REPORT FOR THE HEARING
in Joined Cases C-330/90 and C-331/90 *

I — Facts and written procedure

1. Council Directive 67/43/EEC of 12 January 1967 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons concerned with: (1) matters of 'Real Estate' (excluding 6401) (ISIC Group ex 640); (2) the provision of certain 'Business services not elsewhere classified' (ISIC Group 839), adopted pursuant to the two General Programmes for the abolition of restrictions, on the one hand, on freedom of establishment and, on the other, on freedom to provide services applies, pursuant to Article 2 thereof, to the activities of self-employed persons in matters concerning immoveable property.

2. Directive 67/43/EEC does not contain any harmonization provisions relating to the right to take up such activities and the conditions under which they may be pursued, but confines itself to providing, in Article 5, that Member States are to abolish any discriminatory treatment based on nationality.

3. In Spain, estate agents are regulated by Decree No 3248/69 of 4 December 1969, approving the regulation concerning the functioning of official associations of estate agents.

Article 5 of that regulation makes the carrying out of the activities of estate agents subject to the twofold condition that the agent should hold the required qualification, issued by the administrative authorities, and be registered with the Colegio y Mutualidad de los Agentes de la Propriedad Inmobiliaria (Estate Agents' Association).

4. Royal Decree No 1464/88 of 2 December 1988 which transposed Directive 67/43 into Spanish law provides, in Article 1, that nationals of other Member States have the right of freedom of establishment and freedom to provide services under the same conditions and with the same rights and duties as Spanish citizens.

5. Under Article 321 of the Spanish Criminal Code an offence of wrongful and unauthorized exercise of an occupation is committed by carrying out activities reserved to a profession by a person who does not possess the appropriate official qualification or the qualification recognized by statutory provision or international agreement.

6. Angel López Brea and Carlos Hidalgo Palacios, Spanish nationals domiciled in Spain, both opened an establishment in Alicante for the purpose of carrying out activities as self-employed persons relating to real estate although they did not have the required qualification and authorization.

* Language of the case. Spanish.

7. By order of 11 September 1990, the Juzgado de lo Penal d'Alicante (Criminal Court) hearing the cases brought by the Colegio Oficial de Agentes de la Propriedad Inmobiliaria de Alicante and the Fiscal Jefe de la Audiencia Provincial against Angel López Brea and Carlos Hidalgo Palacios, who were accused of having contravened Article 321 of the Spanish Criminal Code, decided, pursuant to Article 177 of the EEC Treaty, to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

'1. Are Article 1 of the Decree of 4 December 1969 and Royal Decree 1464/88, in so far as they provide that activities as an intermediary or broker for the purchase, sale and exchange of rural and urban property, for loans secured by a mortgage on such property, for the letting of rural and urban property, for the assignment and transfer and the provision of opinions on the value in the event of the sale, assignment or transfer of such property are functions specific to estate agents, valid in the light of Articles 2, 3 and 5 of Council Directive 67/43/EEC and, as from the entry into force of that Directive, may a Member State, in the said real-estate sector, give the exclusive right to carry out such activities to a particular professional group?

2. May a Member State apply any kind of restriction or exclusion to that Directive?'

8. The orders made by the Juzgado de lo Penal d'Alicante were lodged at the Court Registry on 25 October 1990.

9. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted in the two cases on 25 January and 12 February 1991 by the Colegio Oficial de Agentes de la Propriedad Inmobiliaria de Alicante, represented by Jorge Jordana de Pozas Fuentes, of the Madrid Bar, on 5 February 1991 by the Ministerio Fiscal, represented by Ricardo Cabedo, Fiscale Jefe de Alicante, acting as Agent, and on 6 February 1991 by the Commission of the European Communities, represented by Étienne Lasnet, Legal Adviser, and Daniel Calleja, a member of its Legal Service, acting as Agents.

10. Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

11. By Order of 9 July 1991 Cases C-330/90 and C-331/90 were joined for the purpose of the written and oral procedure and the judgment.

12. By decision of 9 July 1991 the Court assigned the two cases to the Second Chamber pursuant to Article 95(1) and (2) of the Rules of Procedure.

II — Written observations submitted to the Court

1. The *Ministerio Fiscal* observes that the first question referred by the national court raises two separate issues, the first relating to the validity of the national rules with regard to Directive 67/43/EEC and the second whether, since that directive entered into force, Member States may, in the real estate sector at issue, confer on a particular professional group an exclusive right to carry out those activities.

