OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 14 September 2010[1]

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I — Introduction

1. In these actions for failure to fulfil obligations, the European Commission seeks a declaration from the Court of Justice that the Kingdom of Belgium, the French Republic, the Grand Duchy of Luxembourg, the Republic of Austria, the Federal Republic of Germany and the Hellenic Republic have failed to fulfil their obligations under Article 43 EC and the first paragraph of Article 45 EC by limiting access to the profession of notary exclusively to nationals of their own country ('the nationality clause'). The European Commission also seeks a declaration that those Member States, with the exception of the French Republic, have failed to fulfil the obligations arising from Directive 2005/36/EC on the recognition of professional qualifications [2] by not applying that directive to the profession of notary. [3]

2. Although the Commission's case is confined to challenging discrimination on grounds of nationality, the issue underlying these proceedings is significantly more complex. The purpose of these actions is after all to seek from the Court of Justice a declaration that the civil-law function of notary as it

2 — Directive of the European Parliament and of the Council of 7 September 2005 (OJ 2005 L 255, p. 22) repealing Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16).

3 — These are not the only actions for failure to fulfil obligations brought by the Commission on this basis, since the Court is due to give rulings on actions brought against Portugal (Case C-52/08) and the Netherlands (Case C-157/09).

is performed in a significant number of Member States [4] falls within the scope of the freedom of establishment because it is not connected with the 'exercise of official authority'.

3. In general terms, this case brings before the Court what is possibly the most sensitive issue concerning the interpretation of the combined provisions of Article 43 EC and the first paragraph of Article 45 EC which it has ever faced. As will be seen, the cases concerning the combination of those two provisions which the Court has dealt with up until now have concerned professionals with nebulous or only very occasional connections with official authority, which certainly cannot be said to be true *prima facie* of the cases at hand.

4. For those reasons, the six actions grouped together for the purposes of this Opinion provide the Court with the opportunity to examine in more detail than ever before the scope of a provision as complex as that resulting from the combination of Article 43 EC and the first paragraph of Article 45 EC. In so doing, and unlike in previous cases, the Court must seek in these proceedings to strike the right balance between the objectives pursued by the fundamental freedoms of the European Union, respect for the competences of the Member States and the status of European citizenship. When balancing those values against each other, the Court will find that the aforementioned articles require a special act of interpretation which will be decisively shaped by the principle of proportionality.

5. The scale of the issue raised here and the possibility of introducing a proportionality test in the context of Article 43 EC and the first paragraph of Article 45 EC clearly show how important this case is not only to the profession of notary itself but also and more broadly to European Union law.

II — Legal framework

A — *Community law*

1. Primary law

6. The legislation on which the Commission relies in support of its application is the

4 — It should be pointed out here and now that, although the civil-law notary that forms the subject of these proceedings is still the most common in Europe, he coexists in the European Union with other variants that do not fall within the scope of the first paragraph of Article 45 EC. This may be either because the notary is an integral part of the public administration or because the acts he performs do not carry the authority of authentication in the sense in which that term is used here. Finally, the situation in Europe has become even more diverse in recent years as a result of the abolition of the nationality clause in some Member States which operate a system of civil-law notaries (Italy, Spain).

combined provisions of Article 43 EC and the first paragraph of Article 45 EC (now Articles 49 and 51 TFEU), which, at the time when the alleged infringement occurred, conferred freedom of establishment on natural and legal persons in the following terms:

'*Article 43*

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

Article 45

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

The Council may, acting by a qualified majority on a proposal from the Commission, rule that the provisions of this Chapter shall not apply to certain activities.' [5]

2. Secondary law

7. Directive 89/48 provided for a transposition period which, under Article 12 of the Directive, expired on 4 January 1991.

8. Article 2 of the Directive provided:

'This Directive shall apply to any national of a Member State wishing to pursue a regulated profession in a host Member State in a self-employed capacity or as an employed person.

This Directive shall not apply to professions which are the subject of a separate Directive establishing arrangements for the mutual recognition of diplomas by Member States.'

5 — It should be pointed out that, although in the course of these infringement proceedings all the parties involved have referred without further clarification to Article 45 EC, the provision actually meant is invariably that contained in the first of the two paragraphs comprising that article, in other words that which 'negatively' defines the scope of the freedom by not extending it to activities connected with the exercise of official authority. Serving a very different purpose, the second paragraph provides for a generic category of economic activities which, although they are not connected with the exercise of official authority, 'may' none the less, on the basis of provisions of secondary law, be 'expelled' from the freedom of establishment. I will have cause to return to this point later.

9. It should be noted that the profession of notary has not been regulated by any instrument referred to in the second paragraph of the above article.

10. Directive 89/48 was repealed and codified by Directive 2005/36. The new wording retains the essential content of Directive 89/48 but recital 41, which is a new departure from its predecessor, provides, in terms that are obviously not irrelevant, as follows:

'This Directive is without prejudice to the application of Articles 39(4) and 45 of the Treaty concerning notably notaries.'

B — *National law*

1. The profession of notary

11. Both the Commission and the Member States have supplied abundant factual and legal information describing in detail the profession of notary in each country. However, taking into account the extent of the information provided, the fact that this Opinion covers a number of cases and the need to bring clarity of argument to my analysis of the substance of the proceedings, I shall subsequently provide a separate summary both of the provisions relied on and of the functions assigned to the profession of notary in each Member State, the most notable of which is the authentication of legal transactions.

(a) Belgian law

12. In Belgium, the profession of notary is regulated by the Law of 25 Ventose of Year XI, as well as by various provisions contained, inter alia, in the Belgian Judicial Code.

13. Under Belgian law, the task of the notary is principally to draw up authentic instruments that have two main characteristics: perfect probative value and enforceability. [6]

14. The notary performs the function of authentication on the instruction of a party and examines the legality of the instrument being authenticated. The notary's intervention may be compulsory or optional, depending on the

6 — Article 19 of the Law of 25 Ventose of Year XI.

instrument that is to be authenticated, and involves verifying that all the conditions that may be required by law for the execution of the instrument have been met and that the parties have legal capacity and capacity to act. In the course of carrying out these tasks, the notary informs each party of his rights and obligations and gives completely impartial advice. [7] The notary also determines and collects directly the fees due for the registration and creation of mortgages.

15. All instruments drawn up by a notary have perfect probative value equivalent to that conferred by instruments drawn up by a public official and challengeable only before a court of law. The notary's assessment is open to review but only by means of an extraordinary review procedure. [8]

16. Furthermore, an authenticated instrument is enforceable throughout Belgian territory. [9] Accordingly, the notorial instrument is imposed on the debtor (although notification is required) in order for it to be enforced, since it falls directly to a public official, the *huissier* (bailiff), to initiate enforcement. Where enforcement is opposed, the debtor may bring the matter before the courts by raising a plea of objection to enforcement. [10]

17. In addition to authentication functions, the Belgian Government has shown that notaries also perform other activities, albeit secondary to that just described. Thus, notaries perform functions connected with the sale of immovable property in enforcement, bankruptcy, guardianship and succession proceedings; inventory functions; functions connected with the division of property in indivisible co-ownership; as well as functions relating to the formation and merger of companies and other acts of association.

18. For the purposes of performing these functions, the notary is a public official who represents the public authorities, although his activity is considered to be an independent profession. [11] His position carries security of tenure and is subject to a disciplinary regime reserved for persons working on behalf of the public authorities. [12] His fees are not commercial and are laid down by law, although the client has extensive freedom of choice in the instruction of a notary. Consequently, notaries compete for clients not through their pricing policies but through the quality of service they provide.

7 — Article 9(1)(3) of the aforementioned Law of 25 Ventose.

8 — Civil proceedings to challenge the authenticity of notarial documents are regulated by Article 895 of the Belgian Judicial Code.

9 — Article 19 of the aforementioned Law of 25 Ventose.

10 — Articles 1395 and 1396 of the Belgian Judicial Code.

11 — Article 1 of the aforementioned Law of 25 Ventose.

12 — Article 108 of the aforementioned Law of 25 Ventose.

(b) French law

19. In France, the profession of notary is governed by the Law of 25 Ventose of Year XI and other specific provisions laid down, notably, in the Code of Civil Procedure.

20. The profession of notary in France is also characterised by the authentication of instruments and contracts submitted by parties to the notary, whose intervention confers perfect probative value and enforceability on the instrument or contract. [13]

21. French notaries act on the instruction of parties, although there are a number of instruments that of necessity require notarial intervention. [14] For an instrument to be duly authenticated, the notary verifies the legality of the transaction and is subject to strict procedural rules laid down by law, [15] including the obligation to draft the document in the French language. [16] Notaries are also under an obligation to inform the parties of the scope and effects of the document, and to ensure that they give their consent freely and have full legal capacity and capacity to act.

22. The authentic instrument has conclusive probative value, although the latter is rebuttable by means of special proceedings in respect of which the tribunal de grande instance (Regional Court) has exclusive jurisdiction. [17] The proceedings may be incidental to the main proceedings or may themselves constitute the main proceedings, depending on whether the content of the authenticated instrument is challenged in the course of existing proceedings. [18] Such proceedings may lead to the imposition of penalties, both for the notary and for the party that initiated them.

23. The enforceability of a notarial instrument means that either of the parties executing it may seek its enforcement directly from the public authority exclusively responsible for enforcement: the *huissier*. [19] Unlike in the case of private instruments, a notarial instrument does not require judicial intervention for the purposes of its enforcement; nor does the debtor need to give his consent. The enforcement procedure is the same as

13 — Article 1 of Order No 45-2590 of 2 November 1945, Article 1319 of the Civil Code and Article 19 of the aforementioned Law of 25 Ventose.

14 — Gifts, marriage settlements, mortgage instruments or futures contracts, inter alia.

15 — See the Law of 25 Ventose of Year XI as well as special provisions such as those contained in Article 850 of the General Tax Code.

16 — Article 1 of Law 94-665 of 4 August 1994 and the Order of Villers-Cotterêts of 1539, which is still in force and is the source of the obligation to use French in public documents.

17 — Article 299 of the Code of Civil Procedure.

18 — Articles 306 and 314 of the Code of Civil Procedure.

19 — The monopoly on the execution of enforceable instruments and titles is reserved for *huissiers* by Article 18 of the aforementioned Code of Civil Procedure.

that applicable to the enforcement of court judgments. [20]

24. In addition to authentication functions, the French Government has shown that notaries also perform other activities, albeit secondary to that just described. Thus, notaries perform functions connected with the collection of taxes, but separate from authentication, which supplement the latter and show the degree to which the profession falls within the sphere of official authority.

25. Notaries are State officials and exercise delegated official authority subject to a special set of rules on incompatibilities, although they perform their activities as independent professionals. [21] However, their function constitutes an activity falling under the heading of preventive jurisdiction which guarantees the stability of legal and corporate relations. Notarial fees are laid down by law but the client has some discretion in his choice of notary. Consequently, the profession of notary is an economic activity pursued on a competitive basis in the context of which it is not prices but quality of service which constitutes the decisive differentiating factor between service providers.

