JUDGMENT OF THE COURT (Grand Chamber)

24 May 2011 *

In Case C-50/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 12 February 2008,

European Commission, represented by J.-P. Keppenne and H. Støvlbæk, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by E. Jenkinson and S. Ossowski, acting as Agents,

intervener,

* Language of the case: French.

v

French Republic, represented by E. Belliard, G. de Bergues and B. Messmer, acting as Agents,

defendant,

supported by:

Republic of Bulgaria, represented by T. Ivanov and E. Petranova, acting as Agents,

Czech Republic, represented by M. Smolek, acting as Agent,

Republic of Latvia, represented by L. Ostrovska, K. Drēviņa and J. Barbale, acting as Agents,

Republic of Lithuania, represented by D. Kriaučiūnas and E. Matulionytė, acting as Agents,

Republic of Hungary, represented by R. Somssich, K. Veres and M. Fehér, acting as Agents,

Romania, represented by C. Osman, A. Gheorghiu, A. Stoia and A. Popescu, acting as Agents,

Slovak Republic, represented by J. Čorba and B. Ricziová, acting as Agents,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, A. Arabadjiev (Rapporteur) and J.-J. Kasel, Presidents of Chambers, R. Silva de Lapuerta, E. Juhász, G. Arestis, M. Ilešič, C. Toader and M. Safjan, Judges,

Advocate General: P. Cruz Villalón,
Registrar: M.-A. Gaudissart, head of unit,

having regard to the written procedure and further to the hearing on 27 April 2010,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2010,

gives the following

Judgment

1 By its application the Commission of the European Communities asks the Court to declare that, by imposing a nationality requirement for access to the profession of civil-law notary, the French Republic has failed to fulfil its obligations under Articles 43 EC and 45 EC.

Legal context

The general organisation of the profession of notary in France

2 Notaries carry out their tasks within the French legal system as members of a liberal profession. The status of that profession is governed by Order No 45-2590 of 2 November 1945 on the Statute of Notaries (JORF [French Official Journal] of 3 November 1945, p. 7160), as amended by Law No 2004-130 of 11 February 2004 (JORF of 12 February 2004, p. 2847).

3 Under Article 1 of that order, notaries are '… public officers authorised to record any instrument or contract the parties to which are obliged, or may wish, to invest with the authenticity associated with public authority instruments, and to guarantee their date, keep them safe and issue principal and additional copies'.

4 Under Article 1a of that order, a notary may pursue his profession either as an individual, or as a member of a 'société civile professionnelle' or a 'société d'exercice libéral' [regulated forms of business structures for professions], or as an employee of a natural or legal person holding notarial office.

5 Under the first paragraph of Article 6-1 of the same order, the professional civil liability of notaries is guaranteed by an insurance contract taken out by the Conseil supérieur du notariat (the High Council of the Notariat).

6 The number of notaries, the location of their offices and their jurisdiction are determined according to the provisions of Decree No 71-942 of 26 November 1971 on the creation, transfer and removal of notarial posts, the jurisdiction of notaries to draw up notarial acts and their residence, the preservation and transfer of notaries' records and professional registers (JORF of 3 December 1971, p. 11796), as amended by Decree No 2005-311 of 25 March 2005 (JORF of 3 April 2005, p. 6062).

7 Under Article 1 of Decree No 78-262 of 8 March 1978 on fixing the fees payable to notaries (JORF of 10 March 1978, p. 995), as amended by Decree No 2006-558 of 16 May 2006 (JORF No 115 of 18 May 2006, p. 7327), the sums payable to notaries in connection with their services are determined in accordance with the provisions of that decree. Article 4 of that decree provides that notaries are remunerated, in respect

of services rendered in the pursuit of activities not provided for in Title II of that decree and compatible with the duties of a notary, by fees agreed by the mutual consent of the parties, which failing, set by the court responsible for the taxation of fees.

8 Article 4 of the national regulation of notaries issued by the Conseil supérieur du notariat pursuant to Article 26 of Decree No 71-942 and approved by Order of the garde des Sceaux [Keeper of the Seals], the Minister of Justice of 24 December 1979 (JORF of 3 January 1980, N.C., p. 45) provides that any natural or legal person, under private law or public law, may choose a notary freely. The same provision states that the clients of a notary consist of 'persons who, voluntarily, seek his advice, opinion and services or entrust him with the task of giving legal form to their agreements.'

9 As regards the conditions of access to the notarial profession, Article 3 of Decree No 73-609 of 5 July 1973 on the professional education and training of notaries and conditions of access to the notarial profession (JORF of 7 July 1973, p. 7341), as amended by Decree No 2006-1299 of 24 October 2006 on employed notaries (JORF of 25 October 2006, p.15781), provides that one of the conditions of becoming a notary is that the person concerned is French.

