

In Case 2/74

Reference to the Court under [Article 267 TFEU] by the Conseil d'Etat, Belgium for a preliminary ruling in the action pending before that court between

JEAN REYNERS, docteur en droit, company manager, resident at Woluwé- Saint-Lambert (Brussels),

and

THE BELGIAN STATE, represented by its Minister of Justice,

Intervening party: L'ORDRE NATIONAL DES AVOCATS DE BELGIQUE, on the interpretation of [Articles 49 and 51 TFEU] with regard to the Royal Decree of 24 August 1970 derogating from the condition of nationality prescribed by Article 428 of the Code judiciaire relating to the title and exercise of the profession of *avocat*,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sorensen, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore (Rapporteur), H. Kutscher, C. O. Dilaigh and A. J. Mackenzie Stuart, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Law

- 1 By judgment dated 21 December 1973, filed at the Registry on 9 January 1974, the Conseil d'Etat of Belgium raised two questions under [Article 267 TFEU] on the interpretation of [Articles 49 and 51 TFEU] relating to the right of establishment in relation to the practice of the profession of *avocat*.
- 2 These questions had been raised in the context of an action brought by a Dutch national, the holder of the legal diploma giving the right to take up the profession of *avocat* in Belgium, who has been excluded from that profession by reason of his nationality as a result of the Royal Decree of 24 August 1972 relating to the title and exercise of the profession of *avocat* (*Moniteur Beige* 1970, p. 9060).

On the interpretation of [Article 49 TFEU]

- 3 The Conseil d'Etat inquires whether [Article 49 TFEU] is, since the end of the transitional period, a 'directly applicable provision' despite the absence of directives as prescribed by [Articles 50(1) and 53(1) TFEU].

- 4 The Belgian and Irish Governments have argued, for reasons largely in agreement, that [Article 49 TFEU] does not have such an effect.
- 5 Taken in the context of the Chapter on the right of establishment, to which reference is expressly made by the wording 'within the framework of the provisions set out below', this Article, in view of the complexity of the subject, is said to constitute only the expression of a simple principle, the implementation of which is necessarily subject to a set of complementary provisions, both [Union] and national, provided for by [Articles 50 and 53 TFEU].
- 6 The form chosen by the Treaty for these implementing acts -the establishment of a 'general programme', implemented in turn by a set of directives -confirms, it is argued, that [Article 49 TFEU] does not have a direct effect.
- 7 It is not for the courts to exercise a discretionary power reserved to the legislative institutions of the [Union] and the Member States.
- 8 This argument is supported in substance by the British and Luxembourg Governments, as well as by the *Ordre national des avocats de Belgique*, the intervening party in the main action.
- 9 The plaintiff in the main action, for his part, states that all that is in question in his case is a discrimination based on nationality by reason of the fact that he is subject to conditions of admission to the profession of *avocat* which are not applicable to Belgian nationals.
- 10 In this respect (he submits) [Article 49 TFEU] is a clear and complete provision, capable of producing a direct effect.
- 11 The German Government, supported in substance by the Dutch

Government and citing the judgment given by this Court on 16 June 1966 in Case 57/65, *Lütticke* (Rec. 1966, p. 293), considers that the provisions which impose on Member States an obligation which they have to fulfil within a particular period, become directly applicable when, on the expiration of this period, the obligation has not been fulfilled.

- 12 At the end of the transitional period, the Member States no longer have the possibility of maintaining restrictions on the freedom of establishment, since [Article 49 TFEU] has, as from this period, the character of a provision which is complete in itself and legally perfect.
- 13 In these circumstances the 'general programme' and the directives provided for by [Article 50 TFEU] were of significance only during the transitional period, since the freedom of establishment was fully attained at the end of it.
- 14 The Commission, in spite of doubts which it experiences on the subject of the direct effect of the provision to be interpreted - both in view of the reference by the Treaty to the 'general programme' and to the implementing directives and by reason of the tenor of certain liberalizing directives already

taken, which do not attain in every respect perfect equality of treatment - considers, however, that [Article 49 TFEU] has at least a partial direct effect in so far as it specifically prohibits discrimination on grounds of nationality.

- 15 [Article 18 TFEU], which forms part of the 'principles' of the [Union], provides that within the scope of application of the Treaty and without prejudice to any special provisions contained therein, 'any discrimination on grounds of nationality shall be prohibited'.