20 — Law 91-650 of 9 July 1991.

21 — The public nature of the activities of notaries was confirmed by the French Conseil d'État (Council of State) in its judgment of 9 June 2006 (No 280911) declaring the first paragraph of Article 45 EC to be applicable to the profession, although it arrived at that conclusion without referring the question to the Court of Justice for a preliminary ruling.

(c) Luxembourg law

26. In Luxembourg, the profession of notary is governed by the Law of 9 December 1976, as well as by other specific provisions, in particular the New Code of Civil Procedure, the Law of 25 September 1905 and the Grand Ducal Regulation of 7 October 2000.

27. The profession of notary in Luxembourg is also characterised by being formed of public officials entrusted with the task of executing all instruments and contracts submitted to them by parties for the purposes of authentication. [22] Authentication also confers enhanced probative value and enforceability. [23]

28. Notaries act on the instruction of parties, being required to verify the legality of the instrument and ensure that the various formalities prescribed by law have been satisfied. Their intervention may nevertheless be compulsory in certain cases. [24] The notary must ensure that the parties enjoy complete freedom of action and have full legal capacity and capacity to act. He is also obliged to ensure that the advice he gives to parties is entirely independent and to inform them of the rights and obligations arising from the instrument and from his intervention.

22 — Article 1 of the Law of 9 December 1976.

23 — Articles 37 and 45 of the law cited in footnote 22.

24 — See, for example, the Law of 25 September 1905 on rights in rem over immovable property.

29. Authentication is effected by affixing the seal bearing the enforcement clause. [25] The probative force of the instrument is therefore extremely robust and may be rebutted only in exceptional cases and by means of a special appeal procedure. [26]

30. The executive force of a notarial instrument allows a creditor to resort directly to the bringing of enforcement proceedings against a debtor without the need to initiate declaratory proceedings before the courts. The creditor is required only to approach the authority exclusively responsible for enforcement, the *huissier*. Decisions taken by the *huissier* during enforcement proceedings are open to appeal under the same conditions as are provided for in the case of enforcement of a judicial decision.

31. In addition to authentication functions, the Luxembourg Government has shown that notaries also perform other activities, albeit secondary to that just described. Thus, notaries perform tasks connected with the sale of property in enforcement, bankruptcy, guardianship or succession proceedings; inventory functions; and functions relating to the division of property in indivisible co-ownership.

32. Notaries are public officials appointed by the Grand Duke on a proposal from the Minister for Justice. They perform their functions throughout Luxembourg territory, where they are obliged to reside. Despite carrying out their functions as independent professionals, they are subject to a special statute, which includes strict incompatibility provisions. [27] Notarial fees are laid down by law but clients have discretion in their choice of notary provided that there is more than one in the judicial district in which the notarial function is to be performed. There is therefore free competition between notaries, although they do not compete on price but on quality of service.

(d) Austrian law

33. The activities of notaries in Austria are regulated, at the most general level, by the Laws of 25 July 1871 and 11 November 1970, as well as by various provisions of the Code of Civil Procedure.

34. The profession of notary in Austria consists of officials appointed for life by the State whose functions include, inter alia, the authentication of instruments on which they confer special probative effects and executive force. [28]

25 — Grand Ducal Regulation of 7 October 2000.

26 — Article 310 et seq. of the New Code of Civil Procedure.

27 — Article 6 of the Law of 9 December 1976.

28 — Paragraph 292 of the Code of Civil Procedure and Paragraph 3 of the Law of 25 July 1871, RGBl. 75/1871.

35. As the Austrian Republic recognised in its defence, authentication is a characteristic and founding task of the profession of notary in that country. It is a function performed on the instruction of a party, although, in some cases, it is compulsory for the purposes of executing and giving full effect to an instrument. The notary verifies the legality of the instrument being executed, advises the parties on their rights and obligations and the effects of the execution, and establishes that they have full legal capacity and capacity to act.

36. Once an instrument has been executed, the notary may represent and, in particular cases, defend the parties before the courts and public authorities. [29] They perform this activity independently and for a fee.

37. Notarial instruments have special probative force, although this may, under strict conditions, be rebutted. [30]

38. Once authenticated, notarial instruments become enforceable titles which, at the request of the person concerned, are directly enforceable before the public bodies responsible for that function: the district courts. [31] There is no need either to obtain the debtor's consent or to obtain a declaratory ruling from a court. Enforcement proceedings are none the less open to appeal, regulated in the special procedural legislation relating to such proceedings. [32]

39. In addition to authentication functions, the Austrian Government has shown that notaries also perform other activities. Thus, a notary may also act as a Gerichtskommissär, a function conferred by law under which he assists with and participates in the conduct of certain judicial proceedings such as, for example, in matters of succession. In his capacity as a Gerichtskommissär, a notary exercises powers, including the power to make orders, equivalent to those exercised by a court.

40. Notaries are officials appointed by order of the Federal Minister for Justice to carry out public duties. They none the less pursue their activities as independent professionals. They perform their functions on a fully independent basis and are subject to a special statute. Their fees are regulated by law but clients

29 — Paragraph 5 of the law cited in footnote 28.

30 — Paragraph 292 of the Code of Civil Procedure.

31 — *Bewilligungs- bzw. Exekutionsgericht.* See Paragraph 17 et seq. of the Law of 27 May 1896, RGBl. 79/1896.

32 — Paragraphs 35 to 37 of the Law of 27 May 1896.

have discretion in their choice of notary. There is therefore a framework of competition between notaries which operates on the basis of quality of service rather than pricing policy.

(e) German law

41. The activities of notaries in Germany are regulated by the Law of 24 February 1961, as well as by various provisions of the Code of Civil Procedure.

42. The profession of notary in Germany consists of independent public officials whose principal function is to authenticate instruments. [33] Once executed, a notarial instrument is enforceable and has special probative value. [34] The function of notary forms part of what is known as 'preventive justice'. [35]

43. Authentication is the most significant and characteristic activity of the profession of notary. To that end, notaries verify the legality of the private instruments which parties wish to execute and ensure that, in declaring their wishes, they have full legal capacity and capacity to act. [36] Once the legal conditions are fulfilled, notaries are obliged to proceed with authentication. [37] In the course of his intervention, a notary advises and informs the parties of their rights and obligations and of the effects flowing from authentication of the instrument. [38] Although notaries act on the instruction of a party and not *ex officio*, German law requires a broad range of instruments to be executed by notary in order to be fully effective. [39]

44. Notarial instruments are authentic and have special probative force, although the latter is rebuttable under defined conditions laid down by law [40] and depending on the matter authenticated by the notary, which may be declarations of third parties, declarations by the notary himself or factual events.

45. Notarial instruments have executive force and the enforcement authorities are directly responsible for enforcing them, there being no any need for the debtor to give his

33 — Paragraphs 1 and 20(1) of the Law of 24 February 1961, BGBl. I, p. 97.

34 — Paragraphs 415, 794(1), point 5, and 797(2) of the Code of Civil Procedure.

35 — In German, according to Paragraph 1 of the Law of 24 February 1961, 'vorsorgende Rechtspflege'.

36 — Paragraph 14(2) of the Law of 24 February 1961.

37 — Paragraph 15(1) of the Law of 24 February 1961.

38 — Paragraph 14(1), point 2, of the Law of 24 February 1961.

39 — See, inter alia, cases involving the pledging of gifts (Paragraph 518 of the Civil Code), marriage settlements (Paragraph 1408 of the Civil Code) or the waiving of inheritance (Paragraph 2346 of the Civil Code).

40 — Paragraph 415(2) of the Code of Civil Procedure.

consent, although he must be notified. This presupposes that the debtor is subject to enforcement as soon as the instrument is drawn up and authenticated. [41] Jurisdiction to enforce lies exclusively with the authorities specified by law, which do not include notaries. [42] Decisions adopted in the course of enforcement which have any connection with the content of the notarial instrument are open to appeal. [43]

46. In addition to authentication functions, the German Government has shown that notaries also carry out other activities, although these are secondary to that just described. Thus, notaries perform functions connected with the certification of documents, the grant of powers of attorney and the witnessing of sworn statements.

47. German notaries are public officials appointed by the *Land* who carry out their functions on behalf of the State. [44] Although their activity is not commercial in nature, notaries act as independent professionals, except in Baden-Württenberg. [45] In the remaining *Länder*, depending on the region, notaries exercise their profession on an exclusive basis or in conjunction with the practice of the profession of lawyer. They are subject to a special statute that guarantees their independence and their fees are laid down by law. [46] Clients none the less have extensive freedom when choosing a notary within a given territorial area. [47] There is therefore competition between notaries practising in a specific territory, although this is exercised in relation to quality of service rather than pricing policy.

(f) Greek law

48. The activities of notaries in Greece are regulated, in essence, by Law 2830/2000.

49. Greek notaries are public officials entrusted, principally, with the task of authenticating instruments, thus giving them probative value and executive force. [48]

41 — Paragraph 794(1), point 5, of the Code of Civil Procedure.

42 — Various authorities have jurisdiction, including bailiffs (Gerichtsvollzieher), enforcement courts (Vollstreckungsgericht), trial courts (Prozessgericht) or land registries (Grundbuchamt).

43 — Paragraphs 732 and 797(3) of the Code of Civil Procedure.

44 — Paragraph 1 of the Law of 24 February 1961.

45 — Here, notaries are officials of the public administration.

46 — Paragraph 17 of the Law of 24 February 1961.

47 — Paragraphs 10a and 11 of the Law of 24 February 1961.

48 — Article 1(1) of Law 2830/2000.

50. Notaries are responsible for authenticating instruments that are freely submitted to them by parties, although notarial intervention may be compulsory in certain cases. [49] The notary informs and advises parties of their rights and obligations and provides his services on a completely independent basis.

51. Notarial documents have special probative value which is effective *erga omnes*. [50] The content of the instrument may be challenged only on exceptional grounds.

52. Owing to the executive nature of notarial documents, their enforcement may be sought directly from the authority competent and responsible for such enforcement. Enforcement measures are none the less open to appeal, albeit only on an incidental basis, in specified circumstances. [51]

53. In addition to authentication functions, the Greek Government has shown that notaries also carry out other activities, albeit secondary to that just described. Thus, notaries perform, inter alia, functions connected with the sale of property in enforcement, bankruptcy, guardianship or succession proceedings; inventory functions; as well as functions relating to the division of property in indivisible co-ownership.

54. Notaries are public officials who provide their services on an independent basis and collect their fees directly from the client. Although the price of their services is laid down by law, customers have some discretion in their choice of notary.

55. There is therefore a framework of competition between notaries which operates on the basis of quality of service rather than pricing policy.

(g) Summary

56. It is reasonable to conclude from all the foregoing that the six defendant Member States have adopted and developed a common model for the profession of notary, in particular as regards authentication and its subsequent effects: probative force and enforceability. Also apparent in all the Member States is the fact that notaries enjoy a special, hybrid status half-way between a public official and an independent professional and are as such subject to rights and obligations that make the office one the holders of which carry on an economic activity *sui generis*. It is the extent of this fundamental common ground that makes it possible to give a single reasoned response to the present actions for failure to fulfil obligations.