Notarial activities in France

10 As regards the various activities of a notary in the French legal system, it is common ground that a notary's principal task is to draw up authentic instruments. The involvement of a notary may thus be obligatory or optional, depending on the nature of the act which he is called on to authenticate. By his intervention the notary confirms that all the conditions required by law for the drawing up of the act in question are satisfied and that the parties concerned have legal capacity and capacity to act.

11 An authentic instrument is defined in Article 1317 of the Civil Code, within Chapter VI, headed 'Of the proof of obligations and of payment', of Title III of Book III of that code. Under that article, '[a]n authentic instrument is one which has been received by public officers empowered to draw up such instruments at the place where the instrument was written and with the requisite formalities'.

12 Under Article 19 of the Law 25 ventôse Year XI on the organisation of the notariat, notarial acts 'are authentic legal instruments and are enforceable throughout the territory of the Republic'.

13 Article 1319 of the Civil Code states that '[a]n authentic instrument is conclusive evidence of the agreement it contains between the contracting parties and their heirs or assignees'.

14 Article 1322 of the Civil Code provides that '[a]n instrument under private signature, acknowledged by the person against whom it is set up, or statutorily held as acknowledged, is, between those who have signed it and between their heirs and assignees, as conclusive as an authentic instrument'.

15 In accordance with Article I of Order No 45-2592 of 2 November 1945 on the Statute of Bailiffs (JORF of 3 November 1945, p. 7163), as amended by Law No 73-546 of 25 June 1973 on the discipline and status of notaries and certain ministerial officials (JORF of 26 June 1973, p. 6731) bailiffs alone have the power to, inter alia, enforce judicial decisions and enforceable acts or orders. Article 18 of Law No 91-650 of 9 July 1991 on the reform of civil enforcement proceedings provides that the only persons who may undertake enforcement and make precautionary attachments are bailiffs tasked with enforcement.

16 Under Article L. 213-6 of the Code on the organisation of the judiciary, the court with jurisdiction in respect of enforcement can alone take cognisance of any difficulties in relation to enforceable orders and challenges made at the time of enforcement, even if they relate to substantive law, unless they are outside the jurisdiction of the ordinary courts. On the same conditions, that court authorises precautionary measures and hears challenges relating to their implementation.

The pre-litigation procedure

17 The Commission received a complaint concerning the nationality requirement for access to the profession of notary in France. Following consideration of that complaint, the Commission sent a letter of formal notice to the French Republic dated 8 November 2000 requesting that it submit, within two months, its observations on the compatibility of that nationality requirement with the first paragraph of Article 45 EC.

18 By letter dated 13 March 2001 the French Republic replied to that letter of formal notice.

19 On 12 July 2002 the Commission sent an additional letter of formal notice to the French Republic, claiming that it had failed to fulfil its obligations under Article 43 EC and the first paragraph of Article 45 EC.

20 The French Republic replied to that additional letter of formal notice by letter dated 11 October 2002.

21 The Commission was not persuaded by the arguments put forward by the French Republic and on 18 October 2006 it sent to the French Republic a reasoned opinion in which it concluded that the French Republic had failed to fulfil its obligations under Article 43 EC and the first paragraph of Article 45 EC. The Commission invited the French Republic to take the measures necessary to comply with the reasoned opinion within two months from its receipt.

22 By letter of 12 December 2006 the French Republic set out the grounds for its belief that the position adopted by the Commission was unfounded.

23 In those circumstances the Commission decided to bring the current action.

The action

Admissibility of the intervention by the United Kingdom of Great Britain and Northern Ireland

24 The French Republic considers that the statement in intervention of the United Kingdom of Great Britain and Northern Ireland is inadmissible because, contrary to the requirements of the fourth paragraph of Article 40 of the Statute of the Court of Justice of the European Union and the second paragraph of Article 93(5) of its Rules of Procedure, the United Kingdom does not seek to support the forms of order sought by the Commission. In the alternative, the French Republic pleads that that intervention is partly inadmissible on the ground that the forms of order sought by the United Kingdom go beyond those submitted by the Commission since the United Kingdom claims, first, that Directive 2005/36/EC of the European Parliament and

of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22) is applicable to the profession of notary and, secondly, that the profession of notary is separable from notarial activities which do not fall under the first paragraph of Article 45 EC.

25 It must be recalled that, in accordance with the fourth paragraph of Article 40 of the Statute of the Court, the forms of order in an application to intervene must be limited to supporting the forms of order of one of the parties.

26 Similarly, the second paragraph of Article 93(5) of the Rules of Procedure provides, inter alia, that a statement in intervention is to contain a statement of the form of order sought by the intervener in support of or opposing, in whole or in part, the form of order sought by one of the parties, and the pleas in law and arguments relied on by the intervener.