With regard to the first issue, the Ministerio Fiscal points out that the Court of Justice has no jurisdiction to examine the question whether national provisions are in conformity with Directive 67/43 but may, by interpreting that directive, supply the national court with the criteria it needs to assess the question.

With regard to the second issue, the Ministerio Fiscal underlines the fact that Articles 52 to 66 of the EEC Treaty concerning the right of establishment and freedom to provide services have two separate aspects; the first concerns the principle of non-discrimination based on nationality, the second the aim of harmonizing the conditions governing the right of establishment and provision of services in a given sector of activity. Far from intending to abolish, assimilate or coordinate the various qualifications required for carrying out the activities of an estate agent, Directive 67/43 is confined to prohibiting any discriminatory treatment based on nationality. Royal Decree No 1464/88 removes any condition relating to nationality as regards the right to take up and pursue the activities at issue in the main proceedings. Since they are Spanish nationals domiciled in Spain and exercising their activities there, the accused in the main proceedings are not concerned by Directive 67/43.

The second question referred by the national court is whether a Member State may restrict, or indeed exclude, in one way or another, implementation of that directive. In that respect the Ministerio Fiscal considers that the directive may not be made subject to any restriction or exclusion and that failing transposition within the prescribed period the provisions of the directive, which are unconditional and sufficiently precise, have direct effect. In the present cases, Directive 67/43 has been properly implemented by Royal Decree No 1464/88.

2. *The Colegio Oficial de Agentes de La Propriedad Inmobiliaria de Alicante* submits that the disputes in the main proceedings do not raise any problem of a conflict between Spanish law and Community law since all the facts are confined to Spanish territory and there is no factor linking the cases to another Member State.

With regard to the first question, the Colegio considers that the Court has no jurisdiction to interpret rules of domestic law nor *a fortiori* to rule on their validity with regard to the Treaty or secondary law.

With regard to the second question, the Colegio points out that the sole object of Directive 67/43 is to abolish any discriminatory treatment based on nationality in connection with establishment and provision of services in matters of real estate. That directive does not deprive the Member States of the power to regulate the pursuit of those activities, provided the principle of non-discrimination is respected. Royal Decree No 1464/88 has abolished, as far as the Spanish legal system is concerned, nationality conditions in respect of the right to take up and pursue the activities concerned.

In the circumstances the Colegio suggests that the Court should reply to the questions referred to it as follows:

'1. The question of interpretation referred to the Court for a preliminary ruling should be rejected since, on the facts, only rules of Spanish law are applicable, to the exclusion of Directive 67/43/EEC.

2. The Court should decline jurisdiction to rule, pursuant to Article 177 of the Treaty establishing the European Economic Community, on the validity or nullity of general rules of domestic law, specifically the Decrees of 4 December 1969 and 2 December 1988.

3. In the alternative, the Court should interpret Directive 67/43/EEC as meaning that it is aimed at abolishing discrimination based on nationality in respect of activities in matters of real estate in the Member States, at abolishing the prohibition on association and easing administrative formalities for proving personal and professional good repute; however, the said directive is not aimed at abolishing the need for any qualifications that may be required by Member States for the pursuit of that activity, since such matters fall within the area of Community law concerning the recognition of qualifications.'

3. *The Commission* makes the preliminary point that the disputes in the main proceedings concern a purely domestic situation. The Court has consistently held that the absence of any element going beyond a purely national setting in a given case means, in matters of freedom of establishment, that the provisions of Community law are not applicable.

With regard to the first question, the Commission points out that in proceedings under Article 177 of the EEC Treaty the Court has no jurisdiction to rule on the compatibility of national provisions with Community law nor to apply a Community rule to a given case.

As regards the second question, the Commission explains that the aim of Directive 67/43 is solely to abolish all conditions relating to nationality which prevent establishment or free provision of services in the area of activities relating to real estate. Member States are under an obligation to achieve a result, in the sense that under the conditions and within the time-limits indicated in the directive they must incorporate the provisions necessary to achieve the elimination of all restrictions based on nationality in their national law.

In the circumstances the Commission suggests that the Court should reply to the questions referred to it by the national court as follows:

'The provisions of Directive 67/43/EEC do not apply to purely domestic situations which involve only a single Member State and concern nationals of that State pursuing on its territory a self-employed activity in respect of which they cannot lay claim to any training or qualification acquired in another Member State.

Member States are bound, pursuant to that directive, to abolish and to refrain from introducing into their national legal order any type of restriction based on nationality with regard to the pursuit of the activities of estate agents.'

F. A. Schockweiler
Judge-Rapporteur