JUDGMENT OF THE COURT (Grand Chamber)

24 May 2011 *

In Case C-61/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 13 February 2008,

European Commission, represented by G. Zavvos and H. Støvlbæk, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

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

intervener,

* Language of the case: Greek.

v

Hellenic Republic, represented by V. Christianos, E.-M. Mamouna and A. Samoni-Rantou, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by:

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

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

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

Republic of Slovenia, represented by V. Klemenc and Ž. Cilenšek Bončina, acting as Agents,

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

interveners,

THE COURT (Grand Chamber),

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

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

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

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

gives the following

Judgment

1 By its application the Commission of the European Communities asks the Court to declare that, by imposing a nationality requirement for access to the profession of civil-law notary and by failing to transpose for that profession Council 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), as amended by Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 (OJ 2001 L 206, p. 1) ('Directive 89/48'), the Hellenic Republic failed to fulfil its obligations under Articles 43 EC and 45 EC and under Directive 89/48.

Legal context

European Union law

2 The 12th recital in the preamble to Directive 89/48 stated that 'the general system for the recognition of higher-education diplomas is entirely without prejudice to the application of … Article [45 EC]'.

3 Article 2 of Directive 89/48 read as follows:

'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.'

4 The profession of notary was not the subject of any legislation of the kind referred to in the second paragraph of Article 2.

5 Directive 89/48 laid down a period for its transposition, which, in accordance with Article 12, expired on 4 January 1991.

6 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22), repealed Directive 89/48 with effect from 20 October 2007, pursuant to Article 62 of Directive 2005/36.

7 Recital 41 in the preamble to Directive 2005/36 states that the directive 'is without prejudice to the application of Articles 39(4) [EC] and 45 [EC] concerning notably notaries.'

National legislation

The general organisation of the notarial profession

8 Notaries carry out their duties, within the Greek legal system, as members of a liberal profession. The organisation of that profession is regulated by Law No 2830/2000 of 16 March 2000 (FEK A' 96/16.3.2000, 'the Code of Notaries').

9 Under Article 1(1) of that code, the task of a notary is, inter alia, to draft and keep safe documents which constitute certain legal acts or serve as evidence of them, to append an order of enforcement on those documents, to stamp private documents and thereby confer on them a definite date and to certify the authenticity of the signatures of all parties concerned.

10 The same provision defines the notary as an 'unremunerated public official' in the sense that he is remunerated not by the State, but by his clients. Each party can freely choose a notary.

11 The number of notaries, the location of their offices and their residence are determined in accordance with, inter alia, Articles 2 and 17 of the Code of Notaries. The former article provides that notaries are to perform their duties within the area of the judicial district in which they reside.

12 In accordance with Article 40 of the Code of Notaries, notaries' fees, which include a fixed component and a variable component according to the value stated in the notarial act concerned, are determined by a joint ministerial decision of the Minister for Economic affairs and Finance and the Minister of Justice, the most recent being Decision 100692(1)/2009.

13 Under Article 153 of the Code of Notaries, two or more qualified notaries who reside in the same judicial district can perform their duties in the form of a civil law partnership.

14 Before a person can apply to become a notary in Greece, one of the conditions in Article 19 of the Code of Notaries is that that person must be Greek.

The activities of a notary

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

16 It is provided by Article 438 of the Code of Civil Procedure, in Chapter VIII headed 'Documents', that an authentic instrument is an official document drawn up by a public official which when produced is complete proof, effective against all, of everything attested to have been done by the official or before him.

17 Notarial acts are enforceable pursuant to Article 904(2) of the Code of Civil Procedure. That provision further confers enforceability on, inter alia, a formal summons and on documents legally recognised as enforcement orders. Before notarial acts can be enforceable, a notary must, under Article 918 of that code, endorse on them an enforcement clause.

18 In accordance with Article 1(2) of Law 2318/1995 of 19 June 1995 on the code of bailiffs (FEK A' 126/19.6.1995), a bailiff is the only person who has the power, unless otherwise provided, to enforce court decisions and enforceable documents or orders.

19 Further, it is evident from Article 933 et seq. of the Code of Civil Procedure that any challenge in relation to methods of enforcement is to be brought before a court.

20 The role of a notary in connection with actual enforcement consists, in essence, in carrying out a public auction, in accordance with the provisions of Articles 959 to 981, 988 and 998 to 1021 of the Code of Civil Procedure.

