OPINION OF ADVOCATE GENERAL COSMAS

delivered on 30 November 1999 *

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I — Introduction

1. By the present reference for a preliminary ruling pursuant to Article 177 of the EC Treaty (now Article 234 EC), the Amtsgericht Heinsberg (Local Court, Heinsberg) (Germany) has submitted a question to the Court on the interpretation of the rules of Community law regarding freedom to provide services. The Court is principally asked whether and to what degree a Member State is able to require, as a condition for the provision of skilled trade services (laying of composition floors) in its territory by an undertaking allowed to pursue its activity in the Member State in which it is established, that it be entered on its national skilled trades register.

* Original language: Greek.

II — Legal framework

A — *Community law*

2. The first paragraph of Article 59 of the EC Treaty (now, after amendment, the first paragraph of Article 49 EC) provides:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

3. Article 60 of the EC Treaty (now Article 50 EC) provides:

'Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

"Services" shall in particular include:

...

(c) activities of craftsmen;

...

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing the service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.'

4. In addition, according to Article 66 of the EC Treaty (now Article 55 EC), the provisions of Articles 55 to 58 of the EC Treaty (now Articles 45 EC to 48 EC) are to apply to the subject-matter governed by Chapter 3.

5. Article 56(1) of the EC Treaty (now, after amendment, Article 46(1) EC) provides that:

'The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.'

6. On 18 December 1961, the Council adopted, on the basis of Articles 54 and 63 of the EC Treaty (now, after amendment, Articles 44 EC and 52 EC), two General Programmes for the abolition of restrictions on freedom of establishment [1] and on freedom to provide services. [2] In order to implement those programmes and because of the lack of the necessary coordination of national regulations, the Council adopted Directive 64/427/EEC of 7 July 1964 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23–40 (Industry and small craft industries). [3] That directive, which was recently repealed by Directive 1999/42/EC, [4] provided for a system of mutual recognition of experience acquired in the Member State from which the person in question comes and was applicable both to establishment and provision of services in another Member State.

7. In particular, Article 3 of Directive 64/427 provided that:

'1. Where, in a Member State, the taking up or pursuit of any activity referred to in Article 1(2) is dependent on the possession of general, commercial or professional knowledge and ability, that Member State shall accept as sufficient evidence of such knowledge and ability the fact that the activity in question has been pursued in

1 — Official Journal 1962 No 2, p. 36.

2 — Official Journal 1962 No 2, p. 32.

3 — OJ, English Special Edition 1963-1964, p. 148.

4 — See Article 11(1) of and Annex B to Directive 1999/42/EC of the European Parliament and of the Council of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications (OJ 1999 L 201, p. 77).
In that connection, it is worth pointing out that the repeal of Directive 64/427 does not affect the usefulness of an interpretation of its provisions in the present case, in that, notwithstanding its transitional nature, the directive in question was applicable at the time when the events forming the factual content of the case in the main proceedings took place, in particular as regards the laying of composition floors. Indeed, in accordance with Article 6 of the directive, its provisions remained in force until the entry into force of the provisions relating to the coordination of national rules concerning the taking up and pursuit of the activities to which the directive refers (see Article 1(2) of the directive). As the Commission indicates in its written observations, neither 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), nor Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (OJ 1992 L 209, p. 25) replaced Directive 64/427.

another Member State for any of the following periods:

(a) six consecutive years either in an independent capacity or as a person responsible for managing an undertaking; or

(b) three consecutive years either in an independent capacity or as a person responsible for managing an undertaking, where the beneficiary can prove that for the occupation in question he has received at least three years' previous training, attested by a certificate recognised by the State, or regarded by the competent professional body as fully satisfying its requirements; or

(c) three consecutive years in an independent capacity, where the beneficiary can prove that he has pursued the occupation in question for at least five years in a non-independent capacity; or

(d) five consecutive years in a managerial capacity, not less than three years of which were in technical posts with responsibility for one or more departments of the undertaking, where the beneficiary can prove that for the occupation in question he has received at least three years' previous training attested by a certificate recognised by the State or regarded by the competent professional body as fully satisfying its requirements.

In the cases referred to in subparagraphs (a) and (c) pursuit of the activity shall not have ceased more than 10 years before the date when the application provided for in Article 4(3) is made.'

8. In addition, according to Article 4 of Directive 64/427:

'For the purpose of applying Article 3:

1. Member States in which the taking up and pursuit of any occupation referred to in Article 1(2) is subject to the possession of general, commercial or professional knowledge or ability shall, with the assistance of the Commission, inform the other Member States of the main characteristics of that occupation (description of the activities covered by the occupation).