49 — This is the case, for instance, with the formation of companies, gifts *inter vivos* or transfers of immovable property.

50 — Article 438 of Law 2830/2000.

51 — Article 933 et seq. of Law 2830/2000.

2. The national legislation specifically forming the subject of the actions: the nationality clauses

57. Now that the basic legislative framework relating to the profession of notary has been defined, it is appropriate to set out the provisions which the Commission is challenging in these proceedings, the purpose of which is to limit access to the profession of notary to nationals of the relevant Member States.

(a) Belgian law

58. Article 35(3) of Law of 25 Ventose of Year XI, as amended by the Law of 4 May 1999, lays down a nationality clause in respect of access to the profession of notary in Belgium. It is worded as follows:

'In order to be admitted as an applicant for the position of notary, the person concerned must: 1. a Belgian citizen …'

(b) French law

59. Article 3 of the Decree of 5 July 1973, as amended by Decree 89-399 of 20 June 1989, contains a nationality clause which attaches conditions to access to the profession of notary in France as follows:

'Only persons fulfilling the following requirements may become notaries: 1. They must be of French nationality …'

(c) Luxembourg law

60. Article 15 of the Law of 9 December 1976 on the organisation of the profession of notary lays down a nationality clause in respect of access to the profession of notary in Luxembourg. It is worded as follows:

'In order to be able to perform the functions of a notary, it is necessary: (a) to be of Luxembourg nationality …'

(d) Austrian law

61. Paragraph 6(1)(a) of Regulation on notaries, RGB1 No 75/1871, as amended by BGB1 No 164/2005, lays down a nationality clause in respect of access to the profession of notary in Austria as follows:

'In order to be able to hold the position of notary, the candidate must (a) have Austrian nationality …'

(e) German law

62. Paragraph 5 of the Federal Code on Notaries, as amended by Article 3 of the Law of 26 March 2007, contains a nationality clause in respect of access to the profession of notary in Germany. It is worded as follows:

'The position of notary may be held only by residents of German nationality who meet the requirements for access to the judiciary laid down in the Federal Law on the rules governing judges.'

(f) Greek law

63. Article 19(1) of the aforementioned Law 2830/2000 lays down a nationality clause in respect of access to the profession of notary in Greece which is worded as follows:

'Persons appointed as notaries shall hold Greek nationality …'

III — Forms of order sought by the parties

64. In the cases joined together here, the Commission, supported by the United Kingdom of Great Britain and Northern Ireland, claims that the Court should:

— declare that, by limiting access to the profession of notary exclusively to persons holding the nationality of their country, the Kingdom of Belgium, the French Republic, the Grand Duchy of Luxembourg, the Republic of Austria, the Federal Republic of Germany and the Hellenic Republic have failed to fulfil their obligations under Article 43 EC and the first paragraph of Article 45 EC;

— declare that, by failing to apply Directive 2005/36 on the recognition of professional qualifications to the profession of notary, the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Republic of Austria, the Federal Republic of Germany and the Hellenic Republic have failed to fulfil their obligations under that directive;

— order the Kingdom of Belgium, the French Republic, the Grand Duchy of Luxembourg, the Republic of Austria, the Federal Republic of Germany and the Hellenic Republic to pay the costs.

65. For their part, the defendant Member States, supported by the Republic of Lithuania, Romania, the Republic of Bulgaria, the Republic of Poland, the Republic of Slovenia, the Czech Republic, the Slovak Republic, the Republic of Hungary and the Republic of Latvia, contend that the Court should:

dismiss the action as unfounded since there has been no infringement, as alleged, of Article 43 EC and the first paragraph of Article 45 EC, and order the Commission to pay the costs.

In addition, and as an issue preliminary to the foregoing, the Federal Republic of Germany raises a plea of inadmissibility on the ground that, in its pre-litigation position, the Commission relied on Directive 89/48, whereas, in its application, it now claims infringement of Directive 2005/36, which replaces the previous directive.

IV — Admissibility

66. In Case C-54/08, in which the Federal Republic of Germany is the defendant, the Federal Republic of Germany, supported by Slovenia and Latvia, raises a plea of inadmissibility based on the provisions relied on by the Commission. In its opinion, the Commission accused it of infringing Directive 89/48 at the pre-litigation stage of these infringement proceedings, but now, at the litigation stage, it has accused it of infringing Directive 2005/36, which replaces the previous directive.

67. This plea cannot be upheld.

68. The Court has consistently held that the proper conduct of the pre-litigation procedure constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter. It is only on the basis of a properly conducted pre-litigation procedure that the contentious procedure before the Court will enable the latter to judge whether the Member State has in fact failed to fulfil the specific obligations which the Commission alleges it has breached. [52]

69. However, as the Court of Justice has repeatedly held, although the claims as stated in the application cannot in principle be extended beyond the infringements alleged in the operative part of the reasoned opinion and in the letter of formal notice, it is none the less true that, where Community law is amended

52 — Order in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraphs 17 and 18.

during the course of the pre-litigation procedure, 'the Commission has standing to seek a declaration that a Member State has failed to fulfil obligations which were created in the original version of a directive, subsequently amended or repealed, and which were maintained in force under the new provisions'. [53]

70. As the Commission has pointed out, a comparative study of those provisions shows that Directive 2005/36 simply consolidated and codified the provisions of Directive 89/48. Consequently, the majority of the obligations imposed on the Member States under Directive 89/48 remain applicable under Directive 2005/36.

71. It follows that the action must be held to be admissible and the plea of inadmissibility raised by Germany must be dismissed, since it refers to the obligations arising from Directive 2005/36, which were already applicable under the repealed directive.

53 — See, inter alia, Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 36, and Case C-145/01 *Commission* v *Italy* [2003] ECR I-5581, paragraph 17.

V — Substance

A — *The first plea of infringement*

72. By its first plea of infringement, the Commission seeks a declaration from the Court that, by reserving access to the profession of notary solely and exclusively to their nationals, the defendant Member States have infringed Article 43 EC and the first paragraph of Article 45 EC.

73. The Member States rely on a different understanding of the rule emerging from the two provisions which is based essentially on a determination of the scope of the negatively expressed rule in the second of those provisions, that is to say a different interpretation of the formulation 'activities which are connected, even occasionally, with the exercise of official authority'.

74. To put it very simply, whereas, for the Commission, the first paragraph of Article 45 EC is essentially confined to circumstances involving 'coercion', the Member States advocate a distinctly broader interpretation to the effect that the rule covers any form of decision that produces special effects different from those of a private instrument.

1. Three general introductory observations

75. Firstly, three general points must be made. One regarding the structure of the rule emerging from Article 43 EC and the first paragraph of Article 45 EC; another regarding the meaning or, if the Court prefers, the scheme of the first paragraph of Article 45 EC; and a third regarding the application of the principle of proportionality.

(a) The provisions which the Commission accuses the Member States of infringing: Article 43 EC and the first paragraph of Article 45 EC

76. As I have just explained, the Commission alleges infringement of the combined provisions of Article 43 EC and the first paragraph of 45 EC, which form the basis for determining the scope of the freedom of establishment. The special nature of that infringement, built as it is on the sum of two provisions of the Treaty, calls for an initial comment from me.

77. Strictly speaking, Article 43 EC and the first paragraph of Article 45 EC constitute a single unit of legislation formed of a rule (freedom of establishment) and an exception (activities connected with the exercise of official authority) which thus define its scope. It is the interplay between those two provisions that will determine the rule by reference to which this case will be resolved. What we have here therefore is not a rule (Article 43 EC) the application of which is simply subject to an *exception* (the first paragraph of Article 45 EC), but a different rule: the rule determining the scope of the freedom of establishment in the context of the exercise of activities *not* connected with participation in the exercise of official authority. That is the scope of the very freedom guaranteed by the Treaty, and it is in this light that the Commission's claim that Article 43 EC and the first paragraph of Article 45 EC have been infringed must be understood.

78. That, moreover, is the crucial functional difference between the two paragraphs comprising Article 45 EC. The first paragraph, as we have seen, defines directly and completely (*perfectly*), albeit negatively, the scope of the freedom by stating that activities connected with the exercise of official authority are immediately excluded from it ('shall not apply'). The second paragraph, on the other hand, simply creates the possibility for secondary law to introduce additional restrictions on the scope of the freedom established by the Treaty under Article 43 EC and the first paragraph of Article 45 EC. That generic possibility of ad hoc derogation from the scope of the freedom, however little it may have been exercised to date, falls entirely outside the ambit of these infringement proceedings. None the less, the contrast between it and the provision

contained in the first paragraph makes it possible to understand and explain the function and scope of the latter.

79. It must therefore be emphasised that Article 43 EC does not declare a freedom — of establishment — to which an exception is *then* created in the first paragraph of Article 45 EC. In other words, the latter provision is not an exception to the application of a rule, but an exception constituting the rule in the Treaty which determines the scope of the freedom. The obligation incumbent on the Member States, therefore, is to implement the freedom of establishment in respect of economic activities that are not connected, even occasionally, with the exercise of official authority. I shall henceforth refer to the scope of Article 43 EC as determined by the first paragraph of Article 45 EC as the 'negative scope of the freedom of establishment'.

(b) The difficulty of interpreting the meaning of the first paragraph of Article 45 EC

80. The second general introductory observation is a matter of substance. It seems clear from the outset that the provision made in the first paragraph of Article 45 EC for economic 'activities connected with the exercise of official authority' is a reference to a *foreign body* in the phenomenology of modern official authority. The separation of the public and private spheres, or, if the Court prefers, of the State and society, which is characteristic of the modern political world, means that there are, in principle, no activities connected with the exercise of official authority which are carried on outside the three branches of government in which official authority is considered to be exercised. A privatised (or non-nationalised) economic activity which is nevertheless characterised by the exercise of official authority is therefore something relatively *unexpected* in the scheme of the Treaty. Even so, this is still the form of words used in the present Article 51 TFEU, formerly the first paragraph of Article 45 EC, and has been since the first version of the EEC Treaty in 1957**.** Moreover, the same provision can also be found in Articles 23 and 27 of the European Free Trade Association Agreement.

81. It seems only natural to assume that the constant presence of the aforementioned provision throughout the development of the primary law must serve some purpose and be the expression of some underlying idea. [54] The only logical explanation is that the

54 — See Tomuschat, C., 'Der Vorbehalt der Ausübung öffentlicher Gewalt in den Berufsfreiheitsregelungen des EWG-Vertrages und die freie Advokatur im Gemeinsamen Markt', in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 27 (1967), p. 53 et seq.

Member States, in their capacity as authors of the Treaties, and perhaps on the basis of their own legal cultures and traditions, took note of the fact that, in at least a significant number of them, their systems included certain activities connected with the exercise of official authority that were nevertheless not undertaken by the official authorities but, on the contrary, took the form of economic activities or activities carried on by economic operators. An argument which concluded that *it is not possible to think of* any existing activity which can be described as such would cast some doubt on the soundness of that interpretation.