27 The conclusion arrived at by the United Kingdom in its statement in intervention is worded as follows:

'the profession of notary falls within the scope of [Directive 2005/36]. Certain activities performed by notaries can only be excluded from the scope of [Directive 2005/36] if the Court of Justice concludes that those activities are included within the exception referred to in Recital 41 of [Directive 2005/36], under Articles 39(4) and/or 45 EC'.

28 It is clear that, in its action, the Commission does not seek a declaration from the Court that the French Republic failed to fulfil its obligations under Directive 2005/36. Consequently, to the extent that the United Kingdom claims that that directive is applicable to the profession of notary, its intervention is inadmissible.

29 For the remainder, even though, read literally, the objective of the United Kingdom's intervention as thus described appears different from that which a statement in intervention can legitimately pursue, it is evident from an overall reading of the statement in intervention concerned and the background to that statement that the arguments which the United Kingdom has submitted are intended to demonstrate, in the same way as the arguments set out by the Commission in its application, that the profession of notary does not involve the exercise of official authority within the meaning of the first paragraph of Article 45 EC.

30 As regards, in particular, the objection pleaded by the French Republic against the argument, put forward by the United Kingdom, that the application of the first paragraph of Article 45 EC cannot be extended to all notarial activities, contrary to the view held by the Commission in its application, it cannot be a criticism of the United Kingdom that it has added new forms of order to those submitted by the Commission. That argument is no more than a reference to paragraph 47 of Case 2/74 *Reyners* [1974] ECR 631, and the United Kingdom has taken no position on the applicability of that case-law to the specific activities pursued by notaries in France.

31 It must therefore be held that the statement in intervention by the United Kingdom is inadmissible in so far as it claims that Directive 2005/36 is applicable to the profession of notary.

Substance

Arguments of the parties

32 The Commission notes, as a preliminary point, that access to the profession of notary is not subject to any nationality requirement in some Member States and that requirement has been abolished in other Member States, such as the Kingdom of Spain, the Italian Republic and the Portuguese Republic.

33 The Commission observes that Article 43 EC is one of the fundamental provisions of European Union law, which is intended to ensure that all nationals of Member States who establish themselves in another Member State, even if that establishment is only secondary, for the purpose of pursuing activities there as self-employed persons receive the same treatment as nationals of that State and which prohibits any discrimination on grounds of nationality.

34 The Commission and the United Kingdom submit that the first paragraph of Article 45 EC must be given an autonomous and uniform interpretation (Case 147/86 *Commission* v *Greece* [1988] ECR 1637, paragraph 8). In that it lays down an exception to freedom of establishment for activities connected with the exercise of official authority, that article must moreover be interpreted strictly (*Reyners*, paragraph 43).

35 The exception under the first paragraph of Article 45 EC must therefore be restricted to activities which in themselves involve a direct and specific connection with the exercise of official authority (*Reyners*, paragraphs 44 and 45). According to the Commission, the concept of official authority implies the exercise of a decision-making power going beyond the ordinary law and taking the form of being able to act independently

of, or even contrary to, the will of other subjects of law. Official authority manifests itself in particular, according to the Court's case-law, in the exercise of powers of constraint (Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraph 37).

36 In the view of the Commission and the United Kingdom, activities connected with the exercise of official authority must be distinguished from those carried out in the public interest. A number of professions are entrusted with special powers in the public interest, but do not for all that take part in the exercise of official authority.

37 Activities constituting assistance or support to the operation of official authority are also outside the scope of the first paragraph of Article 45 EC (see, to that effect, Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 22).

38 The Commission and the United Kingdom also point out that the first paragraph of Article 45 EC in principle refers to specific activities, not to an entire profession, unless the activities concerned are inseparable from the professional activity in question taken as a whole.

39 The Commission proceeds, next, to examine the various activities of notaries in the French legal system.

40 First, as regards the authentication of documents and agreements, the Commission submits that the notary merely attests the intentions of the parties, after advising them, and gives legal effect to those intentions. In carrying out that activity, the notary has no decision making powers with respect to the parties. Accordingly, authentication is no more than confirmation of a prior agreement by those parties. The fact that it is mandatory that certain instruments should be authenticated is of no relevance,

given that the mandatory nature of many procedures is not necessarily an indication of the exercise of official authority.

41 The fact that a notary incurs personal liability by drawing up notarial acts puts him in the same position as the majority of independent professionals, such as lawyers, architects or medical practitioners, who also incur personal liability within the activities which they pursue.