21 Under the relevant provisions of that code, the enforcement order is initially executed by a bailiff, who serves on the debtor an order to pay. The debtor is given a period of time within which to comply. On the expiry of that period, if the debtor has not in the meantime complied, the moveable property concerned is attached by means of service by the bailiff of a writ, that stage being followed by the recording of that writ at the register of mortgages. The bailiff then fixes the date of the public auction, if appropriate, appoints a notary and instructs him to carry out that auction. Lastly, the notary carries out the public auction and in cases of compulsory sale, draws up the bidding papers, which contain an assignment of the price to creditors, and draws up, when necessary, the list of creditors. If there is any challenge to the validity of the enforcement order, the enforcement procedure or the debt, that challenge must be brought before a court in accordance with Articles 933 et seq. of that code.

22 Further, certain transactions must be carried out by notarial act, in default of which they are void. That applies, inter alia, to the constitution and transfer of real rights in immoveable property. Under Article 1033 of the Civil Code, before the ownership of immoveable property can be transferred, there must be agreement between the owner and the purchaser to transfer ownership to the latter for valid consideration, and that agreement must be established by notarial act. There are other acts the validity of which is subject to notarial authentication, for example, voluntary acknowledgement of paternity, gifts of immoveable property and bequests.

23 A notary is also involved in the area of company law. By way of example, acts constituting public and private limited liability companies and certain acts relating to the conversion and merger of those companies must, in accordance with the relevant provisions of Laws 2190/1920 on public limited liability companies (FEK A' 37/30.3.1963) and 3190/1955 on private limited liability companies (FEK A' 91/16.4.1955), take the form of notarial acts, in default of which they are void. In addition, the constitution of those companies is in each case subject to the approval of the Minister for Development or the court with jurisdiction. Their status as legal persons is acquired on the publication of their articles of association, their founding documents and the administrative decision approving the articles of association in the registers of public or private limited liability companies and in the official journal. Similarly, the creation of a trust, which must be executed by notarial act under Article 109 of the Civil code, is subject to the approval of the competent authority, in accordance with Article 112 of that code.

The pre-litigation procedure

24 The Commission received a complaint concerning the nationality requirement for access to the profession of notary in Greece. Following consideration of that complaint, the Commission sent a letter of formal notice dated 14 November 2000 to the Hellenic Republic requesting that it submit, within two months, its observations on the

compatibility of that nationality requirement with the first paragraph of Article 45 EC and on the failure to transpose Directive 89/48 in respect of the profession of notary.

25 By letter dated 27 February 2001 the Hellenic Republic replied to that letter of formal notice.

26 On 12 July 2002 the Commission sent an additional letter of formal notice to the Hellenic Republic, claiming that it had failed to fulfil its obligations under Article 43 EC, the first paragraph of Article 45 EC and Directive 89/48.

27 The Hellenic Republic replied to that additional letter of formal notice by letter dated 8 October 2002.

28 The Commission was not persuaded by the arguments put forward by the Hellenic Republic and on 18 October 2006 it sent to the Hellenic Republic a reasoned opinion in which it concluded that the Hellenic Republic had failed to fulfil its obligations under Article 43 EC, the first paragraph of Article 45 EC and Directive 89/48. The Commission invited the Hellenic Republic to take the measures necessary to comply with the reasoned opinion within two months from its receipt.

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

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

The action

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

31 The Hellenic Republic considers that the statement in intervention of the United Kingdom is inadmissible because, contrary to the requirements of the fourth paragraph of Article 40 of the Statute of the Court of Justice and Article 93(4) of its Rules of Procedure, the United Kingdom does not seek to support the forms of order sought by the Commission. That statement is also claimed to be inadmissible because the United Kingdom referred, first, solely to Directive 2005/36, whereas the current action relates to Directive 89/48, and, second, to Article 39(4) EC, although that provision has no relevance to the subject-matter of these proceedings.

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

33 Similarly, Article 93(4) of the Court's Rules of Procedure provides that the intervener must accept the case as he finds it at the time of his intervention.

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

'the profession of notary falls within the scope of [Directive 2005/36]. Certain activities performed by notaries can only be excluded from the scope of [Directive 2005/36]

if the Court of Justice concludes that those activities are included within the exception referred to in Recital 41 of [Directive 2005/36], under Articles 39(4) and/or 45 EC'.