82. It is quite another matter to take the view that the first paragraph of Article 45 EC is intended to authorise the Member States to undertake an indefinite or generic privatisation of official authority (a form of *devolution*), such that its exercise becomes an 'economic activity'. This does not appear to me to be the case. On the contrary, the first paragraph of Article 45 EC must be regarded not as a provision with a future so much as a provision *with a past*. The first paragraph of Article 45 EC is probably best understood on the basis that the Treaty sought to exclude from the freedom of establishment any economic activity which, exceptionally, still maintains some form of connection with the exercise of State political authority. Of course, the Treaty allows the Member States complete freedom to maintain or put an end to such economic activities. However, in so far as the Member States maintain them, the Treaty makes direct provision to the effect that they are excluded from the freedom of establishment. In this respect, the provision may be likened to an optional *standstill* clause.

(c) Application of the principle of proportionality

83. In the course of these proceedings, the Member States have stated that the application of Article 43 EC and the first paragraph of Article 45 EC does not lend itself to a proportionality test. In saying this, the defendant Member States and interveners argue that, for the purposes of satisfying the requirements of the first paragraph of Article 45 EC, there is no scope for any discretion enabling the provision to be applied in a gradual manner. A gradual approach is the very function of the principle of proportionality when applied to an exception to the fundamental freedoms, since it is the tool that must be used to determine to what extent a restriction on a freedom is necessary in order to achieve legitimate public policy, public security or public

health objectives. [55] The defendant Member States in these proceedings all maintain that the first paragraph of Article 45 EC does not lend itself to a review in accordance with the principle of proportionality, but that it is, so to speak, an 'either or' provision: it is either applicable or it is not applicable but it leaves no room for discretion.

84. It is true that, whenever this Court has dealt with a matter concerning the interpretation of the first paragraph of Article 45 EC, its analysis has been confined to determining whether the activity was directly and actually connected with the exercise of official authority. However, as I shall demonstrate later, it must also be pointed out that, to date, the Court has never needed to go beyond the first stage of the process of examining the application of the first paragraph of Article 45 EC, since it has always been able, on the basis of an initial treatment of the concept in question, to declare that the activity in question was not connected with the exercise of official authority. In other words, in those cases in which it has had to rule on the interpretation of the first paragraph of Article 45 EC, the Court has been able to do so without contemplating the detailed meaning of 'official authority'. [56] On the other hand, if the answer to the question is yes, the Court must provide a fuller line of reasoning. In the latter case, the task of interpretation consists in determining, in the light of the extent to which the activity is connected with the exercise of official authority, whether the national measure in question is necessary to achieve the objectives pursued by Article 43 EC and the first paragraph of Article 45 EC.

85. Consequently, it must be concluded that Article 43 EC and the first paragraph of Article 45 EC do lend themselves to a proportionality test.

86. Within the context of the aforementioned provisions, a proportionality test is carried out, where appropriate, by undertaking an examination similar to that which the Court has employed in its case-law, [57] which considers (1) the impact of the measure adopted, on the one hand, and (2) the degree to which the activity in question is connected with the exercise of official authority. The more direct or immediate the connection is, the greater the range of measures covered by the first paragraph of Article 45 EC will be. The less direct the connection is, the fewer the measures justifiable under that provision will be, in terms of both their quantity and their impact.

55 — Article 46(1) EC. This provision has been interpreted by the Court on the basis of a case-by-case proportionality test, as is clear from extensive case-law. See, among some of the most recent judgments, those in Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 61 et seq.; Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 46. On the principle and its role in the determination of the scope of the freedoms, see Tridimas, T., *The General Principles of EU Law*, 2nd ed., Ed. Oxford University Press, Oxford, 2006, p. 193 et seq., and Galetta, D.-U., *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo*, Giuffrè Editore, Milan, 1998, p. 103 et seq.

56 — See, inter alia, Henssler, M., and Filian, M., 'Die Ausübung hoheitlicher Gewalt im Sinne des Art. 45 EG', *Europarecht*, 2005, p. 192 et seq.

57 — See the case-law cited in footnote 55.

2. Activity connected with the exercise of official authority

(a) The case-law of the Court

87. The first point to note when considering the present state of the case-law concerning Article 43 EC and the first paragraph of Article 45 EC is the frequency with which the Court has emphasised the need for a strict interpretation. As early as 1974, in *Reyners*, [58] it was clear that the case-law would confine the provision to a very narrow sphere. Evidence of that approach is the fact that, after over half a century of case-law and some 15 judgments, the Court has still not held that a particular activity is covered by Article 43 EC and the first paragraph of Article 45 EC.

88. Secondly, in its case-law, the Court has made it clear that an 'activity' is not synonymous with a 'profession'. Consequently, the fact that an activity is connected with the exercise of official authority does not *per se* mean that the first paragraph of Article 45 EC extends to all the other activities carried out by the professional in question. It is on this reasoning that the Court has held that the scope and applicability of Article 43 EC and the first paragraph of Article 45 EC may be extended to a whole profession only in cases where the activities connected with the exercise of official authority are inseparable from the remaining activities. As it held in *Reyners*, a ruling cannot be given on a whole profession 'when, within the framework of an independent profession, the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole'. [59]

89. Thirdly, the Court stated in *Reyners* that the scope of Article 43 EC and of the first paragraph of Article 45 EC 'is limited to those activities which, taken on their own, constitute a direct and specific connection with the exercise of official authority', [60] the Member States being unable to adopt unilateral provisions in this regard that extend or reduce its applicability. [61]

90. Finally, the fourth and final point to be drawn from the Court's case-law is the need to analyse the specific functions performed in the context of each activity, as part of an assessment based closely on the particular circumstances of the case in question; this will require the Court to give careful

58 — Case 2/74 [1974] ECR 631.

59 — Case cited above, paragraph 47.

60 — Paragraph 45.

61 — Case 147/86 *Commission* v *Greece* [1988] ECR 1637 paragraph 8.

consideration to issues of national law that are not always easy to resolve. Thus, *Reyners* made it clear that the criteria to be fulfilled in order for the first paragraph of Article 45 EC to be applicable must 'be considered separately in connection with each Member State having regard to the national provisions applicable to the organisation and the practice of this profession'.[62] As a result of that approach, the case-law is circumstantial, terse and very much confined to the characteristics of each activity. So much so in fact that, at present, there is not a single judgment in which the Court has expanded on the meaning of 'direct', 'specific' or 'official authority'.

91. As regards the practical outcome of that case-law, it is to be noted, as I have already indicated, that, in the judgments that it has delivered to date, the Court has not reached the conclusion that an activity is directly and specifically connected with the exercise of official authority.[63] The profession of lawyer,[64] the teaching profession or the running of private education centres,[65] the operation of data-processing systems for public authorities,[66] insurance auditors,[67] technical inspection of vehicles,[68] bets and lottery sales,[69] private insurance,[70] public ambulance services,[71] or inspection bodies in the field of organic production of agricultural products;[72] all these activities have come under the scrutiny of the Court and in all cases it held that they were not activities connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC.[73]

62 — Paragraph 49.

63 — The Federal Republic of Germany considers that, in Case C-55/93 *Van Schaik* [1994] ECR I-4837, the Court reached the conclusion that an economic activity was connected with the exercise of official authority. It stated in that judgment, in particular in paragraph 16, that the grant by a Member State of authorisation to test motor vehicles to garages established in other Member States involves the extension outside the national territory of rights and powers pertaining to the exercise of official authority. The Court concluded that it was the power to grant authorisations, not the economic activity authorised, that was connected with the exercise of official authority.

64 — *Reyners*.

65 — *Commission* v *Greece*.

66 — Case C-3/88 *Commission* v *Italy* [1989] ECR 4035.

67 — Case C-42/92 *Thijssen* [1993] ECR I-4047.

68 — Case C-438/08 *Commission* v *Portugal* [2009] ECR I-10219, and *Van Schaik*.

69 — Case C-272/91 *Commission* v *Italy* [1994] ECR I-1409.

70 — Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717; Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221; Case C-283/99 *Commission* v *Italy* [2001] ECR I-4363; and Case C-465/05 *Commission* v *Italy* [2007] ECR I-11091.

71 — Case C-160/08 *Commission* v *Germany* [2010] ECR I-3713.

72 — Case C-404/05 *Commission* v *Germany* [2007] ECR I-10239 and Case C-393/05 *Commission* v *Austria* [2007] ECR I-10195.

73 — Which does not mean that the Court has remained silent about activities that may be covered by the first paragraph of Article 45 EC; see, for example, *Van Schaik*, and even in the context of Article 39(4), concerning the free movement of workers, where, as *obiter dicta*, there are clear references to activities which might, in theory, be connected with the exercise of official authority, such as duties relating to public order and the notarising of documents in Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española* [2003] ECR I-10391.

(b) The need for a fuller definition of the meaning of official authority

92. As I have just explained, the case-law offers little assistance when it comes to analysing the nature or quality of 'official authority' as referred to in the provision at issue. A definition of what constitutes official authority within the meaning of the first paragraph of Article 45 EC [74] must of necessity begin with some *prior understanding* of the concept of official authority as a common component of the theory of the State, which term necessarily includes the European Union in that it is a community of States. [75]

93. In this sense, 'official authority' is, above all, 'authority', that is to say the capacity to impose a form of conduct consistent with an irresistible will. On the basis of a readily accepted understanding of the term, and in its fullest sense, that capacity is held exclusively by the State, that is to say by the institution that is the embodiment of the legal system as the instrument for the administration and organisation of legitimate force. [76] Official authority is, therefore, sovereign power, *qui superiorem non recognoscens in regno suo*.

94. This means that official authority is the supreme source of legitimate force in the State, which it administers either for the benefit of the existence of the State and the achievement of its aims (general interest) or in the service of legitimate expectations of conduct held by certain individuals in relation to others (private interest), in the latter case always in accordance with the conditions established previously. [77]

95. Of course, the purpose of the force monopolised and administered by the State is one of the first criteria to be taken into account when it comes to drawing the dividing line between official authority and individuals. Official authority must achieve those general objectives that underpin the legitimacy of the specific form of State adopted by the executive (in Europe, typically, a social and democratic State based on the rule of law). Individuals, on the other hand, in the exercise of their freedom as such, can dedicate

74 — The various versions of which, moreover, make indiscriminate use of two terms which are in theory capable of conveying different shades of meaning; these are 'official authority' and 'public power'. For example, 'official authority' is used in the French ('l'exercice de l'autorité publique'), English ('the exercise of official authority'), Portuguese ('exercício da autoridade pública'), Romanian ('exercitării autorității publice') and Maltese ('l-eżerċizzju ta' l-awtorità pubblika') versions, whereas the expression 'public power' is preferred in the Spanish ('ejercicio del poder público'), German ('Ausübung öffentlicher Gewalt'), Italian ('esercizio dei pubblici poteri') and Swedish ('utövandet av offentlig makt') versions.

