# OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 13 February 1992 *

*My Lords,*

1. In this case, the Tribunal da Relação (Court of Appeal) of Lisbon has referred for a preliminary ruling four questions concerning the compatibility with Community law of certain national restrictions on the provision of driving instruction. The Tribunal da Relação seeks guidance on whether the restrictions are compatible with the provisions of the Treaty concerning the free movement of persons and services, and with the competition rules of the Treaty, as well as on the interpretation and effect of First Council Directive 80/1263/EEC of 4 December 1980 on the introduction of a Community driving licence (Official Journal 1980 L 375, p. 1), hereafter 'the driving licence directive'.

2. The reference is made in the course of an appeal to the Tribunal da Relação against a decision of the local court of Loures, in which Mr Morais was held to have infringed Article 7(1) of Decree-Law 6/82 of 12 January 1982 (hereafter 'the Decree-Law') and ordered to pay a fine of ESC 20 000. Article 7 of the Decree-Law provides that driving schools may only give instruction on the territory of the district in which they are situated, except where special authorization has been given or where there are no driving schools in neighbouring districts. It appears that on 27 May 1989, Mr Morais was found to be giving a driving lesson on a motorway within the district of Loures, whilst employed by a driving school situated in the adjoining district of Lisbon. The district of Loures has its own driving schools, and no special authorization to provide instruction there has been given to Mr Morais' employer.

## Compatibility with the Treaty

3. The first two questions referred by the Tribunal da Relação are as follows:

'(a) May or must Article 7(1) of Decree-Law 6/82 be regarded as infringing the rules on the free movement of persons and services and, in particular, Articles 52, 53, 54(2) and (3)(c), 56 and 57 of the Treaty (on the right of establishment), Articles 60(a), 63(2) and 65 of the Treaty (on the free movement of services), and Article 85(1)(c) (on the rules of competition), and as such is it inapplicable in national law?

* Original language: English.

(b) Must the rules on the free movement of persons, services and goods laid down in the Treaty, which relate to the citizens or goods of one State in connection with situations arising in another Member State of the Community, also be applied in cases where barriers to freedom of movement may arise in relation to citizens of only one State and within its geographical territory?'

It is appropriate, in my view, to consider the second of those two questions first.

*Question (b)*

4. The second question referred to the Court asks, essentially, whether the provisions of the Treaty relating to the free movement of persons, services and goods apply to situations which are purely internal to a Member State, that is to say to situations where there is no element of fact connecting the case with another Member State. It is however to be observed that the present case does not appear to raise any issue relating to the free movement of goods, as opposed to persons or services.

5. The Court has held on numerous occasions that the Treaty provisions on the free movement of persons and services do not apply to situations which are in every respect located within a single Member State: see, for the freedom of establishment, Case 20/87 *Ministère public* v *Gauchard* [1987] ECR 4879, at paragraphs 10 to 12 of the judgment, Joined Cases C-54/88, C-91/88 and C-14/89 *Nino* [1990] ECR I-3537, at paragraphs 10-11, and Joined Cases C-330/90 and C-331/90 *López Brea and Hidalgo Palacios* [1992] ECR I-323, at paragraph 7; and, for the free movement of services, Case 52/79 *Debauve* [1980] ECR 833, at paragraph 9, and Case C-41/90 *Höfner* v *Macrotron* [1991] ECR I-1979, at paragraphs 37 to 39. As far as the free movement of persons and services is concerned, therefore, it is clear that a negative answer is to be given to the second question referred to the Court.

6. Moreover, the circumstances of the present case do appear to be an example of a situation which is purely internal to Portugal. Thus, it appears that Mr Morais is a Portuguese national who is employed by a driving school established in Portugal. There is no suggestion that any restriction arises, in the present instance, on the provision of services to or by persons coming from other Member States. Furthermore, the theoretical possibility that Mr Morais may, on future occasions, have pupils coming from other Member States is not sufficient to establish such a connection: see Case C-41/90 *Höfner* v *Macrotron*, cited above, at paragraph 39 of the judgment. By virtue of the answer I have suggested for the second question, therefore, it can be seen that, for the purpose of answering the first question referred to the Court, it is only necessary to consider the compatibility of the national provisions in question with the competition rules of the Treaty.