35 It is clear that, in its action, the Commission does not seek a declaration from the Court that the Hellenic Republic failed to fulfil its obligations under Article 39(4) EC and Directive 2005/36.

36 However, even though, read literally, the objective of the United Kingdom's intervention as thus described appears different from that which a statement in intervention can legitimately pursue, it is evident from an overall reading of the statement in intervention concerned and the background to that statement that the arguments which the United Kingdom has submitted are intended to contribute to the success of the Commission's action by shedding further light on the dispute.

37 That analysis is not rebutted by the two objections pleaded by the Hellenic Republic. As regards the references made in the statement in intervention to Directive 2005/36, it is clear that the view of the United Kingdom is that that directive essentially restates the provisions of Directive 89/48, which it replaced.

38 That is why the United Kingdom chose to refer, in its arguments, to Directive 2005/36, leaving it to be understood that those arguments have equal force in relation to Directive 89/48.

39 Moreover, as regards the references made in that statement in intervention to Article 39(4) EC, the United Kingdom expressly acknowledges that that provision is not applicable in the present case but maintains that the Court's case-law in relation to that article ought however to be applied by analogy when the first paragraph of Article 45 EC is examined.

40 It must therefore be held that the United Kingdom's statement in intervention is admissible.

First head of claim

Arguments of the parties

41 By its first head of claim, the Commission asks the Court to declare that, by reserving access to the profession of notary exclusively to its own nationals, the Hellenic Republic has failed to fulfil its obligations under Article 43 EC and the first paragraph of Article 45 EC. The Commission states that, by that claim, its complaint is that the Hellenic Republic infringed Article 43 EC, that infringement not being justified by the derogation laid down in the first paragraph of Article 45 EC.

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

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

44 The Commission and the United Kingdom submit that the first paragraph of Article 45 EC must be given an autonomous and uniform interpretation (Case 147/86 *Commission* v *Greece* [1988] ECR 1637, paragraph 8). In that it lays down an exception to freedom of establishment for activities connected with the exercise of official authority, that article must moreover be interpreted strictly (Case 2/74 *Reyners* [1974] ECR 631, paragraph 43).

45 The exception under the first paragraph of Article 45 EC must therefore be restricted to activities which in themselves involve a direct and specific connection with the exercise of official authority (*Reyners*, paragraphs 44 and 45). According to the Commission, the concept of official authority implies the exercise of a decision-making power going beyond the ordinary law and taking the form of being able to act independently of, or even contrary to, the will of other subjects of law. Official authority manifests itself in particular, according to the Court's case-law, in the exercise of powers of constraint (Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraph 37).

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

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

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

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

50 First, as regards the authentication of documents and agreements, the Commission submits that the notary merely attests the intentions of the parties, after advising them, and gives legal effect to those intentions. In carrying out that activity, the notary has no decision-making powers with respect to the parties. Accordingly, authentication is no more than confirmation of a prior agreement by those parties. The fact that it is mandatory that certain instruments should be authenticated is of no relevance, given that the mandatory nature of many procedures is not necessarily an indication of the exercise of official authority.

51 The same is true of the specific properties attached to notarial acts under the rules of evidence, since a comparable probative force is also conferred on other documents which do not fall under the exercise of official authority, such as, for example, reports drawn up by accredited gamekeepers. The fact that a notary incurs personal liability by drawing up notarial acts is also not relevant. That is the case for the majority of independent professionals, such as lawyers, architects or medical practitioners.

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

53 Second, in relation to the tasks of a notary in the area of company law and the law on associations, the Commission's view is that a notary does no more than carry out certain procedural requirements, laid down by legislation, necessary to the constitution of a legal person. Further, those tasks can also be performed by legal advisers and lawyers.

54 Third, as regards the tasks of a notary in the area of constituting and transferring real rights to immoveable property, those contain no decision-making power going beyond the ordinary law. The same is true of the tasks of a notary relating to the execution of certain acts, such as, inter alia, gifts, voluntary acknowledgements of paternity and bequests.

55 Fourth, a notary's connection to actual enforcement also does not, by itself, reflect an exercise of official authority, since his role is moreover comparable to that of a director of public auctions.