75 — Notwithstanding that the last word on the meaning of the term must lie with European Union law, it being clearly understood that the Court of Justice, as the supreme interpreter of that law, will always take as the starting point for its definition the different ways in which the Member States interpret the term. See, inter alia, Schlag, M., 'Art. 45', *EU-Kommentar* (J. Schwarze, ed.), 2nd ed., Nomos, Baden-Baden, 2009.

76 — See, inter alia, in an extensive bibliography, Passerin d'Entreves, A., *La dottrina dello Stato*, Giappichelli, Torino, 1962.

77 — This obviously leaves out of account the force monopolised by another State, which exists harmoniously alongside that of the first State provided that the respective areas of sovereignty defined by international law are observed.

themselves to the satisfaction of their private interests. What is more, they may do so, where appropriate and under the conditions laid down by the system, by recourse to the force administered by official authority, which, for those purposes, is, in principle, an instrument for the pursuit of non-general interests.

96. However, the criterion most traditionally used to identify official authority is the capacity of the body exercising official authority to impose its will unilaterally, that is to say without requiring the consent of the person subject to the relevant obligation. An individual, on the other hand, may secure the acceptance of his will by another individual only with the latter's consent.

97. Things are not so simple, however, when we are dealing — as we always are — with a democratic State. For, in these circumstances, some form of consent is always ultimately required. The assertion that the will of a body exercising official authority is unchallengeable must also be qualified in this context. After all, in a State governed by the rule of law, which includes the European Union, any act of official authority is open to review. Seen in that light, the sovereign authority of a democratic State is more *auctoritas* rather than pure *imperium*.[78] In other words, it is the power of domination exercised by the will of the very persons under an obligation to obey and ensured by the legitimacy of the will to dominate rather than by the naked threat of physical coercion.[79]

98. This means that, in this context, official authority is a relative rather than an absolute concept and may therefore vary in degree.[80] The easier it is to impose a form of conduct, the more akin such imposition is to the exercise of official authority, although this does not include measures imposed in an outright and unchallengeable manner.

99. For all those reasons, reliance on the criterion of purpose (general interest/individual interest) or the criterion of the manner of imposition of the obligation secured by (unilateral/bilateral) force is an approach which inevitably leads to shaky ground. For the concepts involved are extraordinarily imprecise,

78 — In reality, of course, sovereignty is a quality which, though exhibited by the State, cannot be claimed by any of its institutions which, as the State itself, are based solely on the constitution, 'es gibt nur so viel Staat, wie die Verfassung konsituiert' 'there can only be as much State as granted by the constitution' (Häberle, P., *Europäische Verfassungslehre*, 6th ed., Nomos, Baden-Baden, 2009, p. 187, reiterating the idea of Smend, R., and Arndt, A.). It has been said that there is no sovereign in the constitutional State since sovereignty is a quality of the State as a whole: Kriele, M., *Einführung in die Staatslehre. Die geschichtlichen Legitimatitätsgrundlagen des demokratischen Verfassungsstaates*, Rowohlt Taschenbuch Verlag, Hamburg, 1975.

79 — The original legitimacy supplemented by that conferred through its exercise in accordance with procedural logic. See to this effect Luhmann, N., *Legitimation durch Verfahren*, Ed. Luchterhand, Neuwied/Berlin, 1969.

80 — See again to this effect, for example, Tomuschat, C., p. 69.

subject as they are to the vagaries of relative proportions, and, therefore, inaccessible to the slightest degree of objectivity. The aforementioned criteria are of course workable in circumstances indisputably involving the exercise of official authority, such as the activities most directly connected with the exercise of sovereign rights and powers (army, police force, courts, government), but they are not sufficient to determine the classification to be given to other public activities which, though closely connected with the use of coercion, are none the less qualitatively distinct from private activity.

100. Taking this line of reasoning a step further, it is important to take into account the fact that the modern State is a much more sophisticated form of organisation of authority than those which existed previously. The latter boiled down to the administration of physical coercion through extraordinarily simplified procedures for defining the conditions for its use. Accordingly, in order to define the phenomenon of official authority in all its complexity, it is now all but impossible not to start from an understanding based on the logic of the legal system in which that authority is exercised.

101. In this connection, the legal system is a process for organising the exercise of legitimate force which may, where appropriate, result in the application of that force to a specific situation. That being so, there should be no reason not to accept the proposition that the acts which the system finally adopts (that is to say where the process of legitimate force leads to an act which terminates that process, giving it definitive status) appear to be the fullest expression of the legal order. [81]

102. On that premiss, the decisive criterion for classifying an act as emanating from official authority would then be the nature of its relationship with the legal system operated in the State. More specifically, the nature of an activity would have to be regarded as constituting participation in the exercise of official authority depending on the extent to which that activity forms part of (*belongs to*) the legal system. The criterion, therefore, would not be whether it is merely in conformity with the legal system but whether it is an act integral to that system. [82]

81 — On the view of the legal system as a succession of applications traceable back to an initial provision of positive law constituting the expression of sovereign authority, see, by way of example, Kelsen, H., *Reine Rechtslehre*, 2nd ed., Deuticke, Vienna, 1960.

82 — Accordingly, in order to determine whether or not a specific activity is connected with the exercise of official authority, it is not necessary to attribute that activity to one of the three branches of government and/or functions of the State, that is to say the legislature, the executive or the judiciary, in particular the judiciary, as the arguments put forward in these proceedings show.

103. In this connection, the courts may be regarded as the most representative expression of official authority. After all, their rulings provide a definitive statement of the law and, in this context, become indistinguishable from the legal system itself. [83] By the same token, however, it is also fair to say that official authority is exercised by a body whose acts are capable of enjoying that status without the need for *iurisdictio*. Firstly, the law is executive in its own right, as are provisions adopted by the administrative authorities or orders made by the law enforcement agencies. These acts and provisions are always open to judicial review, but they do not in any event require 'authorisation' in order to produce immediate effects.

104. It is clear from the foregoing that no individual can create legal acts capable of being imposed on a third party other than through the intervention of official authority. It having been established that individuals may not employ force, it follows that the assertion of individual rights always requires official authorisation. Official authority is not confined in such cases to *reviewing* an act capable of producing in and of itself a binding effect on a third party, such as acts of the administration, the executive or the legislature. On the contrary, in such cases, the body exercising official authority always *establishes* the obligation which the individual wishes to assert against a third party. Such obligations may have arisen from a concurrence of wills (contract/operative principle), but the individual can do nothing to enforce them without the intervention of official authority.

105. It is therefore appropriate to conclude from the foregoing, albeit with the degree of generalisation required here, that, among the features that identify official authority in the various national traditions, regard is to be had to its capacity to define an act, provision or form of conduct as corresponding to the will of the State as formalised through its legal system. That, after all, is a lowest common denominator shared by all those traditions, under which the capacity to define a specific will as corresponding to the general will of the State is regarded as the decisive criterion in drawing the dividing line between the public and the private spheres.

106. The foregoing considerations should make it possible to address with a greater degree of confidence the central question posed by the activities of notaries.

83 — Merkl, A., *Die Lehre von der Rechtskraft*, Deuticke, Leipzig, 1923.

3. Whether the activities of notaries, in particular authentication, form part of the negative scope of the freedom of establishment

107. A note of caution must none the less be sounded. The question whether the activities of notaries fall within what we have termed the 'negative scope' of the freedom of establishment is not only not resolved in the Court's case-law, which goes without saying at this stage, but comes in the wake of an intense and extensive debate on the matter which is amply reflected both in the written observations and in the extended hearing which took place on 27 April 2010. While it is true that the case-law contains the occasional passage that may be regarded as giving an affirmative response to that question, [84] it can in no way be said that the Court has had occasion to examine the question with the thoroughness required.

108. In this connection, the fact that the debate on this matter has been intense and extensive is readily apparent from the positions adopted at different points in time by the European Parliament. [85] The same might be said of recital 41 of Directive 2005/36, reproduced above, however ambiguous or otherwise it may be — an issue to which I shall return later. In any event, it is clear that none of those statements is capable of substituting the Court in, or relieving it of, its function of giving the last word on the interpretation of the Treaties

(a) Authentication as the central activity of notaries in the defendant Member States

109. Be that as it may, let us start by recalling that both the Member States and the Commission recognise that the core of a notary's activities consists in the power to authenticate and the effects attendant upon it: enforceability and probative force. Some Member States, such as Belgium or Austria, have highlighted a number of secondary notarial

84 — In *Colegio de Oficiales de la Marina Mercante*, the Court held, albeit in relation to Article 39(4) EC, that 'Spanish law confers … authority in respect of notarial matters and the registration of births, marriages and deaths, which cannot be explained solely by the requirements entailed in commanding the vessel. Such duties constitute participation in the exercise of rights under powers conferred by public law for the purposes of safeguarding the general interests of the flag State' (paragraph 42).

85 — See European Parliament Resolutions of 18 January 1994 and 23 March 2006 stating that the profession of notary is connected directly and actually with the exercise of official authority. The 2006 Resolution stated very explicitly that the Parliament 'considers that Article 45 of the Treaty must be fully applied to the profession of civil-law notary as such', and based that assertion on the fact that 'the partial delegation of the authority of the State is an original element inherent in the exercise of the profession of civil-law notary, and whereas it is currently exercised on a regular basis and represents a major part of the activities of a civil-law notary'.

functions in their legal systems which reflect aspects of official authority. However, they all, including the Commission, agree that authentication, combined with its effects, is the activity which best defines the profession and without which it would not be meaningful.

110. Moreover, the reason it has been possible to group together six actions for failure to fulfil obligations for the purposes of this Opinion is essentially the fact that the expression 'activities of notaries' can be used in the same way in relation to all of them. In other words, a notary's work can be said to consist, in the six Member States, in the central activity of 'authentication', the effects of which are broadly the same in their respective legal systems. It is of course within the scope of the sovereignty of those Member States to alter that situation, either because the Member State chooses to exercise those functions directly through its own administrations or because it drastically weakens the effects of notarial intervention in 'public' documents. An example of the former scenario would be Portugal before it began the process of altering the profession of notary there, or Baden-Württemberg; an example of the latter scenario might, by definition, also be Portugal, depending on how extensive the process of change has been over the last decade. [86] In short, the answer to the issue raised by these actions must be based on a classification of certain professional activities as they are currently regulated in the Member States concerned. Any change to those regulations may of course have a bearing on the answer to be given by the Court.

111. It is also important to point out here, in accordance with *Reyners*, and as I made clear earlier, that what I am calling the negative scope of the freedom of establishment may be extended to an entire profession where 'the activities connected with the exercise of official authority are [inseparable] from the professional activity in question taken as a whole.' [87] The view taken by the Member States and the Commission that authentication, together with its effects, is inseparable from the activities of notaries as a whole must therefore be endorsed. Consequently, if it is confirmed that those activities are connected directly and specifically with the exercise of official authority, the activities of notaries, in the sense of the profession as a whole, would

86 — On the specific profession of notary in Portugal, see my Opinion in Case C-52/08 *Commission* v *Portugal*, pending before the Court, delivered on the same day as this Opinion.

87 — Paragraph 47.

fall within the scope of the circumstances provided for in the first paragraph of Article 45 EC.