*Question (a)*

7. According to the consistent case-law of the Court, Member States may not maintain in force any measures which deprive of their effect Articles 85 and 86 of the Treaty. Such measures are prohibited by the second paragraph of Article 5 or, where applicable,

by Article 90(1). A Member State may not, in particular, create a situation in which undertakings are constrained to act in a manner which, if it resulted from an agreement or a concerted practice, would be contrary to Article 85, whether or not the undertakings in question are undertakings to which the Member State has granted special or exclusive rights: see Case 13/77 *Inno* v *ATAB* [1977] ECR 2115, at paragraphs 32, 33 and 42 of the judgment, and Case C-41/90 *Höfner* v *Macrotron*, cited above in paragraph 5, at paragraph 27 of the judgment.

8. Thus, national provisions are in principle forbidden which oblige undertakings to act in a manner which would be contrary to Article 85(1)(c) of the Treaty, for instance because the effect of the measure is to divide the market according to geographical area. The measure at issue in the present case certainly appears to be anti-competitive, and no convincing reason for it has been advanced. However, Article 85(1) will only be infringed if the resulting practice is liable to affect trade between Member States. In its written observations, the Commission suggests that there appears to be no prospect of such trade being affected in the present circumstances, as would for example be the case if, but for the national provisions in question, driving schools established in other Member States might attempt to provide instruction in Portugal.

9. It must be emphasized however that, contrary to the view apparently taken by the Commission in these proceedings, the test for whether an agreement or practice is liable to affect trade between Member States, for the purposes of the application of Article 85(1) of the Treaty, does not coincide with the test for whether a situation can be described as more than purely internal, for the purposes of the application of the provisions of the Treaty concerning the free movement of persons or services. Thus, for example, an exclusive distribution agreement may be held to affect, actually or potentially, trade between Member States, even where all the parties to the agreement are situated within the same Member State and the agreement is solely concerned with the distribution of national products; for such an agreement may none the less have repercussions on the distribution of other products: see Case 126/80 *Salonia* v *Poidomani* [1981] ECR 1563, at paragraphs 14 to 16 of the judgment. In my view, the same principle would hold in the case of an agreement relating to services. However, it seems to me that in the present case it would not be possible to find that the provisions in question had the required kind of effect. For, in order to be prohibited by Article 85(1)(c) in conjunction with Article 5, the contested provisions must be viewed as equivalent in their effect to a network of agreements or concerted practices between Portuguese driving instructors. It is however clear that such a network could not affect the freedom of non-Portuguese instructors to offer services in Portugal. The national provisions themselves may of course impose such a restriction, but in doing so they would be caught, if at all, by Article 59 rather than by Article 85.

10. I conclude therefore that national provisions such as those of Article 7(1) of the Decree-Law are not to be regarded, in circumstances such as those of the present case, as contrary to the competition rules of the Treaty.

**Compatibility with the driving licence directive**

11. The third and fourth questions referred by the Tribunal da Relação are as follows:

'(c) May or must Directive 80/1263/EEC, although it concerns driving tests, be interpreted as meaning that driving instruction itself is subject to similar requirements, such as the requirement that it must be provided, as far as possible, on motorways and in different traffic conditions as advised for the purposes of the test?

(d) Finally, may or must the directive in question be interpreted as being in the nature purely and simply of a directive within the meaning of Article 189 of the Treaty, inasmuch as it is left to the national authorities to determine the choice of form and methods for its implementation (that is to say, where it needs merely to be implemented) or must it, on the contrary, notwithstanding its designation as a directive, be regarded as a generally applicable and mandatory directive of the kind adopted pursuant to Articles 56, 63 and 87 of the Treaty?'

The purport of question (c) is clear: the Tribunal da Relação wishes to know whether the driving licence directive, which lays down various requirements concerning the issue of driving licences and the nature of the driving test which must be passed before a licence is issued, is also to be understood as laying down, by implication, requirements on the instruction provided to candidates for the test. The Tribunal da Relação wishes to know, in particular, whether a requirement is to be implied that driving instruction must be provided in part on the motorway.

12. In contrast, the Tribunal da Relação's fourth question does not make complete sense as currently worded. There is no distinction known to Community law between directives within the meaning of Article 189 of the Treaty, and directives adopted under Articles 56, 63 or 87: the latter are merely examples of the former. In my view, however, the Tribunal da Relação is in substance asking whether the relevant provisions of the driving licence directive have direct effect, that is to say whether they may be relied upon by an individual against a Member State which has failed to implement them in national law.

*Question (c)*

13. I shall first consider whether the driving licence directive has any implications for the requirements imposed by Member States on the conduct of driving instruction. In his written observations, Mr Morais suggests that it follows from the directive that Member States are required, in particular, to ensure that driving instruction is carried out at least in part on motorways and on roads situated outside built-up areas.