42 As regards the enforceability of authentic instruments, the Commission considers that the endorsement of the enforcement clause precedes the actual enforcement and is not a part of it. Accordingly, that enforceability confers no power of constraint on notaries. Moreover, any legal challenge is resolved not by a notary, but by a court.

43 Secondly, the role of a notary in relation to the collection of taxes cannot constitute a connection with the exercise of official authority, since private individuals are often brought to accept that type of responsibility in the area of taxes. Thus, private undertakings act on behalf of a third party when they retain the tax deductible at source from the salaries of their employees. The same is true of credit institutions which retain withholding tax on behalf of their clients who are in receipt of income from moveable property.

44 Thirdly, the specific status of a notary under French law is not directly relevant to the assessment of the nature of the activities concerned.

45 The Commission considers, next, like the United Kingdom, that the rules of European Union law containing references to notarial activities do not exclude the application of Article 43 EC and the first paragraph of Article 45 EC to those activities.

46 Both Article 1(5)(d) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1) and recital 41 of the preamble to Directive 2005/36 exclude from the scope of those directives notarial activities only to the extent that they involve a direct and specific connection with the exercise of official authority. That is therefore no more than a reservation which has no effect on the interpretation of the first paragraph of Article 45 EC. As regards Article 2(2)(l) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), which excludes notarial activities from the scope of that directive, the Commission states that the fact that the European Union legislature chose to exclude a specific activity from the scope of that directive does not mean that the first paragraph of Article 45 EC applies to that activity.

47 As regards Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1), and Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15), the Commission considers that those regulations do no more than impose an obligation on Member States to recognise and enforce acts which are executed and enforceable in another Member State.

48 Further, Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1), and Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ 2005 L 310, p. 1) have no relevance to the outcome of

these proceedings, since those measures do no more than confer on notaries, and on other competent authorities designated by the State, the task of issuing a certificate attesting to the completion of certain acts and formalities to be accomplished before the transfer of a company's registered office, or before a company's constitution or merger.

49 As regards the resolution of the European Parliament of 23 March 2006 on the legal professions and the general interest in the functioning of legal systems (OJ 2006 C 292E, p. 105, 'the 2006 resolution'), that is a purely political measure, the content of which is ambiguous, since on the one hand, in point 17 of that resolution, the European Parliament asserted that Article 45 EC must be applied to the profession of civil-law notary, whereas, on the other hand, in point 2 thereof, it confirmed the position set out in its resolution of 18 January 1994 on the state and organisation of the profession of notary in the twelve Member States of the Community (OJ 1994 C 44, p. 36, 'the 1994 resolution'), where it expressed the wish that the nationality requirement for access to the profession of notary laid down in the legislation of several Member States be removed.

50 The Commission and the United Kingdom add that the case which gave rise to the judgment in Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española* [2003] ECR I-10391, to which several Member States refer in their written observations, concerned the fact that the masters and chief mates of merchant navy ships have a wide range of duties relating to ensuring safety and public order and powers in respect of notarising documents and registering births, marriages and deaths. Accordingly, the Court had no occasion to examine in detail the various activities carried out by notaries in the light of the first paragraph of Article 45 EC. Consequently, that judgment is not authority for the conclusion that that provision is applicable to notaries.

51 Further, contrary to what is maintained by the French Republic, the Court's case-law distinguishes notaries from public authorities by recognising that an authentic instrument can be established by a public authority or other authority empowered for that purpose (Case C-260/97 *Unibank* [1999] ECR I-3715, paragraphs 15 and 21).

52 The French Republic's first contention, supported by the Republic of Bulgaria, the Czech Republic, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, Romania and the Slovak Republic, is that the Commission misinterprets the Court's case-law. That case-law does not restrict the application of the first paragraph of Article 45 EC solely to activities involving a power of constraint, such a power being merely one component of the exercise of official authority.

53 In that regard, the Court recognised, in *Colegio de Oficiales de la Marina Mercante Española*, that the tasks of a notary constitute participation in the exercise of rights under powers conferred by public law.

54 Second, the connection of notaries with the exercise of official authority is demonstrated by the tasks conferred on them in relation to the collection of taxes. Those tasks are not confined solely to the retention of public funds but also include determining the tax base in respect of income arising from capital gains on immoveable property, the collection of registration fees and of the tax on inherited income, notaries assuming responsibility for the payment of those registration fees. By carrying out those tasks, notaries pay tax on behalf of third parties, namely their clients.

55 Third, the French Republic states, as do the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, Romania and the Slovak Republic, that the activities pursued by notaries involve the drawing up of authentic instruments which have probative force and are enforceable, and that constitutes a concrete manifestation of official authority. In respect of certain acts, such as gifts, marriage settlements, mortgage instruments, sales of land and buildings to be erected thereon [Article 1601-3 of the French Civil Code] and transferable agricultural leases, the intervention of a notary is a condition of their validity.