112. In the six defendant Member States, the notary's task consists principally in drawing up authentic documents that have two main characteristics: perfect probative force and enforceability. [88] By way of a description which is broadly applicable to all those Member States and which recalls the description given at the beginning of this Opinion, it is fair to say that, in performing the function of authentication, the notary acts on the instruction of a party and carries out an examination of the legality of the instrument which he authenticates. The notary's intervention may be compulsory or optional, depending on the instrument that is to be authenticated, and involves verifying that all the conditions that may be required by law for the execution of the instrument have been met and that the parties have legal capacity and capacity to act. [89]

113. Instruments drawn up by a notary have perfect probative force equivalent to that conferred by acts adopted by a public official and rebuttable only before a court of law. In other words, the notary's assessment is open to review but only by means of an extraordinary review procedure. [90]

114. An authenticated instrument is also enforceable throughout the territory of the country. Accordingly, the debtor does not have to give his consent (although he does have to be notified) in order for the notarial instrument to be enforced, since it falls directly to a public authority to effect such enforcement. Where enforcement is opposed, the debtor may bring the matter before the courts by raising a plea of objection to enforcement. [91]

(b) Attribution of the activity of authentication to the exercise of official authority

115. The answer to what is ultimately the key question raised by these actions for failure to fulfil obligations is almost self-evident from the foregoing considerations on the criteria for defining official authority. After all, if one of the most characteristic features of the modern State is its connection with the legal system, the fact that a given activity is capable of affecting the configuration of a legal system will be decisive in formulating that answer.

116. If I may take the liberty of reiterating some of those considerations, the will of the State finds its definitive expression in judicial

88 — See points 13, 20, 27, 34, 42 and 49 of this Opinion.

89 — See points 14, 21, 28, 35, 36, 43 and 50 of this Opinion.

90 — See points 15, 22, 29, 37, 44 and 51 of this Opinion.

91 — See points 16, 23, 30, 38, 45 and 52 of this Opinion.

rulings, which expression may already have been given in instruments which, depending on the person from which they emanate, will or will not be immediately enforceable. We have also seen that it is that very degree of immediacy of enforceability that is the most reliable criterion for identifying official authority. Any enforcement claim can always be legally opposed of course and, in such cases, it will once again be the courts that will definitively dispose of the matter. The courts may perform their role as appeaser in the resolution of specific disputes, in particular the resolution of opposing private-law claims (typically civil claims brought by one individual in order to assert his rights against another individual).

117. Accordingly, and particularly importantly for these purposes, a given national legal system may choose to *pre-empt* (and thus prevent) the dispute. Crucially, it may do so by classifying as public (with proven legal value and inherent enforceability) certain instruments and measures adopted by individuals which, in themselves, would otherwise have no greater value than private transactions. By taking such action in relation to instruments executed by individuals, the body exercising official authority endows them with reliability and certainty, thus reducing litigation. That said, the possibility of judicial intervention is of course never ruled out if, despite everything, a dispute does eventually arise. [92] Not entirely appropriately, but certainly eloquently, that function of pre-emptive appeasement, a characteristic feature of the notarial activity of authentication, has led to its being described as 'preventive justice'.

118. In other words, within the conceptual framework defined in points 92 and 105 of this Opinion, in performing the function of authentication, notaries participate directly and specifically in the exercise of an official activity in the sense that they thus expedite for individuals an authorisation to exercise subjective rights which they would otherwise have to request on a case-by-case basis. Notarial intervention relieves them of the need to seek the intervention of another body exercising official authority in order to assert the fact declared to be authentic by the notary and therefore confers on the authenticated instrument a conclusive value under public law which can henceforth be challenged only before the courts (in the same way, moreover, as any measure of official authority can). Obviously, it is not immunity from judicial review — impossible anyway in a State governed by the rule of law — that determines whether a body acts in the exercise of official authority, but the conclusive presumption of the

92 — See in particular de Otto, I., *Estudios sobre el Poder Judicial*, Ministry of Justice, Madrid, 1989.

legitimacy of its own acts and, consequently, some degree of rigour in the conditions necessary for their review.

119. Obviously, notaries do not employ coercion or impose any obligations unilaterally. However, as we have seen, this is not the only criterion for determining whether a body acts in the exercise of official authority. Authentication confers official status on instruments drawn up by individuals, in the sense that it gives them advance legal value which, without notarial intervention, the individuals would of necessity have to seek from an(other) body exercising official authority in order to render those instruments effective in law. This form of official authority is exercised in the sphere closest to that of the private individual, the latter sphere being pre-eminently characterised by free will. However, taking into account its capacity to make what is purely private public and thus to give it the force inherent in official authority, it unquestionably has a public dimension. [93]

120. The fact that, because they have a less 'intimate' connection with the exercise of official authority in the strictest sense of that term (through their connection with the powers of sovereign authority), the activities of notaries may be subject to less strict conditions than are applicable to the authorities most closely involved in the expression of sovereignty is another matter.

121. Consequently, in so far as authentication matches the characteristics of that function, I consider it to be an activity which is connected directly and specifically with the exercise of official authority, since it gives a special status to documents, provisions and forms of conduct that would otherwise have no more legal value than the expression of a private will. If the case-law emerging from *Reyners* is applied to that conclusion, it must be stated, given that authentication constitutes the inseparable core of the functions performed by notaries in all the defendant Member States, that the profession of notary in general and taken as a whole is connected directly and specifically with the exercise of official authority.

122. However, I am aware that that conclusion is not yet sufficient in itself to form the basis of an answer to the first plea in the present infringement proceedings.

93 — In this respect, certain symbolic features highlighted by some Member States may serve to endorse the proposition I am putting forward. Thus, the fact that, in some Member States, notaries keep and make use of the State's seal. Also indicative of the public function of notaries is the enforcement clause sometimes used, such as, for example, in France: 'En conséquence, la République mande et ordonne à tous les huissiers de justice, sur ce requis de mettre les présentes à exécution. Aux Procureurs Généraux de la République près des Tibunaux de grande instance d'y tenir main. A tous, Commandants et Officiers de la force publique de prêter main-forte lorsqu'ils en seront légalement requis.'

4. The nationality clause in the light of the principle of proportionality

123. So far, I have examined the functional aspect of the profession of notary in the defendant States. However, the Commission has focused its action for a declaration of infringement on a specific provision of the legislation governing notaries, the nationality clause. It is now necessary, therefore, to establish whether or not the fact that the profession of notary falls within the 'negative scope' of the freedom of establishment inevitably lends legitimacy to that clause. This is another way of saying, as I pointed out earlier, that a proportionality test must be carried out to balance any discrimination on grounds of nationality, on the one hand, against the extent to which the activities of notaries are connected with official authority, on the other.

(a) Notarial status

124. Of course, function is followed by status and that status confirms the classification given to the function. Thus, a notary is a public official who represents the State, although the activity is considered to be an independent profession. His appointment is permanent and is subject to a disciplinary regime specifically applicable to persons working on behalf of the public authorities. [94]

125. The official nature of the link between the notary and the State is particularly indicative of the connection with official authority. It is after all a link that emerges when the notary first takes up his activity, access to the profession being conditional on the passing of tests similar to those taken by civil servants and on the taking of an oath. His status is therefore an expression of the institutional nature of the link between the notary and the State and therefore enables him to formalise the will of the State by executing private legal instruments.

126. By virtue of that link, the defendant Member States have introduced into their national legislation the requirement of holding the nationality of the Member State in order to work as a notary there. That requirement, which causes direct discrimination on grounds of nationality and is evidently to be satisfied by anyone working as a notary, is the element which, in the Commission's view, infringes Article 43 EC and the first paragraph of Article 45 EC, and which, as shall be discussed later, needs to be made subject to a proportionality test.

94 — See points 18, 25, 32, 40, 47 and 54 of this Opinion.

(b) Discrimination on grounds of nationality in the light of Article 43 EC and the first paragraph of Article 45 EC

127. As was explained in points 83 to 86 of this Opinion, when applying Article 43 EC and the first paragraph of Article 45 EC, it is not only necessary to assess whether an activity is connected with the exercise of official authority; it must also be considered, next, whether the contested national provision is justified, in the light of the principle of proportionality, by the objectives pursued by those two provisions.

128. It must be pointed out first of all that the first paragraph of Article 45 EC, despite the more 'spontaneous' interpretation of it which may have emerged and even though the case-law may indicate otherwise, [95] makes no reference to discrimination on grounds of nationality. Consequently, the association traditionally made between the first paragraph of Article 45 EC and the nationality requirements must be approached with caution, since it is an association which has been formed as a result of the cases on which the Court has given rulings to date rather than on the basis of a *necessary* link between the two. [96] It is important to emphasise that, although the first paragraph of Article 45 EC is a provision that has not changed since it was originally drafted, the Treaty has changed radically. Although the initial understanding of the first paragraph of Article 45 EC could be linked to nationality, the transformation which the founding Treaties have undergone over the last 20 years should not lead one to conclude so readily that that provision necessarily presupposes that States are justified in introducing measures discriminating on grounds of nationality without exercising a greater degree of caution.

129. Secondly, it need hardly be pointed out that direct discrimination on grounds of nationality is not a common or garden measure the effect of which is merely to hinder the freedom of movement. Quite the contrary, such discrimination has special implications for European Union law, since, for one thing, it constitutes the most naked expression of national protectionism. [97] In a Union

95 — See the case-law cited in footnotes 64 to 73.

96 — Proof of this is the fact that the first paragraph of Article 45 EC has also been relied upon, although unsuccessfully, to justify conditions governing residence or permanent infrastructures in a Member State, as was the case in *Commission* v *Germany* and *Commission* v *Austria*.

97 — See, in general, Davies, G., *Nationality Discrimination in the European Internal Market*, ed. Kluwer, The Hague, 2003, and Rossi, M., 'Das Diskriminierungsverbot nach Artikel 12 EGV' *Europarecht*, 2000, p. 197 et seq.

which prides itself on the creation of a market without internal borders, the existence of direct discrimination on grounds of nationality constitutes a negation of the very idea of integration. Its exceptional nature is all the more striking given that the Union has incorporated fundamental rights, in particular the principle of equality, into its internal law under Articles 20 and 21 of the Charter of Fundamental Rights. [98] Thus, a Union established under the rule of law that guarantees respect for fundamental rights cannot but question an interpretation that results in a form of discrimination that is already serious enough in itself, but which also undermines the most basic principles of the internal market. This is confirmed by Article 12 EC, which states that 'any discrimination on grounds of nationality shall be prohibited' and by the case-law of the Court of Justice, which has repeatedly rejected recourse to such measures by the Member States. It can therefore be stated that of all the grounds for discrimination prohibited by European Union law that based on nationality is particularly serious. [99]

130. We therefore have no choice but to consider to what extent the rule resulting from Article 43 EC and the first paragraph of Article 45 EC derogates from the rest of the Treaty and, in particular, from some of its basic principles.