2. The competent authority designated for this purpose by the country whence the beneficiary comes shall certify what professional activities were actually pursued by the beneficiary and the duration of those activities. Certificates shall be drawn up having regard to the official description of the occupation in question supplied by the

Member State in which the beneficiary wishes to pursue such occupation, whether permanently or temporarily.

3. The host Member State shall grant authorisation to pursue the activity in question on application by the person concerned, provided that the activity certified conforms to the main features of the description of the activity communicated pursuant to paragraph 1 and provided that any other requirements laid down by the rules of that State are satisfied.'

B — *National law*

9. As the order for reference indicates, anyone practising a craft or trade in Germany must be entered on the 'Skilled Trades Register' (Paragraph 1(1), first sentence, of the Handwerksordnung (Skilled Trades Order — 'the HandwO')).

10. In accordance with Paragraph 7 of the HandwO, any person who has passed the master's examination (Meisterprüfung) in the skilled trade to be carried on by him or in a related craft or trade, or who has obtained an exceptional authorisation in accordance with Paragraphs 8 or 9 of the HandwO, shall be entered on the Skilled Trades Register.

11. Paragraph 8 of the HandwO provides that in exceptional cases authorisation to be entered on the Skilled Trades Register (exceptional authorisation) is to be granted if the applicant is able to show the knowledge and skill required to pursue the skilled trade to be carried on by him in an independent capacity.

12. In addition, according to Paragraph 9 of the HandwO, within the framework of the application of European Community directives relating to freedom of establishment and freedom to provide services, the Federal Minister for the Economy is authorised to determine the conditions under which nationals of the Member States may obtain exceptional authorisation to be entered on the Skilled Trades Register apart from the cases provided for in Paragraph 8(1).

13. Pursuant to Paragraph 9 of the HandwO, regulations (Verordnung) were adopted on 4 August 1966 which transposed into German law the provisions of Articles 3 and 4(2) and (3) of Directive 64/427 ('the EC skilled trades rules').

14. As is indicated in the order for reference, the above rules provide that for foreign undertakings from Member States of the European Community the conditions

for being entered on the Skilled Trades Register are as follows:

If the foreign contractor has completed an appropriate training, leading either to a master's examination (Meisterprüfung) or to a certificate of proficiency (Fachdiplom), he must show that he has worked in his country of origin either for a period of three years in an independent capacity or for a period of five years in a managerial capacity. If the foreign contractor does not need a proficiency certificate or to pass an examination in his country of origin in order to carry on his trade, he must show that he has been doing so for at least six consecutive years in his country of origin. In no circumstances may such activity have ceased more than ten years earlier.

15. As is also indicated in the order for reference, the procedure for a foreign undertaking wishing to be entered on the German Skilled Trades Register on the basis of the above conditions is as follows:

A specified authority in the country of origin (in the Netherlands: Hoofdbedrijfschap Ambachten (Central Crafts and Trades Board)) must certify the period of time during which the activity has been pursued and the qualifications acquired. The tradesman must deliver the certificate, translated into German if appropriate, to the competent German Chamber of Trades ('the Chamber') in person. The Chamber then checks that the conditions set out in the EC skilled trades rules have been fulfilled and forwards the certificate to the Regierungspräsident (President of the Land) together with an application by the tradesman for exceptional authorisation, in respect of which a fee of between DEM 300 and DEM 500 is payable. If the exceptional authorisation is granted, it is sent to the tradesman's home address once the fee is paid. He must then apply, with the exceptional authorisation, to the Chamber to be entered on the Skilled Trades Register. In addition, he must produce a recent extract from the Business Register and pay an application fee. A German skilled tradesman's card is then sent to him at his business address. From that point on, the foreign tradesman is authorised to carry on skilled activities in Germany.

As the Commission indicates in its written observations, the above procedure seems to apply whether the skilled trade undertaking intends to carry on its activities in Germany on a long-term basis or only temporarily.

III — Facts

16. As part of a construction project in Germany, Mr Corsten, who is a self-employed architect, entrusted the laying of composition floors to a Netherlands undertaking whose registered office is in the Netherlands, which carries out the laying of composition floors there lawfully

and as a business, but is not entered on the Skilled Trades Register in Germany.

17. The Netherlands undertaking charges a price for its work (per square metre of composition floor) that is considerably lower than German undertakings ask for equivalent work.