56 In the pursuit of his activity, a notary has the duty to explain to the parties the consequences of their act, to be satisfied that they freely consent to it and to ask the necessary questions to obtain the information obligatorily required to comply with the legal provisions. A notary is also obliged to undertake, when necessary, any inquiry which is appropriate to ensure that the act is legally valid. Further, a notary must refuse to execute any act which is immoral or illegal.

57 Further, a notarial act has the highest degree of probative force in the hierarchy of modes of proof under French law. That probative force attaches to the date of the act, the signatures appended to it and the facts certified by the notary, namely what was accomplished by him or what took place in his presence. The authenticity of those matters can be challenged only by means of the plea of 'inscription de faux' [plea of forgery], provided for by Articles 303 to 316 of the Code of Civil Procedure.

58 Moreover, it is clear from *Unibank* that the involvement of a public authority or any other authority empowered for that purpose by the State is needed in order to endow a given act with the character of an authentic instrument.

59 Notarial acts are also enforceable without it being necessary first to obtain a court judgment. Accordingly, even if the Court's case-law limits the application of the first paragraph of Article 45 EC solely to activities involving a power of constraint, the profession of notary falls under that provision by reason of the fact that a notarial act is enforceable.

60 Fourth, the French Republic contends that the status of a notary in the French legal system is evidence of the direct connection of notaries with the exercise of official authority. Thus, notaries are appointed by the Minister of Justice and are under the supervision of the State Prosecutor. Further, they take an oath and are subject to strict rules of disqualification from holding other office.

61 Fifth, the French Republic states that the European Union legislature has confirmed that notaries are connected with the exercise of official authority. In that regard, the French Republic refers to the European Union measures mentioned in paragraph 46 of this judgment, which either exclude notarial activities from their scope because of the connection of notaries with the exercise of official authority or recognise that authentic instruments are drawn up by a public authority or any other authority empowered for that purpose by the State. It is apparent, moreover, from the measures mentioned in paragraphs 47 and 48 of this judgment that notarial acts are comparable to judicial decisions.

62 Further, the Parliament asserted in the 1994 and 2006 resolutions that the profession of notary is connected with the exercise of official authority.

Findings of the Court

— Preliminary considerations

63 The Commission complains that the French Republic is preventing the establishment of nationals of other Member States in its territory for the purpose of practising as a notary, by reserving access to that profession to its own nationals, in breach of Article 43 EC.

64 This action thus concerns solely the nationality requirement laid down by the French legislation at issue for access to that profession, in the light of Article 43 EC.

65 Accordingly, this action does not relate to the status and organisation of notaries in the French legal system, or to the conditions of access, other than that of nationality, to the profession of notary in that Member State.

66 Moreover, as the Commission stated at the hearing, the Commission's action does not concern the application of the provisions of the EC Treaty on the freedom to provide services. Nor does it relate to the Treaty provisions on freedom of movement for workers.

— The alleged failure to fulfil obligations

67 It must be recalled at the outset that Article 43 EC is one of the fundamental provisions of European Union law (see, to that effect, inter alia, *Reyners*, paragraph 43).

68 The concept of establishment within the meaning of that provision is a very broad one, allowing a national of the European Union to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the European Union in the sphere of activities of self-employed persons (see, inter alia, Case C-161/07 *Commission* v *Austria* [2008] ECR I-10671, paragraph 24).

69 The freedom of establishment conferred on nationals of one Member State in the territory of another Member State includes in particular access to and exercise of activities of self-employed persons under the same conditions as are laid down by the law of the Member State of establishment for its own nationals (see, inter alia,

Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 13, and, to that effect, *Commission* v *Austria*, paragraph 27). In other words, Article 43 EC prohibits the Member States from laying down in their laws conditions for the pursuit of activities by persons exercising their right of establishment there which differ from those laid down for its own nationals (*Commission* v *Austria*, paragraph 28).

70 Article 43 EC is thus intended to ensure that all nationals of all Member States who establish themselves in another Member State for the purpose of pursuing activities there as self-employed persons receive the same treatment as nationals of that State, and it prohibits, as a restriction on freedom of establishment, any discrimination on grounds of nationality resulting from national legislation (*Commission* v *France*, paragraph 14).

71 In the present case, the national legislation at issue reserves access to the profession of notary to French nationals, thus enshrining a difference in treatment on the ground of nationality which is prohibited in principle by Article 43 EC.

72 The French Republic submits, however, that the activities of notaries are outside the scope of Article 43 EC because they are connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC. The Court must therefore begin by examining the concept of the exercise of official authority within the meaning of that provision, before going on to ascertain whether the activities of notaries in the French legal system fall within that concept.