131. Discrimination on grounds of nationality is of course prohibited by Article 12 EC. [100] However, through the joint application of Article 43 EC and the first paragraph of Article 45 EC, a Member State could, in principle, lawfully adopt a discriminatory measure of this kind in relation to natural persons. Alternatively, it might be argued that, in such circumstances, Article 18 EC would be applicable, which establishes the free movement of persons where the economic freedoms do not

98 — In his Opinion in Case C-303/06 *Coleman* [2008] ECR I-5603, Advocate General Maduro stated that 'the most obvious way in which such a person's dignity and autonomy may be affected is when one is directly targeted because one has a suspect characteristic. Treating someone less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being human. Recognising the equal worth of every human being means that we should be blind to considerations of this type when we impose a burden on someone or deprive someone of a benefit. Put differently, these are characteristics which should not play any role in any assessment as to whether it is right or not to treat someone less favourably' (point 10).

99 — Evidence of such seriousness is the substantial case-law of the Court of Justice, which has repeatedly rejected the efforts of the Member States to justify the adoption of provisions discriminating on grounds of nationality. See, among many others, Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraph 33; Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325, paragraphs 26 and 29; Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraphs 19 and 20; Case C-164/07 *Wood* [2008] ECR I-4143, paragraph 13; and Case C-524/06 *Huber* [2008] ECR I-9705, paragraphs 78 and 79.

100 — See Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 19; Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 20; Case C-131/96 *Mora Romero* [1997] ECR I-3659, paragraph 10; Case C-336/96 *Gilly* [1998] ECR I-2793, paragraph, 37; Case C-100/01 *Oteiza Olazábal* [2002] ECR I-10981, paragraph 25; Case C-289/02 *AMOK* [2003] ECR I-15059, paragraph 25; and Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 57.

apply. However, that provision will of course be applicable 'subject to the limitations and conditions laid down in the Treaties'; those limitations clearly include the first paragraph of Article 45 EC. [101]

132. It is therefore fair to say that, if they determined that a measure of discrimination on grounds of nationality fell within the negative scope of the freedom of establishment, Member States would be authorised to derogate from European Union law, and that measure could not in principle be called into question under any other provision of the Treaties.

133. That outcome, which makes Article 12 EC subordinate to other provisions of the Treaty, strikes me as questionable. The fact that Article 12 EC is subject to conditions does not mean that it is a subsidiary provision. Quite the reverse. Its position within the scheme of the Treaty, as well as the significance of the principle of non-discrimination in European Union law, means that it must be regarded as a panoptic provision rather than as a subsidiary provision, in the sense that it is automatically open to exclusion depending on other, more specific provisions of the Treaty. In addition, the Court of Justice appears to have been leaning towards that interpretation in its most recent judgments. [102] Consequently, the mere fact that an activity is considered, in the light of Article 43 EC and the first paragraph of Article 45 EC, to fall within the negative scope of the freedom of establishment does not necessarily mean that it is exempt from a schematic interpretation in the light of Article 12 EC.

134. That interpretation is further endorsed by the fact that, in a case such as this, an activity such as that of a notary, although apparently connected with the exercise of official authority, continues to be subject to other provisions of the Treaty. This is true in particular of Article 86 EC, which requires Member States to ensure compliance with the rules on competition in sectors subject to public service obligations. [103] If the Court

101 — See Rossi, M., 'Das Diskriminierungsverbot nach Artikel 12 EGV', p. 208; Epiney, A., 'The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship', *European Law Journal*, 2007 p. 611 et seq.; Kadelbach, S., 'Union Citizenship', in von Bogdandy, A., and Bast, J., *Principles of European Constitutional Law,* 2nd ed., Hart Publishers, Oxford-Portland, 2005, p. 461.

102 — See Case C-251/04 *Commission* v *Greece* [2007] ECR I-67, paragraph 26, and the Opinion of Advocate General Mengozzi in Case C-383/08 (pending before this Court), delivered on 7 September 2010, in particular points 60 to 69.

103 — See van Vormizeele, P.V., 'Art. 86', in Schwarze, J., *EU-Kommentar*; Buendía Sierra, J.L., *Exclusive rights and state monopolies under EC Law,* Oxford University Press, Oxford, 1999; Prosser, T., *The Limits of Competition Law. Markets and Public Services,* Oxford University Press, Oxford, 2005; and Szyszczak, E., *The Regulation of the State in Competitive Markets in the EU,* Hart Publishers, Oxford, 2007.

finds that an activity falls within the scope of the first paragraph of Article 45 EC, this does not necessarily mean that it is immune to the rules on competition laid down in Articles 81 EC and 82 EC. [104] The same applies to the legal bases prescribed for the implementation of European Union policies, which in no way prevent the institutions from adopting regulations or directives in areas which, from the point of view of the freedoms, have been excluded from their scope. This is confirmed by the case-law of the Court, which, for example, has stated that the activities of notaries are subject to VAT, on the ground that it considers them to be taxable persons inasmuch as they independently carry out an economic activity, 'whatever the purpose or results of that activity'. [105] Indeed, in *Commission* v *Netherlands*, the Court, after finding that the activities of notaries are public in nature, held, in the specific context of indirect taxation, that such activities are not pursued in the form of a body governed by public law, 'since they are not part of the public administration, but in the form of an independent economic activity carried out in the exercise of a liberal profession.' [106]

135. In short, the fact that an activity is connected with the exercise of official authority does not exempt the Member States from the obligation to comply with European Union law. That obligation, which in this case relates to the activities of notaries and, therefore, to a group made up of natural persons, must be given special consideration in circumstances involving discrimination on grounds of nationality. In so far as it pertains to natural persons, on the one hand, and measures of discrimination based on nationality, on the other hand, this case necessarily requires that the issue also be addressed in the light of European Union citizenship status.

136. Since 1992, both the Treaties and the case-law of the Court of Justice have helped to create a direct and evolving bond of citizenship between the individual and the Union. [107] That relationship is of course established on the basis of the nationality of each Member State, which does not mean that such citizenship is superimposed; on the contrary, it is a status which is established by virtue of a person's status as a national but which, once created, evolves and acquires rights and duties autonomously, the Member States being un-

104 — See, inter alia, Case 267/86 *Van Eycke* [1988] ECR 4769; Case 30/87 *Bodson* [1988] ECR 2479; Case C-202/88 *France* v *Commission* [1991] ECR I-1223; Case C-41/90 *Höfner and Elser* [1991] ECR I-1979; Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941; Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Others* v *Ufex and Others* [2003] ECR I-6993; and Case C-49/07 *MOTOE* [2008] ECR I-4863.

105 — Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471. The citation comes from Article 4(1) of the so-called 'Sixth VAT Directive', Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

106 — Paragraph 22.

107 — See, inter alia, O'Leary, S., *The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship*, Kluwer Law International, The Hague, 1996, pp. 23 to 30.

able to adopt legislation to oppose it. That autonomy was recently confirmed by the Court in *Rottmann*, when it stated that Member States cannot interfere in the bond between the citizen and the Union by unjustifiably depriving him of State nationality. Consequently, a national measure that can cause a citizen 'to lose the status conferred by Article 17 EC and the rights attaching thereto falls, *by reason of its nature and its consequences*, within the ambit of European Union law.' [108]

137. Moreover, European citizenship is evolving not only as a direct bond between the citizen and the Union but also as a sphere of relationships between the citizen and all the Member States. That aspect of citizenship guarantees for all nationals the right to move freely throughout the territory of the Union, as well as the right to reside in any Member State. The bond with the Union thus produces a horizontal effect in respect of all national authorities, which must refrain from adopting measures that hinder freedom of movement or make it more difficult, even where the measure affects nationals of the State concerned. [109] To that end, the Court has enhanced the scope of Article 18 EC first by giving it direct effect [110] and subsequently by developing a substantial line of case-law that has given substance to mobile citizen status, even in situations where the individual affected did not pursue an economic activity [111] or where the measure affected relatives from third countries. [112]

138. A nationality clause which affects natural persons and which is introduced under the alleged cover afforded by the negative scope of the freedom of establishment must be categorised first and foremost as a measure affecting citizenship status, in so far as it uses the criterion for the attribution of European citizenship, that is to say the nationality of the State, as a ground for preventing access to activities which are connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC. However, only in very defined circumstances, which, as we shall see, do not arise in this case, will the Treaties allow the basis for establishing European citizenship to be used as a ground for derogating from a right intimately connected

108 — Case C-135/08 [2010] ECR I-1449, paragraph 42 (italics added).

109 — See, for example, Case C-148/02 *Garcia Avello* [2003] ECR I-11613; Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639, or *Rottmann*.

110 — Case C-413/99 *Baumbast and R* [2002] ECR I-7091.

111 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193; Case C-60/00 *Carpenter* [2002] ECR I-6279; Case C-209/03 *Bidar* [2005] ECR I-2119; Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451; Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161; and, most recently, Case C-480/08 *Teixeira* [2010] ECR I-1107 ; and Case C-310/08 *Ibrahim* [2010] ECR I-1065.

112 — See, for example, *Carpenter*, and Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

with status as a European Union citizen. In so far as it has a transnational dimension, European citizenship is founded on the existence of a community of States and individuals who share a scale of values, a high degree of mutual trust and a commitment to solidarity. Given that, on being awarded the nationality of a Member State, an individual is introduced into that community of values, trust and solidarity, it would be paradoxical if membership of that very community were to constitute the ground for preventing a European Union citizen from exercising the rights and freedoms guaranteed by the Treaty.

139. In the light of all the foregoing, it may be stated that discrimination on grounds of nationality is a measure which, by its very nature, constitutes a serious encroachment in the sphere of European citizenship which would be permissible in the light of Article 43 EC and the first paragraph of Article 45 EC only after a strict examination as to its proportionality, meaning that it would have to be supported by very strong reasons in the general interest.

(c) Assessment of proportionality

140. Finally, as I have stated above, it is necessary when carrying out a proportionality test to the rule resulting from Article 43 EC and the first paragraph of Article 45 EC to consider to what extent the activity in question is connected with the exercise of official authority. In these proceedings, as explained in points 115 to 121 of this Opinion, the activities of notaries are connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC but, not least because they are performed on an economic basis, they do so to a lesser extent than other activities such as those involving the direct use of public powers. Consequently, the Member States are authorised to adopt such measures as they consider appropriate outside the scope of the aforementioned freedoms, provided that they are proportionate to the aims or objectives pursued. In view of the arguments put forward by the Member States, although it is true that the profession of notary involves guarantees and special characteristics that make apparent its importance in the context of private legal transactions, it is also true that none of those characteristics is such that the status of its members may justifiably constitute the grounds for a measure as severe and drastic as the direct discrimination on grounds of nationality at issue here.

141. The defendant Member States have relied in particular for these purposes on the importance of the oath taken by notaries before they take up their duties. According to the Member States, that declaration expresses the close bond that exists between the notary and the State which confers official authority on him. That bond is manifested by

the individual's loyalty to a given political community and, in this case, takes the form of a nationality requirement. The defendant Member States have repeatedly emphasised the importance of that bond, Luxembourg in particular having even linked the nationality clause limiting access to the profession of notary to the protection of the Grand Duchy's constitutional identity.