14. Article 6(1) of the directive provides that:

'A driving licence shall . . . be issued only to those applicants:

(a) who have passed a practical and theoretical test and who meet medical standards, the minimum requirements of which may not be substantially less stringent than those set out in Annexes II and III;

. . .'.

Annex II is entitled 'Minimum requirements for driving tests', and is divided into two sets of requirements, for the theoretical and practical tests respectively. Among the requirements for the practical test are those specified in paragraph 9, which is headed 'Location of the test':

'The part of the test described in paragraph 5 may be conducted on a special testing ground, in which case precise criteria should be laid down for measuring objectively the candidate's ability to handle the vehicle. The part of the test described in paragraph 6 shall, wherever possible, be conducted on roads outside built-up areas and on motorways as well as in urban traffic.'

15. Mr Morais argues as follows. From the second sentence of paragraph 9, it is clear that, wherever possible, a part of the driving test must be conducted on motorways and on roads outside built-up areas. In the case of tests set in the Lisbon area, that is in fact possible, since although the district of Lisbon does not contain such roads, adjoining districts do. It follows that the driving test in Lisbon must be conducted in part upon such roads, and hence that persons preparing for the test must be permitted to have instruction on them, even if their chosen school is situated in the district of Lisbon. Accordingly, driving instructors in Lisbon have the right to provide driving instruction on the motorway, and that right can moreover be relied upon before a national court in order to prevent the application of Article 7(1) of the Decree-Law.

16. The Commission, however, argues in its written observations that the directive allows Member States a broader discretion than Mr Morais suggests. The Commission points out that in some regions of Portugal, the nearest motorway might be as far as 200 km from the place where the driving test is conducted. The Commission takes the view that, in such circumstances, the requirement that a part of the test be conducted on the motorway 'wherever possible', does not prevent a Member State from deciding that the test should never be conducted on the motorway. Thus, according to the Commission, a Member State is entitled to impose a uniform driving test throughout its territory which takes into account the fact that in some of its regions there is no convenient access to a motorway. Furthermore, the United Kingdom, in its written observations, points out that in some Member States learner drivers are not permitted to drive on the motorway, and suggests that those too are circumstances in which the conduct of a part of the test on the motorway is not 'possible' within the meaning of paragraph 9 of Annex II.

17. From the written observations of the Portuguese Government, it appears that the latter, unlike Mr Morais, does not consider that it would be possible to conduct a part of the driving test on the motorway, even in the Lisbon area. There is disagreement, therefore, on the interpretation of the notion of 'possibility' as it figures in Annex II of the directive. It seems to me however that, in the context of Annex II, the notion is not to be interpreted too strictly. It may first be observed that the French version of the directive uses the expression 'si possible', which would translate as '*if* possible' rather than '*wherever* possible'; and the Portuguese version, similarly, uses 'se possível'. No reliance should therefore be placed on the somewhat more emphatic wording of the English version. It may also be noted that, as both the Commission and the United Kingdom emphasized at the hearing, the directive represents only a first stage in a process of harmonization continued by the recently adopted Council Directive 91/439/EEC on driving licences (Official Journal 1991 L 237, p. 1), which will replace the present directive as from 1 July 1996; although it must be said that, as far as the wording presently in issue is concerned, there is little difference between the two directives.

18. Furthermore, the interpretation of the notion of possibility used in paragraph 9 of Annex II to the current directive is assisted by an examination of paragraph 7 of the same annex. That paragraph provides that:

'Whenever possible, the part of the test described in paragraph 5 should be carried out before the part described in paragraph 6.'

Strictly speaking, it would always be possible to test the execution of the manoeuvres specified in paragraph 5 before the behaviour in traffic described in paragraph 6. It is therefore clear that the expression 'whenever possible' in paragraph 7 is not to be taken in a strict sense, and has a meaning closer to 'reasonably practicable' than to 'consistent with the laws of physics'. In my view, the same must hold for the interpretation of 'wherever possible' in paragraph 9.

19. Thus, in my view a Member State is not obliged to conduct the driving test on the motorway wherever there is a motorway within driving distance of the test centre; rather, it is entitled to lay down the rule governing the matter which is most practicable in all the circumstances, and to take into account such matters as the consistency of the test. A Member State is entitled, in particular, to have regard to the need to impose a test which is uniform throughout its territory, some parts of which may have no easy access to a motorway. It seems to me that a Member State is also entitled to have regard to legitimate considerations of public interest, and thus could properly take the view that considerations of road safety, for example, justified restrictions on the use of motorways by learner drivers. Where the Member State has made what, in all the circumstances, is a reasonable exercise of its discretion, it cannot in my view be said to be in breach of its obligations under Annex II, paragraph 9, and Article 6(1) of the driving licence directive.