73 As regards the concept of the 'exercise of official authority' within the meaning of the first paragraph of Article 45 EC, the assessment of that concept must take account, in accordance with settled case-law, of the character as European Union law of the limits imposed by that provision on the permitted exceptions to the principle of freedom of establishment, so as to ensure that the effectiveness of the Treaty in the field of freedom of establishment is not frustrated by unilateral provisions of the Member

States (see, to that effect, *Reyners*, paragraph 50; *Commission* v *Greece*, paragraph 8; and Case C-438/08 *Commission* v *Portugal* [2009] ECR I-10219, paragraph 35).

74 It is also settled case-law that the first paragraph of Article 45 EC is an exception to the fundamental rule of freedom of establishment. As such, the exception must be interpreted in a manner which limits its scope to what is strictly necessary to safeguard the interests it allows the Member States to protect (*Commission* v *Greece*, paragraph 7; *Commission* v *Spain*, paragraph 34; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 45; Case C-393/05 *Commission* v *Austria* [2007] ECR I-10195, paragraph 35; Case C-404/05 *Commission* v *Germany* [2007] ECR I-10239, paragraphs 37 and 46; and *Commission* v *Portugal*, paragraph 34).

75 In addition, the Court has repeatedly held that the exception in the first paragraph of Article 45 EC must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority (*Reyners*, paragraph 45; *Thijssen*, paragraph 8; *Commission* v *Spain*, paragraph 35; *Servizi Ausiliari Dottori Commercialisti*, paragraph 46; *Commission* v *Germany*, paragraph 38; and *Commission* v *Portugal*, paragraph 36).

76 In this respect, the Court has had occasion to rule that the exception in the first paragraph of Article 45 EC does not extend to certain activities that are auxiliary or preparatory to the exercise of official authority (see, to that effect, *Thijssen*, paragraph 22; *Commission* v *Spain*, paragraph 38; *Servizi Ausiliari Dottori Commercialisti*, paragraph 47; *Commission* v *Germany*, paragraph 38, and *Commission* v *Portugal*, paragraph 36), or to certain activities whose exercise, although involving contacts, even regular and organic, with the administrative or judicial authorities, or indeed cooperation, even compulsory, in their functioning, leaves their discretionary and decision-making powers intact (see, to that effect, *Reyners*, paragraphs 51 and 53), or to certain activities which do not involve the exercise of decision-making powers (see, to that effect, *Thijssen*, paragraphs 21 and 22; Case C-393/05 *Commission* v *Austria*,

paragraphs 36 and 42; *Commission* v *Germany*, paragraphs 38 and 44; and *Commission* v *Portugal*, paragraphs 36 and 41), powers of constraint (see, to that effect, inter alia, *Commission* v *Spain*, paragraph 37) or powers of coercion (see, to that effect, Case C-47/02 *Anker and Others* [2003] ECR I-10447, paragraph 61, and *Commission* v *Portugal*, paragraph 44).

77 It must be ascertained in the light of the above considerations whether the activities entrusted to notaries in the French legal system involve a direct and specific connection with the exercise of official authority.

78 Account must be taken of the nature of the activities carried out by the members of the profession at issue (see, to that effect, *Thijssen*, paragraph 9).

79 The French Republic and the Commission are agreed that the main activity of notaries in the French legal system consists of drawing up authentic instruments in due and proper form. To achieve that, the notary must, inter alia, ascertain that all the conditions required by law for drawing up the instrument are satisfied. Moreover, an authentic instrument has probative force and is enforceable.

80 First, it must be observed in that regard that the documents that may be authenticated under French law are documents and agreements freely entered into by the parties. The parties decide themselves, within the limits laid down by law, the extent of their rights and obligations and choose freely the conditions which they wish to be subject to when they submit a document or agreement to the notary for authentication. The notary's intervention thus presupposes the prior existence of consent or a voluntary agreement of the parties.

81 Further, a notary cannot unilaterally alter the agreement which he is called on to authenticate without obtaining the prior consent of the parties.

82 The activity of authentication entrusted to notaries therefore does not, in itself, involve a direct and specific connection with the exercise of official authority within the meaning of the first paragraph of Article 45 EC.

83 The fact that some documents and agreements are subject to mandatory authentication, in default of which they are void, cannot call that conclusion into question. It is normal for the validity of various documents to be subject, in national legal systems and in accordance with the prescribed rules, to formal requirements or even compulsory validation procedures. That fact cannot, therefore, be sufficient to support the position maintained by the French Republic.

84 The obligation of notaries to ascertain, before carrying out the authentication of a document or agreement, that all the conditions required by law for drawing up that document or agreement have been satisfied and, if that is not the case, to refuse to perform the authentication cannot call that conclusion into question either.