- 16 [Article 49 TFEU] provides for the implementation of this general provision in the special sphere of the right of establishment.
- 17 The words 'within the framework of the provisions set out below' refer to the Chapter relating to the right of establishment taken as a whole and require, in consequence, to be interpreted in this general context.
- 18 After having stated that 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period', [Article 49 TFEU] expresses the guiding principle in the matter by providing that freedom of establishment shall include the right to take up and pursue activities as self-employed persons 'under the conditions laid down for its own nationals by the law of the country where such establishment is effected'.
- 19 For the purpose of achieving this objective by progressive stages during the transitional period [Article 50 TFEU] provides for the drawing up by the Council of a 'general programme' and, for the implementation of this programme, directives intended to attain freedom of establishment in respect of the various activities in question.
- 20 Besides these liberalizing measures, [Article 53 TFEU] provides for directives intended to ensure mutual recognition of diplomas, certificates and other evidence of formal qualifications and in a general way for the coordination of laws with regard to establishment and the pursuit of activities as self-employed persons.

- 21 It appears from the above that in the system of the Chapter on the right of establishment the 'general programme'. and the directives provided for by the Treaty are intended to accomplish two functions, the first being to eliminate obstacles in the way of attaining freedom of establishment during the transitional period, the second being to introduce into the law of Member States a set of provisions intended to facilitate the effective exercise of this freedom for the purpose of assisting economic and social interpenetration within the [Union] in the sphere of activities as self-employed persons.
- 22 This second objective is the one referred to, first, by certain provisions of [Article 50(2) TFEU], relating in particular to cooperation between the competent authorities in the Member States and adjustment of administrative procedures and practices, and, secondly, by the set of provisions in [Article 53 TFEU].
- 23 The effect of the provisions of [Article 49 TFEU] must be decided within the framework of this system.
- 24 The rule on equal treatment with nationals is one of the fundamental legal provisions of the [Union].
- 25 As a reference to a set of legislative provisions effectively applied by the country of establishment to its own nationals, this rule is, by its essence, capable of being directly invoked by nationals of all the other Member States.
- 26 In laying down that freedom of establishment shall be attained at the end of the transitional period, [Article 49 TFEU] thus imposes an obligation to attain a precise result, the fulfilment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures.

- 27 The fact that this progression has not been adhered to leaves the obligation itself intact beyond the end of the period provided for its fulfilment.
- 28 This interpretation is in accordance with Article 8 (7) of the [EEC] Treaty [repealed], according to which the expiry of the transitional period shall constitute the latest date, by which all the rules laid down must enter into force and all the measures required for establishing the common market must be implemented.
- 29 It is not possible to invoke against such an effect the fact that the Council has failed to issue the directives provided for by [Articles 50 and 53 TFEU] or the fact that certain of the directives actually issued have not fully attained the objective of non-discrimination required by [Article 49 TFEU].
- 30 After the expiry of the transitional period the directives provided for by the Chapter on the right of establishment have become superfluous with regard to implementing the rule on nationality, since this is henceforth sanctioned by the Treaty itself with direct effect.
- 31 These directives have however not lost all interest since they preserve an important scope in the field of measures intended to make easier the effective exercise of the right of freedom of establishment.
- 32 It is right therefore to reply to the question raised that, since the end of the transitional period, [Article 49 TFEU] is a directly applicable provision despite the absence in a particular sphere, of the directives prescribed by [Articles 50(1) and 53(1) TFEU].

On the interpretation of [Article 51 TFEU]

- 33 The Conseil d'Etat has also requested a definition of what is meant in [the first paragraph of Article 51 TFEU] by 'activities which in that State are connected, even occasionally, with the exercise of official authority'.
- 34 More precisely, the question is whether, within a profession such as that of *avocat*, only those activities inherent in this profession which are connected with the exercise of official authority are excepted from the application of the Chapter on the right of establishment, or whether the whole of this profession is excepted by reason of the fact that it comprises activities connected with the exercise of this authority.
- 35 The Luxembourg Government and the Ordre national des avocats de Belgique consider that the whole profession of *avocat* is exonerated from the rules in the Treaty on the right of establishment by the fact that it is connected organically with the functioning of the public service of the administration of justice.
- 36 This situation (it is argued) results both from the legal organization of the Bar, involving a set of strict conditions for admission and discipline, and from the functions performed by the *avocat* in the context of judicial procedure where his participation is largely obligatory.
- 37 These activities, which make the advocate an indispensable auxiliary of the administration of justice, form a coherent whole, the parts of which cannot be separated.
- 38 The plaintiff in the main action, for his part, contends that at most only certain activities of the profession of *avocat* are connected with

the exercise of official authority and that they alone therefore come within the exception created by [Article 51 TFEU] to the principle of free establishment.