56 Lastly, the Commission and the United Kingdom add that the case which gave rise to the judgment in Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española* [2003] ECR I-10391, to which several Member States refer in their written observations, concerned the fact that the masters and chief mates of merchant navy ships have a wide range of duties relating to ensuring safety and public order and powers

in respect of notarising documents and registering births, marriages and deaths. Accordingly, the Court had no occasion to examine in detail the various activities carried out by notaries in the light of the first paragraph of Article 45 EC. Consequently, that judgment is not authority for the conclusion that that provision is applicable to notaries.

57 The Hellenic Republic's initial contention is that this claim is unfounded in that it relates to an alleged infringement of both Articles 43 EC and 45 EC, whereas the application of one of those two provisions excludes the application of the other.

58 As regards the concept of connection with the exercise of official authority within the meaning of the first paragraph of Article 45 EC, the Hellenic Republic considers that that concept must be interpreted as meaning that activities involving the use of powers outside the scope of the ordinary law are covered by the exception laid down in that provision. The Court confirmed, in *Colegio de la Marina Mercante Espanola*, that a notary has a connection with the exercise of official authority.

59 As regards the direct and specific connection of a notary with the exercise of official authority, the Hellenic Republic considers that that connection must be assessed on the basis of a set of criteria which include, first, the fact that there are activities of a notary which are substantive and primary, and not ancillary or secondary; second, the fact that those activities are carried out regularly and habitually and not sporadically or exceptionally; third, the exercise of such activities must represent a significant part of all the activities at issue and, fourth, the exercise of such activities must affect the discretion of the judicial authority (see *Reyners*, paragraph 53, and Case C-306/89 *Commission* v *Greece* [1991] ECR I-5863, paragraph 7). Those criteria are met by the activities carried out by notaries in the Greek legal system. The role of a notary cannot therefore be assessed solely in the light of whether he has a decision-making power, as suggested by the Commission.

60 The fact that the involvement of a notary is obligatory, particularly in the creation of legal persons and alterations of their legal personality, the constitution and transfer of real rights in immoveable property and the control of enforcement, demonstrates that a notary is directly and specifically connected with the exercise of official authority.

61 In that regard, the Hellenic Republic first contends that a notary is involved in the instruments constituting a trust, a public limited liability company, a European company and a private limited liability company. Further, any alteration to the legal personality of those bodies requires the involvement of a notary if the alteration is not to be void. The assignment of legal personality to those bodies and the alterations made to the form of that personality are official authority powers.

62 Secondly, the involvement of a notary is also obligatory for the constitution and transfer of real rights in immoveable property. If there is no notarial act, there can be no acquisition of any right of property or of other real rights. The same is true of voluntary acknowledgments of paternity, *inter vivos* gifts of immoveable property and bequests.

63 Thirdly, the involvement of a notary is obligatory in enforcement procedures and, more particularly, in enforced auctions of moveable and immoveable property, ships and aircraft. A notary thus has authority, inter alia, to rank creditors and to distribute funds to them where property has been attached. Comparable tasks are entrusted to a notary when there is a special liquidation of a company in difficulty. In such cases, a notary has, according to the Hellenic Republic, powers of constraint.

64 Fourthly, the Hellenic Republic emphasises that notarial acts constitute enforceable orders and there is no requirement of prior court involvement. For that purpose, those instruments must have endorsed to them an enforcement clause. Similarly, a notary has the power to note protests in case of non-acceptance or non-payment of bills or cheques. Those activities constitute, according to the Hellenic Republic, the preparatory stage of either enforcement or the raising of proceedings in a court of law.

Findings of the Court

— Preliminary observations

65 By its first head of claim, the Commission complains that the Hellenic Republic is preventing the establishment of nationals of other Member States in its territory for the purpose of practising as a notary, by reserving access to that profession to its own nationals, in breach of Article 43 EC.

66 That head of claim thus concerns solely the nationality requirement laid down by the Greek legislation at issue for access to that profession, in the light of Article 43 EC.

67 Accordingly, it does not relate to the status and organisation of notaries in the Greek legal system, nor the conditions of access, other than that of nationality, to the profession of notary in that Member State.

68 Moreover, as the Commission stated at the hearing, the first head of claim does not concern the application of the provisions of the EC Treaty on the freedom to provide services. Nor does it relate to the Treaty provisions on freedom of movement for workers.