20. It is to be noted, furthermore, that Article 6(1) of the directive requires only that the standards of the driving test are not

to be 'substantially less stringent' than those set out in Annex II. That is a further indication that the notion of possibility employed in Annex II is not to be given an unduly strict construction, since it is clear from Article 6(1) that Member States enjoy a degree of discretion throughout in determining the modalities of the test.

21. In any event, however, it is not disputed that the driving test in Lisbon is not conducted on the motorway. Indeed, the Portuguese Government stated at the hearing that learner drivers are prohibited from receiving lessons on the motorway under any circumstances. Thus, no driving school in Portugal can lawfully provide instruction on the motorway, and it is unnecessary to provide such instruction in order to prepare candidates for the driving test. Accordingly, even if, contrary to the conclusion I have reached above, a Member State were required to ensure that a part of the driving test is conducted on the motorway, it seems to me that no implications would follow for the conduct of driving instruction in circumstances where a Member State was in breach of the postulated requirement. Although, on that hypothesis, the Member State would be in breach of a requirement of the directive concerning the location of the test, it would not in my view be in breach of any further requirement relating to the provision of driving instruction.

*Question (d)*

22. As we have seen, the fourth question referred to the Court can be understood as asking whether paragraph 9 of Annex II to the driving licence directive, in conjunction with Article 6(1), creates rights which can be invoked by individuals before the national courts. The right which Mr Morais would have to rely upon in the present case, in order to avoid application of Article 7(1) of the Decree-Law, would be a right for his pupils to have a part of their driving test conducted on the motorway, and hence (by necessary implication) to receive instruction on such a road, if need be one located outside the district in which the driving school is situated.

23. According to the consistent case-law of the Court, provisions of a directive have direct effect in national law only if their content is unconditional and sufficiently precise: see, most recently, Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* v *Italy* [1991] ECR I-5357, at paragraph 11. I have however already concluded, in paragraphs 19 to 20 above, that the directive does not impose upon Member States any precise and unconditional obligation to conduct a part of the driving test on the motorway; rather, each Member State enjoys a discretion to decide, in the light of national circumstances, whether or not it is possible to lay down such a requirement.

24. It is true that the fact that a provision imposing an obligation upon a Member State gives the State a certain power of appraisal, does not in itself preclude that provision from having direct effect, since

the exercise of the power may also be subject to judicial control. Thus, for example, Article 48 of the Treaty has direct effect, notwithstanding that Article 48(3) subjects the rights implied by the freedom of movement for workers to limitations which may be imposed by the Member States and which are justified on grounds of public policy, public security or public health. Accordingly, the rights guaranteed by Article 48 can be invoked by individuals before the national courts in cases where the Member State cannot, in the circumstances, rely upon those limitations: see Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337, at paragraph 7 of the judgment.

25. In the present case, however, it cannot, for the reasons already given, be said that Portugal exceeded the limits of its discretion in refusing to provide for a part of the test to be conducted on a motorway, and the question of the direct effect of paragraph 9 of Annex II to the directive does not therefore arise. Thus, given the conclusions I have reached, it is unnecessary to answer the fourth question referred to the Court.

## Conclusion

26. Accordingly, I am of the opinion that the questions referred to the Court by the Tribunal da Relação of Lisbon should be answered as follows:

(1) A law of a Member State which grants the exclusive right to provide driving instruction on the roads of a particular district to schools which are licensed to provide such instruction and which are situated within that district, is not in itself incompatible with Article 85(1) of the EEC Treaty in conjunction with the second paragraph of Article 5.

(2) The provisions of the Treaty relating to the freedom of establishment and the freedom to provide services do not apply to a situation which is purely internal to a Member State, such as where a national of that State who is employed by a school established therein provides driving instruction to persons coming from that State.

(3) A Member State must ensure that persons preparing for the driving test set by that State are not prevented from receiving driving instruction on roads similar to those upon which the test is actually held, whether or not the test fully conforms to the requirements laid down by Article 6(1) and Annex II of First Council Directive 80/1263/EEC of 4 December 1980. The directive does not impose any other obligation relating to the location of driving instruction.