85 It is true that, as submitted by the French Republic, the notary's ascertainment of those facts pursues an objective in the public interest, namely to guarantee the lawfulness and legal certainty of documents entered into by individuals. However, the mere pursuit of that objective cannot justify the powers necessary for that purpose being reserved exclusively to notaries who are nationals of the Member State concerned.

86 Acting in pursuit of an objective in the public interest is not, in itself, sufficient for a particular activity to be regarded as directly and specifically connected with the exercise of official authority. It is not disputed that activities carried out in the context of various regulated professions frequently, in the national legal systems, involve an obligation on the persons concerned to pursue such an objective, without falling within the exercise of official authority.

87 However, the fact that notarial activities pursue objectives in the public interest, in particular to guarantee the lawfulness and legal certainty of documents entered into by individuals, constitutes an overriding reason in the public interest capable of justifying restrictions of Article 43 EC deriving from the particular features of the activities of notaries, such as the framework within which notaries act as a result of the procedures by which they are appointed, their limited number and the restriction of their territorial jurisdiction, or the rules governing their remuneration, their independence, their disqualification from holding other office and their protection against removal, provided that those restrictions enable those objectives to be attained and are necessary for that purpose.

88 It is also the case that a notary must refuse to authenticate a document or agreement which does not satisfy the conditions laid down by law, regardless of the wishes of the parties. However, following such a refusal, the parties remain free to remedy the unlawfulness, amend the conditions in the document or agreement, or abandon the document or agreement.

89 Further, the consultation and legal assistance provided by a notary when authenticating a document or agreement cannot be considered as connected with the exercise of official authority, even where a notary is legally obliged to provide such consultation or assistance (see, to that effect, *Reyners*, paragraph 52).

90 As to the probative force and the enforceability of notarial acts, those indisputably endow such acts with significant legal effects. However, the fact that an activity includes the drawing up of acts with such effects does not suffice for that activity to be regarded as directly and specifically connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC.

91 In particular, as far as the probative force of notarial acts is concerned, it must be pointed out that that force derives from the rules on evidence laid down by law in the legal system in question. Thus, Article 1319 of the Civil Code, which determines the probative force of an authentic instrument, is part of Chapter VI of that code, headed 'Of the proof of obligations and of payment'. The probative force conferred by law on a particular document thus has no direct effect on whether the activity which includes the drawing up of the document is in itself directly and specifically connected with the exercise of official authority, as required by the case-law (see, to that effect, *Thijssen*, paragraph 8, and *Commission* v *Spain*, paragraph 35).

92 Further, under Article 1322 of the Civil Code, '[a]n instrument under private signature, acknowledged by the person against whom it is set up, or statutorily held as acknowledged, is, between those who have signed it and between their heirs and assignees, as conclusive as an authentic instrument'.

93 As regards the enforceability of an authentic instrument, it must be observed that, as the French Republic submits, the effect of that enforceability is that the obligation embodied in the instrument can be enforced without the prior intervention of the court.

94 The enforceability of an authentic instrument does not, however, derive from powers possessed by the notary which are directly and specifically connected with the exercise of official authority. So, while the notary's endorsement of the enforcement clause on an authentic instrument does give it enforceable status, that status is based

on the intention of the parties to sign a document or agreement, after its conformity with the law has been checked by the notary, and confer enforceability on it.

95 Consequently, the drawing up of authentic instruments endowed with legal effects, as described in paragraphs 90 to 94 of this judgment, does not involve a direct and specific connection with the exercise of official authority within the meaning of the first paragraph of Article 45 EC.

96 Second, as regards the tasks entrusted to a notary of collecting taxes, those tasks cannot in themselves be regarded as constituting a direct and specific connection with the exercise of official authority. It must be noted, in that regard, that after tax is collected by a notary on behalf of a debtor, the sums involved are sent to the competent State authority, and that collection is therefore not fundamentally different from the collection of value added tax.

97 Third, as regards acts such as gifts, marriage settlements, mortgage instruments, sales of land and buildings to be erected thereon and transferable agricultural leases, which must be executed by notarial act, in default of which they are void, reference is made to the points made in paragraphs 80 to 95 of this judgment.

98 Fourth, as regards the particular status of notaries in the French legal system, it need only be recalled that, as follows from paragraphs 75 and 78 of this judgment, it is by reference to the nature of the relevant activities themselves, not by reference to that status as such, that it must be ascertained whether those activities fall within the exception in the first paragraph of Article 45 EC.