— Substance

69 Article 43 EC is one of the fundamental provisions of European Union law (see, to that effect, inter alia, *Reyners*, paragraph 43).

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

71 The freedom of establishment conferred on nationals of one Member State in the territory of another Member State includes in particular access to and exercise of activities of self-employed persons under the same conditions as are laid down by the law of the Member State of establishment for its own nationals (see, inter alia, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 13, and, to that effect, *Commission* v *Austria*, paragraph 27). In other words, Article 43 EC prohibits the Member States from laying down in their laws conditions for the pursuit of activities by persons exercising their right of establishment there which differ from those laid down for its own nationals (*Commission* v *Austria*, paragraph 28).

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

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

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

75 As regards the concept of the 'exercise of official authority' within the meaning of the first paragraph of Article 45 EC, the assessment of that concept must take account, in accordance with settled case-law, of the character as European Union law of the limits imposed by that provision on the permitted exceptions to the principle of freedom of establishment, so as to ensure that the effectiveness of the Treaty in the field of freedom of establishment is not frustrated by unilateral provisions of the Member States (see, to that effect, *Reyners*, paragraph 50; Case 147/86 *Commission* v *Greece*, paragraph 8; and Case C-438/08 *Commission* v *Portugal* [2009] ECR I-10219, paragraph 35)

76 It is also settled case-law that the first paragraph of Article 45 EC is an exception to the fundamental rule of freedom of establishment. As such, the exception must be interpreted in a manner which limits its scope to what is strictly necessary to safeguard the interests it allows the Member States to protect (Case 147/86 *Commission* v

Greece, paragraph 7; *Commission* v *Spain*, paragraph 34; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 45; Case C-393/05 *Commission* v *Austria* [2007] ECR I-10195, paragraph 35; Case C-404/05 *Commission* v *Germany* [2007] ECR I-10239, paragraphs 37 and 46; and *Commission* v *Portugal*, paragraph 34).

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

78 In this respect, the Court has had occasion to rule that the exception in the first paragraph of Article 45 EC does not extend to certain activities that are auxiliary or preparatory to the exercise of official authority (see, to that effect, *Thijssen*, paragraph 22; *Commission* v *Spain*, paragraph 38; *Servizi Ausiliari Dottori Commercialisti*, paragraph 47; *Commission* v *Germany*, paragraph 38, and *Commission* v *Portugal*, paragraph 36), or to certain activities whose exercise, although involving contacts, even regular and organic, with the administrative or judicial authorities, or indeed cooperation, even compulsory, in their functioning, leaves their discretionary and decision-making powers intact (see, to that effect, *Reyners*, paragraphs 51 and 53), or to certain activities which do not involve the exercise of decision-making powers (see, to that effect, *Thijssen,* paragraphs 21 and 22; Case C-393/05 *Commission* v *Austria*, paragraphs 36 and 42; *Commission* v *Germany*, paragraphs 38 and 44; and *Commission* v *Portugal*, paragraphs 36 and 41), powers of constraint (see, to that effect, inter alia, *Commission* v *Spain*, paragraph 37) or powers of coercion (see, to that effect, Case C-47/02 *Anker and Others* [2003] ECR I-10447, paragraph 61, and *Commission* v *Portugal*, paragraph 44).

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

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

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

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

83 Furthermore, the notary cannot unilaterally alter the agreement he is called on to authenticate without first obtaining the consent of the parties.

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

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

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

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

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

89 However, the fact that notarial activities pursue objectives in the public interest, in particular to guarantee the lawfulness and legal certainty of documents entered into

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

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

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

92 Thus, in particular, as far as the probative force of notarial acts is concerned, it must be pointed out that that force derives from the rules on evidence laid down by law in the legal system in question. The probative force conferred by law on a particular document thus has no direct effect on whether the activity which includes the drawing up of the document is in itself directly and specifically connected with the exercise of official authority, as required by the case-law (see, to that effect, *Thijssen*, paragraph 8, and *Commission* v *Spain*, paragraph 35).

93 It cannot moreover be argued that a notarial act, because of its probative force, unconditionally binds a court exercising its power of assessment, since, as is not disputed, the judge decides in accordance with his own firm conviction in the light of all the facts and evidence collected in the judicial proceedings.

94 As regards the enforceability of an authentic instrument, it must be observed, as the Hellenic Republic submits, that that enforceability enables the obligation embodied in the instrument to be enforced without the prior intervention of the court.