- 39 The German, Belgian, British, Irish and Dutch Governments, as well as the Commission, regard the exception contained in [Article 51 TFEU] as limited to those activities alone within the various professions concerned which are actually connected with the exercise of official authority, subject to their being separable from the normal practice of the profession.
- 40 Differences exist, however, between the Governments referred to as regards the nature of the activities which are thus excepted from the principle of the freedom of establishment, taking into account the different organization of the professions corresponding to that of *avocat* from one Member State to another.
- 41 The German Government in particular considers that by reason of the compulsory connection of the *Rechtsanwalt* with certain judicial processes, especially as regards criminal or public law, there are such close connexions between the profession of *Rechtsanwalt* and the exercise of judicial authority that large sectors of this profession, at least, should be excepted from freedom of establishment.
- 42 Under the terms of the first paragraph of [Article 51 TFEU] the provisions of the Chapter on the right of establishment 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'.
- 43 Having regard to the fundamental character of freedom of establishment and the rule on equal treatment with nationals in the system of the Treaty, the exceptions allowed by the first paragraph of [Article 51 TFEU] cannot be given a scope which would exceed the objective for which this exemption clause was inserted.

- 44 The first paragraph of [Article 51 TFEU] must enable Member States to exclude non-nationals from taking up functions involving the exercise of official authority which are connected with one of the activities of self-employed persons provided for in [Article 49 TFEU].
- 45 This need is fully satisfied when the exclusion of nationals is limited to those activities which, taken on their own, constitute a direct and specific connexion with the exercise of official authority.
- 46 An extension of the exception allowed by [Article 51 TFEU] to a whole profession would be possible only in cases where such activities were linked with that profession in such a way that freedom of establishment would result in imposing on the Member State concerned the obligation to allow the exercise, even occasionally, by non-nationals of functions appertaining to official authority.
- 47 This extension is on the other hand not possible 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.
- 48 In the absence of any directive issued under [Article 53 TFEU] for the purpose of harmonizing the national provisions relating, in particular, to professions such as that of *avocat*, the practice of such professions remains governed by the law of the various Member States.
- 49 The possible application of the restrictions on freedom of establishment provided for by the first paragraph of [Article 51 TFEU] must therefore be considered separately in connexion with each Member State having regard to the national provisions

applicable to the organization and the practice of this profession.

- 50 This consideration must however take into account the [Union] character of the limits imposed by [Article 51 TFEU] on the exceptions permitted to the principle of freedom of establishment in order to avoid the effectiveness of the Treaty being defeated by unilateral provisions of Member States.
- 51 Professional activities involving contacts, even regular and organic, with the courts, including even compulsory cooperation in their functioning, do not constitute, as such, connexion with the exercise of official authority.
- 52 The most typical activities of the profession of *avocat*, in particular, such as consultation and legal assistance and also representation and the defence of parties in court, even when the intervention or assistance of the *avocat* is compulsory or is a legal monopoly, cannot be considered as connected with the exercise of official authority.
- 53 The exercise of these activities leaves the discretion of judicial authority and the free exercise of judicial power intact.
- 54 It is therefore right to reply to the question raised that the exception to freedom of establishment provided for by the first paragraph of [Article 51 TFEU] must be restricted to those of the activities referred to in [Article 49 TFEU] which in themselves involve a direct and specific connexion with the exercise of official authority.
- 55 In any case it is not possible to give this description, in the context of a profession such as that of *avocat*, to activities such as consultation and legal assistance or the representation and defence of parties in court, even if the performance of these activities is compulsory or there is a legal monopoly in respect of it.

Costs

- 56 The costs incurred by the Government of the Kingdom of Belgium, the Government of the Federal Republic of Germany, the Government of Ireland, the Government of the Grand Duchy of Luxembourg, the Government of the Kingdom of the Netherlands, the Government of the United Kingdom of Great Britain and Northern Ireland and the Commission of the European [Union], which have submitted observations to the Court, are not recoverable.
- 57 Since these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before a national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Conseil d'Etat of Belgium, section d'administration, IIIe Chambre, by judgment dated 21 December 1973, hereby rules

- 1. Since the end of the transitional period [Article 49 TFEU] is a directly applicable provision, despite the absence, in a particular sphere, of the directives prescribed by [Articles 50(1) and 53(1) TFEU].**
- 2. The exception to freedom of establishment provided for by the first paragraph of [Article 51 TFEU] must be restricted to those of the activities referred to in [Article 49 TFEU] which in themselves involve a direct and specific connexion with**

the exercise of official authority; it is not possible to give this description, in the context of a profession such as that of *avocat*, to activities such as consultation and legal assistance or the representation and defence of parties in court, even if the performance of these activities is compulsory or there is a legal monopoly in respect of it.

Lecourt Donner Sorensen Monaco Mertens de Wilmars
 Pescatore Kutscher O Dalaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 21 June 1974.

A. Van Houtte
Registrar

R. Lecourt
President