99 Two points must be made here, however. In the first place, it is not disputed that, apart from the cases in which a notary is appointed by law, every party can choose a notary freely, in accordance with Article 4 of the national regulation of notaries, referred to in paragraph 8 of this judgment. While notaries' fees are indeed partly fixed by law, the quality of the services they provide may vary from one notary to another, depending in particular on their professional capabilities. It follows that, within the geographical boundaries of their office, notaries practise their profession, as the Advocate General observes in point 18 of his Opinion, in conditions of competition, which is not characteristic of the exercise of official authority.

100 In the second place, it must be observed, as argued by the Commission without contradiction on that point by the French Republic, that notaries are directly and personally liable to their clients for harm or loss resulting from any fault committed in the exercise of their activities.

101 Further, the argument which the French Republic bases on certain European Union measures also fails to convince. As regards the measures mentioned in paragraph 46 of this judgment, it must be stated that the fact that the legislature has chosen to exclude notarial activities from the scope of a given measure does not mean that those activities necessarily fall under the exception provided for in the first paragraph of Article 45 EC. As regards, in particular, Directive 2005/36, the very wording of recital 41 of the preamble to that directive, stating that the directive 'is without prejudice to the application of … [Article 45 EC] concerning notably notaries', shows that the European Union legislature precisely did not adopt a position on the applicability of the first paragraph of Article 45 EC to the profession of notary.

102 The argument based on the European Union measures referred to in paragraphs 47 and 48 of this judgment is not relevant either. As regards the regulations mentioned in paragraph 47 of this judgment, those relate to the recognition and enforcement of authentic instruments which are executed and are enforceable in a Member State and consequently do not affect the interpretation of the first paragraph of Article 45 EC.

The same conclusion must be reached with regard to the European Union measures mentioned in paragraph 48 of this judgment since, as rightly argued by the Commission, they do no more than confer on notaries, and on other competent authorities designated by the State, the task of issuing a certificate attesting to the completion of certain acts and formalities to be accomplished before the transfer of a company's registered office or before a company's constitution or merger.

103 As regards the 1994 and 2006 resolutions, mentioned in paragraph 49 of this judgment, it must be stated that those resolutions have no legal force, given that such resolutions, by their nature, do not constitute legally binding acts. Further, although the resolutions state that the profession of notary falls under Article 45 EC, the Parliament explicitly stated in the 1994 resolution its wish that measures should be taken to remove the nationality requirement for access to the profession of notary, that position being again implicitly confirmed in the 2006 resolution.

104 As regards the French Republic's argument based on *Colegio de Oficiales de la Marina Mercante Española*, it must be stated that the case giving rise to that judgment related to the interpretation of Article 39(4) EC and not the interpretation of the first paragraph of Article 45 EC. Further, it is evident from paragraph 42 of that judgment that when the Court held that the duties entrusted to masters and chief mates of ships constituted participation in the exercise of rights under powers conferred by public law, the Court had in mind all the duties performed by those persons. The Court therefore did not examine the single notarial power entrusted to masters and chief mates of ships, namely responsibility for the receipt of wills, their safekeeping and their dispatch to the authorities, separately from their other powers, such as, inter alia, their powers of coercion or punishment.

105 As regards *Unibank*, to which the French Republic also refers, it is clear that the case which gave rise to that judgment is not at all concerned with the interpretation of the first paragraph of Article 45 EC. Further, the Court held, in paragraph 15 of that judgment, that, in order to endow an act with the character of an authentic instrument within the meaning of Article 50 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), the involvement of a public authority or any other authority empowered for that purpose by the State of origin is needed.

106 In those circumstances, it must be concluded that the activities of a notary, as they are defined currently in the French legal system, are not connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC.

107 It must consequently be declared that the nationality requirement imposed by the French legislation as a requirement for access to the profession of notary constitutes discrimination on grounds of nationality prohibited by Article 43 EC.

108 In the light of all the foregoing considerations, it must be held that the Commission's action is well founded.

109 Consequently, it must be held that, by imposing a nationality requirement for access to the profession of notary, the French Republic failed to fulfil its obligations under Article 43 EC.

Costs

110 Under Article 69(2) of the Rules of Procedure, an unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked that the French Republic be ordered to pay the costs and the French Republic has been unsuccessful, it must be ordered to pay the costs.

111 Under the first subparagraph of Article 69(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs. The Republic of Bulgaria, the Czech Republic, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, Romania, the Slovak Republic and the United Kingdom must therefore bear their own costs.

On those grounds, the Court (Grand Chamber) hereby

1. **Declares that, by imposing a nationality requirement for access to the profession of notary, the French Republic failed to fulfil its obligations under Article 43 EC;**

2. **Orders the French Republic to pay the costs;**

3. **Orders the Republic of Bulgaria, the Czech Republic, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, Romania, the Slovak Republic and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

[Signatures]