95 The enforceability of an authentic instrument does not, however, derive from powers possessed by the notary which are directly and specifically connected with the exercise of official authority. So, while the notary's endorsement of the enforcement clause on the authentic instrument does give it enforceable status, that status is based on the intention of the parties to sign a document or agreement, after its conformity with the law has been checked by the notary, and confer enforceability on it.

96 It must also be determined whether the other activities entrusted to the notary in the Greek legal system and to which the Hellenic Republic refers entail a direct and specific connection with the exercise of official authority.

97 First, as regards tasks entrusted to a notary in connection with enforcement, it must be observed that the notary's main responsibility is to carry out the auction and, in cases of compulsory sale, to draw up the bidding papers, which contain the assignment of prices to creditors, and to establish, when necessary, the list of creditors.

98 It is however evident, first, that a notary does not himself have the power to attach the object which is to be sold to enforce payment. Second, challenges to the validity of the enforcement order, the enforcement procedure or the debt must be brought before a court in accordance with Article 933 et seq. of the Code of Civil Procedure.

99 The tasks entrusted to notaries in relation to enforcement are therefore subject to the supervision of the court, to which the notary must refer any legal challenges and which, moreover, makes the ultimate decision. Consequently, those tasks cannot be regarded, in themselves, as directly and specifically connected with the exercise of official authority (see, to that effect, *Thijssen*, paragraph 21; Case 395/05 *Commission* v *Austria*, paragraphs 41 and 42; *Commission* v *Germany*, paragraphs 43 and 44, and *Commission* v *Portugal*, paragraphs 37 and 41).

100 The same conclusion must be reached, moreover, in relation to the activities carried out by a notary in the special liquidation of companies in difficulty, since those activities are comparable, as the Hellenic Republic itself acknowledges, to those carried out by a notary in enforced auctions.

101 It must further be added, as regards the notarial activities mentioned in paragraphs 97 to 100 of this judgment, that, as was stated in paragraph 78 above, professional services involving assistance, even when obligatory, to the operation of courts or tribunals do not thereby constitute a connection with the exercise of official authority (*Reyners*, paragraph 51).

102 Second, as regards the notary's involvement in cases of non-acceptance or non-payment of bills or cheques, it must be observed, as expressly acknowledged by the Hellenic Republic, that that intervention, consisting of noting a protest, constitutes the preparatory stage of either an enforcement or proceedings before the courts. However, preparatory activities for the exercise of official authority are, in accordance with settled case-law, excluded from the derogation laid down in the first paragraph of

Article 45 EC (see, to that effect, *Thijssen*, paragraph 22; *Commission* v *Spain*, paragraph 38; *Servizi Ausiliari Dottori Commercialisti*, paragraph 47; *Commission* v *Germany*, paragraph 38, and *Commission* v *Portugal*, paragraph 36).

103 Third, as regards transactions and acts, such as the constitution and transfer of real rights in immoveable property, gifts of immoveable property, voluntary acknowledgement of paternity and bequests, which must be executed using a notarial act, in default of which they are void, reference is made to the considerations set out in paragraphs 82 to 95 of this judgment.

104 Fourth, the same considerations apply in relation to acts constituting companies and trusts, where those must be drawn up using an authentic instrument, in default of which they are void. It must moreover be added in that regard that the constitution of those bodies is subject to the approval of the competent authority and those bodies acquire their status as legal persons by means of entering in the appropriate register, and publishing in the official journal, their articles of association, their founding documents and the decision approving the articles of association.

105 As regards the particular status of notaries in the Greek legal system, it need only be recalled that, as follows from paragraphs 77 and 80 of this judgment, it is by reference to the nature of the relevant activities themselves, not by reference to that status as such, that it must be ascertained whether those activities fall within the exception in the first paragraph of Article 45 EC.

106 Two points must be made here, however. In the first place, it is not disputed that, apart from the cases in which a notary is appointed by law, every party can choose a notary freely. While notaries' fees are indeed fixed by law, the quality of the services they provide may vary from one notary to another, depending in particular on

their professional capabilities. It follows that, within the geographical boundaries of their office, notaries practise their profession, as the Advocate General observes in point 18 of his Opinion, in conditions of competition, which is not characteristic of the exercise of official authority.

