of another. The second is that such a restriction, unless it is the subject of a particular exemption or exception, is incompatible with Community law if it affects events on Community territory.

This leads me to the last of the essential points in this case. Should an exception be made, from the provisions of the Treaty against discrimination on the grounds of nationality, for rules of organizations concerned with sport that are designed to secure that a national team shall consist only of nationals of the country that that team is intended to represent? My Lords, I would answer that question by saying that such an exception should clearly be made. I have in mind a test that is adopted, in the laws of some of our countries, to ascertain whether a term should be implied into a contract, and which seems to me equally appropriate in the interpretation of the Treaty: the test of the 'officious bystander'. Suppose that an officious bystander, at the time of the signing of the EEC Treaty, or, for that matter, at the time of the signing of the Treaty of Accession, had asked those round the table whether they intended that Articles 48 and 59 should preclude a requirement that, in a particular sport, a national team should consist only of nationals of the country it represented. Common sense dictates that the signatories, with their pens poised, would all have answered impatiently 'Of course not' — and perhaps have added that, in their view, the point was so obvious that it did not need to be stated. I find this test more satisfactory than that proposed by the Commission in its Observations, which is based on the Court's Judgment in Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153. It seems to me that the principle laid down there, which permits account to be taken in a proper case of objective differences between the situations of different workers, is not really in point.

A good deal has been said, in the observations submitted to the Court, on the question whether the pacer and the stayer, in a motor-paced race, should or should not be regarded as truly a team. But in my opinion, my Lords, that question also belongs to the field of the application of the Treaty and it will be for the Arrondissementsrechtbank to decide. On the facts that have been adduced before the Court, it looks very much like a borderline one. Conscious of this, the Commission has, as I interpret its Observations, suggested that the Court should help the Arrondissementsrechtbank by giving it an indication of what is involved in the concept of a national team. I think, for my part, that it would be unwise for the Court to attempt to do so. Such help has not been asked for by the Arrondissementsrechtbank and, if the Court were to provide it gratuitously, the Court would in my opinion, not only be probably exceeding its jurisdiction, but, possibly, laying down criteria that turned out to be difficult to apply, or incomplete, or only partly apposite, in the light of the evidence and arguments submitted to the Arrondissementsrechtbank. It were better, I think, to let the Arrondissementsrechtbank, if it finds itself in difficulty in interpreting the concept, make a further order for reference to the Court — even though that must cause more delay in the decision of the case.

The Arrondissementsrechtbank asks, it is true —

'... does it make any difference whether the pacemaker is to be regarded as a participant in the competition or as somebody who merely fulfils a supporting function on behalf of the participant (stayer)?'

But that is only to ask whether it makes any difference whether the pacemaker and the stayer are to be regarded as a team or the stayer is to be regarded as the only participant in the competition. My answer would be, of course, that it makes all the difference.

Then the Arrondissementsrechtbank asks —

'Does it matter... that the said provision in the rules is concerned with a sporting event in which countries or nationalities compete for the world title?'

I agree with the Commission that this question must be answered 'No'. The crucial test is whether the provision in the rules is aimed at the constitution of national teams. If it is, I do not think that the nature of the event in which they are to compete — whether it be for a world title or for some more local title, for instance the European — matters, provided of course that it is an international event. But even the concept of 'international event' must be interpreted flexibly. Thus I believe that the international rugby championships are between England, France, Ireland (the whole of it), Scotland and Wales.

Lastly, the Arrondissementsrechtbank asks some questions about Article 7 of the Treaty, but makes it clear that it does not need an answer to those questions if the Court's answers to the questions about Articles 48 and 59 are such as to render those about Article 7 irrelevant. My Lords, on the view I take of the scope and effect of Articles 48 and 59, the questions about Article 7 are irrelevant. I accordingly say nothing about them.

I am therefore of the opinion that the questions referred to the Court by the Arrondissementsrechtbank should be answered as follows:

1. A provision in the rules of an international sporting association whereby a person who is to fulfil a certain function in a sporting event under a contract of service is required to be of a particular nationality is incompatible with Article 48 of the EEC Treaty unless aimed at the constitution of national teams.

2. A provision in such rules whereby a person who is to fulfil such a function under a contract for services is required to be of a particular nationality is incompatible with Article 59 of the Treaty unless so aimed.

3. In neither case does it matter whether the provision in question is or is not concerned with a competition for the world title.

4. In neither case does it matter whether or not the provision in question is concerned with a competition that is to be held on the territory of a Member State of the EEC if that provision in fact has the effect of placing the nationals of one Member State at a disadvantage as compared with those of another as regards participation in events taking place on such territory.

5. Since the end of the transitional period Article 59 of the Treaty has had direct effect in the legal systems of the Member States even in the absence, in a particular sphere, of any such directive as is prescribed by Article 63 (2).