142. However, the concept of loyalty as an expression of commitment to and solidarity with the political community cannot be regarded in itself as a distinctive, exclusive and preclusive characteristic of the Member States, such that it inevitably requires the bond of nationality. On the contrary, a European citizen is not as such unable to make a commitment of loyalty to the Union. A premiss whereby a national of a Member State has no way of expressing a legitimate commitment of loyalty to another Member State other than by first adopting its nationality would seriously call into question both Article 17 EC and Article 18 EC, as well as the political rights of citizenship flowing from the Treaties and from the Charter of Fundamental Rights of the European Union.

143. The instruments of judicial cooperation in civil and criminal matters adopted by the European Union, in particular that provided for in Council Regulation (EC) No 44/2001, [113] lend support to that idea. A notary, through his intervention, performs an activity of an official nature the effects of which are automatically recognised in all the States of the Union. The existence of a high degree of trust and the community of values and principles on which the Union is founded make the notary a public official not only of the State but also of the Union. That conferral of authority, which is effective within the Union, reflects a more complex commitment of loyalty than that between a national and his State alone. The notary thus operates within a framework in which loyalty extends both to the State conferring authority and to the Union assuming it, as well as to the other Member States.

144. When the process of European integration has reached a stage where European Union citizens are able to participate in the national democratic decision-making processes in the Member State where they are resident, as is the case with local elections or support for citizens' legislative initiatives at European

113 — Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), in particular Article 57.

level, loyalty can no longer be confined solely and necessarily to the nationals of that Member State. On the understanding that loyalty is a commitment to assume rights and obligations that bind the citizen to the Member State and to the Union, I do not consider it to be necessary or reasonable, in the circumstances of these proceedings, to require a bond of nationality with the Member State as an expression of that commitment.

145. In any event, the role of Gerichtskommissär performed in particular by notaries in Austria deserves special mention. Although it is true that a notary may make individual and binding decisions in the course of performing that role, it is also true that that role is a secondary function which, moreover, is largely confined to matters of succession. Also, as the agent for the Austrian Government stated at the hearing, a notary who acts as a Gerichtskommissär does so as an independent professional and not as an official, a fact which, in principle, indicates that the role in question is open to competition. Consequently, in the light of the information furnished to the Court, the fact that an Austrian notary performs functions as a Gerichtskommissär likewise does not justify the masking behind the rule resulting from Article 43 EC and the first paragraph of Article 45 EC of discrimination on grounds of nationality.

5. Conclusion in respect of the first plea of infringement

146. In short, a measure which introduces a nationality clause such as that challenged by the Commission in these proceedings is disproportionate in so far as it is not necessary in order to achieve the aims pursued by each Member State in removing the activities of notaries from the scope of the freedom of establishment. Consequently, despite the fact that the activity in question is connected with the exercise of official authority and therefore falls within the negative scope of the freedom of establishment, I consider that, in the specific circumstances of the profession of notary, Article 43 EC and the first paragraph of Article 45 EC do not allow a national measure that discriminates on grounds of nationality against those who wish to gain access to that profession. In the light of all the foregoing, I consider that, although the activities of notaries as carried on in the defendant Member States fall within the negative scope of the freedom of establishment under Article 43 EC and the first paragraph of Article 45 EC, they are not such as to warrant the — disproportionate — imposition of a nationality clause as part of the rules governing the profession of notary, since this is not required by the extent to which those activities are connected with the exercise of official authority. The first plea of infringement, based on a breach of Article 43 EC and the first paragraph of Article 45 EC, should therefore be upheld.

B — *The second plea of infringement*

147. With the exception of the French Republic, the Commission accuses the defendant Member States of infringing Directive 2005/36 on the recognition of professional qualifications by having failed to apply it to the profession of notary in their national legislation.

148. As explained above, the profession of notary falls within the 'negative scope' of the freedom of establishment, on the basis of the interpretation of Article 43 EC and the first paragraph of Article 45 EC. I have also made it clear in the foregoing pages that such an outcome does not necessarily mean that the Member States are not required to fulfil their obligations under the Treaties. None the less, there is reasonable doubt as to the applicability of Directive 2005/36 to the profession of notary.

149. In an action for failure to fulfil obligations, it is for the Commission to demonstrate that the Member State has committed an infringement of European Union law. However, as the documents before the Court show, the Commission has confined itself to relying on the failure to transpose Directive 2005/36 in good time, whereas the Member States have sought the application not only on of the first paragraph of Article 45 EC but also of the exclusion of the activities of notaries referred to in recital 41 of the aforementioned directive.

150. Recital 41 of Directive 2005/36 states that 'this Directive is without prejudice to the application of Articles 39(4) and 45 of the Treaty concerning notably notaries'. The legislature, albeit with all the ambiguity of that statement, seems implicitly to suggest that the answer to the question whether the activities of notaries fall within the scope of the first paragraph of Article 45 EC *will determine* the answer to the question whether the directive is applicable to the profession of notary. The strategy adopted by the Commission in these proceedings, in so far as it takes the first paragraph of Article 45 EC as the premiss for its arguments, seems to indicate that it concurs with the position formulated in recital 41. However, in the light of the reply which I propose should be given to the first question, the Commission should have raised other arguments concerning the applicability of the directive to the profession of notary. Its sole argument, which is based on an interpretation of the notion of 'official authority' laid down in the first paragraph of Article 45 EC, has been invalidated. In those circumstances, it is clear that the Commission has not advanced any valid argument which would

make it possible to uphold the second plea of infringement.

151. Consequently, I consider that the second plea, in so far as the Commission has failed to demonstrate that the Member States are obliged to fulfil the obligations laid down in Directive 2005/36 in respect of the activities of notaries, is unfounded.

VI — Costs

152. Under Article 69(3) of the Rules of Procedure of the Court of Justice, 'where each party succeeds on some and fails on other heads,... the Court may order that the costs be shared or that the parties bear their own costs'. Since I have concurred with one of the two pleas of infringement raised, I recommend that, in order to ensure a fair distribution of the cost borne by the parties in connection with these proceedings, the Court should order the European Commission, the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Republic of Austria, the Federal Republic of Germany and the Hellenic Republic to pay their own costs.

153. With regard to the action for failure to fulfil obligations brought against the French Republic, it should be noted that, under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the only plea raised by the French Republic has been dismissed, it is appropriate to order it to pay the costs, as they have been applied for by the Commission.

154. In accordance with the first paragraph of Article 69(4) of the Rules of Procedure, the Republic of Lithuania, Romania, the Republic of Bulgaria, the Republic of Poland, the Federal Republic of Germany, the Republic of Slovenia, the Republic of Austria, the Czech Republic, the Slovak Republic, the Republic of Hungary, the Republic of Latvia, the United Kingdom of Great Britain and Northern Ireland and the French Republic, which intervened in the present case shall bear their own costs.

VII — Conclusion

155. In the light of the foregoing considerations, I propose that the Court should:

In Case C-47/08,

(1) declare that, by adopting a measure such as that provided for in Article 35(3) of the Law of 25 Ventose of Year XI, as amended by the Law of 4 May 1999, limiting access to the profession of notary exclusively to Belgian nationals, the Kingdom of Belgium has failed to fulfil its obligations under Article 43 EC and the first paragraph of Article 45 EC;

(2) dismiss the action as to the remainder;

(3) order the Commission and the Kingdom of Belgium to bear their own costs;

(4) order the Republic of Lithuania, the Czech Republic, the Slovak Republic, the Republic of Hungary, the Republic of Latvia, the United Kingdom of Great Britain and Northern Ireland and the French Republic, interveners in the present case, to bear their own costs.

In Case C-50/08,

(1) declare that, by adopting a measure such as that provided for in Article 3 of the Decree of 5 July 1973, as amended by Decree 89-399 of 20 June 1989, limiting

access to the profession of notary exclusively to French nationals, the French Republic has failed to fulfil its obligations under Article 43 EC and the first paragraph of Article 45 EC;

(2) order the French Republic to pay the costs;

(3) order the Republic of Lithuania, Romania, the Czech Republic, the Slovak Republic, the Republic of Hungary, the Republic of Latvia, the United Kingdom of Great Britain and Northern Ireland and the Republic of Bulgaria, interveners in the present case, to bear their own costs.

In Case C-51/08,

(1) declare that, by adopting a measure such as that provided for in Article 15 of the Law of 9 December 1976 limiting access to the profession of notary exclusively to Luxembourg nationals, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 43 EC and the first paragraph of Article 45 EC;

(2) dismiss the action as to the remainder;

(3) order the Commission and the Grand Duchy of Luxembourg to bear their own costs;

(4) order the Republic of Lithuania, the Czech Republic, the Republic of Poland, the Slovak Republic, the Republic of Hungary, the Republic of Latvia, the United Kingdom of Great Britain and Northern Ireland and the French Republic, interveners in the present case, to bear their own costs.

In Case C-53/08,

(1) declare that, by adopting a measure such as that provided for in Article 6(1)(a) of the Regulation on notaries RGB1 No 75/1871, as amended by BGB1 No 164/2005, limiting access to the profession of notary exclusively to Austrian nationals, the Republic of Austria has failed to fulfil its obligations under Article 43 EC and the first paragraph of Article 45 EC;

(2) dismiss the action as to the remainder;

(3) order the Commission and the Republic of Austria to bear their own costs;

(4) order the Republic of Slovenia, the Republic of Lithuania, the Czech Republic, the Republic of Poland, the Republic of Hungary, the United Kingdom of Great Britain and Northern Ireland, the Slovak Republic, the Republic of Latvia, the Federal Republic of Germany and the French Republic, interveners in the present case, to bear their own costs.

In Case C-54/08,

(1) declare that, by adopting a measure such as that provided for in Article 5 of the Federal Code on Notaries, as amended by the Law of 26 March 2007, limiting access to the profession of notary exclusively to German nationals, the Federal Republic of Germany has failed to fulfil its obligations under Article 43 EC and the first paragraph of Article 45 EC;

(2) dismiss the action as to the remainder;

(3) order the Commission and the Federal Republic of Germany to bear their own costs;

(4) order the Republic of Slovenia, the Republic of Lithuania, the Czech Republic, the Republic of Poland, the Republic of Hungary, the United Kingdom of Great Britain and Northern Ireland, the Republic of Estonia, the Slovak Republic, the Republic of Austria, the Republic of Latvia, the Republic of Bulgaria and the French Republic, interveners in the present case, to bear their own costs.

In Case C-61/08,

(1) declare that, by adopting a measure such as that provided for in Article 19(1) of Law 2830/2000 limiting access to the profession of notary exclusively to Greek nationals, the Hellenic Republic has failed to fulfil its obligations under Article 43 and the first paragraph of Article 45 EC;

(2) dismiss the action as to the remainder;

(3) order the Commission and the Hellenic Republic to bear their own costs;

(4) order the Republic of Lithuania, the Republic of Slovenia, the Slovak Republic, the United Kingdom of Great Britain and Northern Ireland, the Czech Republic and the French Republic, interveners in the present case, to bear their own costs.