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

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

109 Further, the objection pleaded by the Hellenic Republic contending that this head of claim is vitiated by a contradiction because the Commission complains that it simultaneously infringed both Article 43 EC and the first paragraph of Article 45 EC must be rejected. In that regard, it is evident from the application, looked at overall and in context, that the Commission's complaint is that the defendant Member State infringed Article 43 EC, and that that infringement cannot be justified in the light of the first paragraph of Article 45 EC. Those two provisions of the Treaty must be examined together, as is obvious from all the foregoing considerations, since Article 43

EC constitutes the rule to which the first paragraph of Article 45 EC provides an exception.

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

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

112 In the light of all the foregoing considerations, it must be held that the first head of claim is well founded.

The second head of complaint

Arguments of the parties

113 The Commission complains that the Hellenic Republic did not transpose Directive 89/48 in respect of the profession of notary. According to the Commission, that profession cannot be excluded from the scope of that directive, since a notary has no direct and specific connection with the exercise of official authority.

114 The Commission states that Directive 89/48 enables Member States to prescribe either the taking of an aptitude test or completion of an adaptation period, either being capable of ensuring that notaries have the high level of qualifications required. Moreover, the application of that directive would not have the effect of preventing the recruitment of notaries by competition but only of giving nationals of other Member States access to that competition. Such an application would also have no impact on the procedure for the appointment of notaries.

115 Further, the fact that the question of whether that directive was applicable to the profession of notary was never discussed when that directive was being worked on and that no sectoral directive in relation to that profession has been adopted is not a legally valid argument.

116 Likewise, the fact that the European Union legislature has excluded certain activities from the scope of a Union measure cannot in itself imply that Directive 89/48 is not applicable to the activities at issue. Both Article 1(5)(d) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1) and recital 41 of the preamble to Directive 2005/36 exclude from the scope of those directives notarial activities only to the extent that they involve a direct and specific connection with the exercise of official authority. That is therefore no more than a reservation which has no effect on the interpretation of the first paragraph of Article 45 EC. As regards Article 2(2)(l) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), which excludes notarial activities from the scope of that directive, the Commission states that the fact that the European Union legislature chose to exclude a specific activity from the scope of that directive does not mean that the first paragraph of Article 45 EC applies to that activity.

117 Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17) and Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77, p. 36) are not relevant either because they exclude notarial activities from their scope in order to enable certain Member States with a distinct legal tradition, such as the United Kingdom, not to allow lawyers from other Member States to pursue activities which are typically notarial, although those activities are pursued, in the United Kingdom, by a specific category of lawyers, namely solicitors.

118 As regards the resolution of the European Parliament of 23 March 2006 on the legal professions and the general interest in the functioning of legal systems (OJ 2006 C 292E, p. 105, 'the 2006 resolution'), that is a purely political measure, the content of which is ambiguous, since on the one hand, in point 17 of that resolution, the European Parliament asserted that Article 45 EC must be applied to the profession of civil-law notary, whereas, on the other hand, in point 2 thereof, it confirmed the position set out in its resolution of 18 January 1994 on the state and organisation of the profession of notary in the 12 Member States of the Community (OJ 1994 C 44, p. 36, 'the 1994 resolution'), where it expressed the wish that the nationality requirement for access to the profession of notary laid down in the legislation of several Member States be removed.

119 The Hellenic Republic's preliminary observation is that this action is concerned solely with Directive 89/48 and not with Directive 2005/36, although the latter repealed the former prior to the bringing of this action.

120 The Hellenic Republic considers, first, that Directive 89/48 is not applicable to the profession of notary, as is apparent from the 12th recital of its preamble. Further, the possible application of that directive to that profession was never discussed when

that directive was being worked on. Further, there is no sectoral directive applicable to that profession, although other professions are subject to such directives. That interpretation is supported by various measures of secondary legislation, such as those referred to in paragraphs 116 and 117 of this judgment, which exclude the profession of notary from their scope. In addition, the 1994 and 2006 resolutions, mentioned in paragraph 118 of this judgment, are evidence that the European Union legislature considers that that profession falls under the first paragraph of Article 45 EC.

121 Secondly, the Hellenic Republic contends that the Commission did not set out, clearly and exhaustively, all the facts and points of law on which the alleged infringement of Directive 89/48 is based.

Findings of the Court

— Admissibility

122 It is settled case-law that, in the context of proceedings under Article 226 EC, the existence of a failure to fulfil obligations must be assessed in the light of the European Union legislation in force at the close of the period prescribed by the Commission for the Member State concerned to comply with its reasoned opinion (see, inter alia, Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 32; Case C-275/04 *Commission* v *Belgium* [2006] ECR I-9883, paragraph 34; and Case C-270/07 *Commission* v *Germany* [2009] ECR I-1983, paragraph 49).

123 In the present case, that period expired on 18 December 2006. On that date Directive 89/48 was still in force, since Directive 2005/36 did not repeal Directive 89/48 until 20 October 2007. Consequently, an action based on a failure to transpose Directive 89/48 is not devoid of purpose (see, by analogy, the judgment of 11 June 2009 in Case C-327/08 *Commission* v *France*, paragraph 23).

124 The objection pleaded by the Hellenic Republic must therefore be rejected.

— Substance

125 The Commission complains that the Hellenic Republic has not transposed Directives 89/48 in respect of the profession of notary. The Court must therefore examine whether that directive applies to that profession.

126 In that regard, the legislative context of that directive must be taken into account.

127 Thus, it must be noted that the legislature expressly stated in the 12th recital in the preamble to Directive 89/48 that the general system for the recognition of higher-education diplomas introduced by that directive is 'entirely without prejudice to the application of … [Article 45 EC]'. That reservation reflects the legislature's intention to leave activities covered by the first paragraph of Article 45 EC outside the scope of that directive.

128 At the time of adoption of that directive, the Court had not yet had occasion to rule on whether the activities of notaries were covered by the first paragraph of Article 45 EC.

129 Moreover, in the years following the adoption of Directive 89/48, the Parliament, in its 1994 and 2006 resolutions mentioned in paragraph 118 of this judgment, asserted on the one hand that the first paragraph of Article 45 EC should be fully applied to the profession of notary as such, while expressing the wish on the other hand that the nationality requirement for access to that profession should be removed.

130 Moreover, when adopting Directive 2005/36, which replaced Directive 89/48, the European Union legislature was careful to state, in recital 41 in the preamble to the directive, that it was without prejudice to the application of Article 45 EC 'concerning notably notaries'. By expressing that reservation, the European Union legislature did not adopt a position on the applicability of the first paragraph of Article 45 EC, and hence of Directive 2005/36, to the activities of notaries.

131 That is shown in particular by the legislative history of Directive 2005/36. In its legislative resolution on the proposal for a European Parliament and Council directive on the recognition of professional qualifications (OJ 2004 C 97E, p. 230), adopted on first reading on 11 February 2004, the Parliament had proposed that it should be expressly stated in the text of Directive 2005/36 that it did not apply to notaries. Although that proposal was not taken up in the amended proposal for a Directive of the European Parliament and of the Council on the recognition of professional qualifications (COM(2004) 317 final) or in Common Position (EC) No 10/2005 of 21 December 2004 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the recognition of professional qualifications (OJ 2005 C 58E, p. 1), that was not because the proposed directive was to apply to the profession of notary but because, in particular,

a 'derogation from the principle of freedom of establishment and the freedom to provide services for activities that involve direct and specific participation in the exercise of official authority [was] provided for by the first paragraph of Article 45 EC'.

132 In view of the particular circumstances of the legislative procedure and the situation of uncertainty which resulted, as may be seen from the legislative context described above, it does not appear possible to conclude that, at the end of the period prescribed in the reasoned opinion, there existed a sufficiently clear obligation for the Member States to transpose Directive 89/48 with respect to the profession of notary.

133 The second head of claim must therefore be rejected.

134 In the light of all the foregoing considerations, it must be held that, by imposing a nationality requirement for access to the profession of notary, the Hellenic Republic failed to fulfil its obligations under Article 43 EC and the action must be dismissed as to the remainder.

Costs

135 Under Article 69(3) of the Rules of Procedure, 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 the Commission's application has been upheld only in part, each party must be ordered to bear its own costs.

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

On those grounds, the Court (Grand Chamber) hereby:

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

2. Dismisses the action as to the remainder;

3. Orders the European Commission, the Hellenic Republic, the Czech Republic, the French Republic, the Republic of Lithuania, the Republic of Slovenia, the Slovak Republic and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.

[Signatures]