18. By a 'Bußgeldbescheid' (administrative order imposing a fine) of 2 January 1996, the competent German authority imposed on Mr Corsten a penalty of DEM 2 000 for breach of Paragraph 2 of the Law against black market work (Gesetz zur Bekämpfung der Schwarzarbeit, 'the SchwArbG'). [5] According to that Law (a combination of the provisions of Paragraphs 2(1)(1) and 1(1)(3)), an administrative penalty is to be imposed upon anyone who entrusts work to undertakings which are not entered on the German Skilled Trades Register. In that connection it is worth pointing out that in Germany the laying of composition floors constitutes a skilled trade activity.

19. Mr Corsten lodged an objection ('Einspruch') against the above order imposing an administrative penalty before the Amtsgericht Heinsberg.

5 — By decision of 9 October 1995 it had also barred the Netherlands undertaking from continuing to lay composition floors in Germany. In an order of the same date it had further imposed a penalty of DEM 1 000 on the undertaking for breach of Paragraphs 1 and 117 of the HandwO.

IV — The question referred for a preliminary ruling

20. The Amtsgericht Heinsberg, doubting that the abovementioned provisions of German law were compatible with Community law on freedom to provide services, stayed the proceedings before it, and by order of 13 February 1998, which was supplemented on 22 June 1998, submitted the following question to the Court of Justice for a preliminary ruling:

'Is it compatible with Community law on the freedom to provide services for a Netherlands undertaking, which in the Netherlands satisfies all the conditions for carrying on a commercial activity, to have to satisfy further — albeit purely formal — conditions (in this case to be entered on the Skilled Trades Register) in order to carry on that activity in Germany?'

V — The reply to the question referred for a preliminary ruling

21. I shall examine the substance of the question submitted for a preliminary ruling (B), after initially making certain observations about its formulation (A).

A — *Formulation of the question referred for a preliminary ruling*

22. Regarding the formulation of the question referred for a preliminary ruling, I would point out that, in the context of Article 177 of the Treaty, the Court does not pronounce upon the interpretation or validity of national provisions, or on whether those provisions are compatible with Community law, but provides the national court with all the necessary guidance on interpretation to enable that court to decide for itself whether a provision of national law is compatible with the Community rules. [6]

23. Consequently, it must be considered that the question referred for a preliminary ruling by the Amtsgericht Heinsberg concerns the question whether the rules of Community law on freedom to provide services and, in particular, Article 59 et seq. of the Treaty and Directive 64/427, are to be construed in such a way that they conflict with national provisions of a Member State (the host Member State) according to which an undertaking which satisfies, in the Member State in which it is established, all the conditions for carrying on a commercial activity, must satisfy further — albeit purely formal — conditions (in this case to be entered on the Skilled Trades Register) in order to carry on that activity in the host Member State.

B — *Substance*

24. In order to answer the question referred for a preliminary ruling it is first necessary to analyse the requirement to be entered on the Skilled Trades Register which is imposed by the provisions of German law at issue (a). That analysis will establish the boundaries for, second, the interpretation sought by the national court of the relevant rules of Community law which safeguard the freedom to provide services, namely Directive 64/427(b) and Article 59 et seq. of the Treaty (c).

(a) Requirement to be entered on the Skilled Trades Register under German law

25. In order to ensure that the interpretation requested of the rules of Community law is appropriate and useful, it is necessary to determine exactly the content, the extent and in general the onerousness of the

6 — See, for example, Case 27/74 *Demag* [1974] ECR 1037, paragraph 8; Case 22/80 *Boussac* v *Gerstenmeier* [1980] ECR 3427, paragraph 5; Case C-69/88 *Krantz* [1990] ECR I-583, paragraph 7; and Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 6.

requirement that an undertaking be entered on the Skilled Trades Register of the host Member State, as that requirement appears in the legal background to the case in the main proceedings. In spite of the contrary impression which could be created upon first sight, such a determination is not incompatible with the Court's lack of jurisdiction to interpret national legal provisions, [7] because from a teleological point of view this is not aimed at giving an interpretation of those provisions which would be objectively correct and binding upon the national court with regard to their application to the case in the main proceedings, but simply at determining the legal and factual framework in the light of which, taken as an example, the interpretation of the provisions of Community law is requested.

26. The requirement for undertakings of other Member States to be entered on the domestic Skilled Trades Register in Germany if they intend to carry on their activity in that Member State must be interpreted within the framework established by the more general system of the HandwO and the EC skilled trades rules, which determine the procedure for recognising experience acquired in other Member States.

27. That system, as described in the order for reference, [8] establishes a two-stage procedure. In the first stage, the competent German authorities (the relevant Chamber and Regierungspräsident) check whether the essential conditions of the EC skilled trades rules are met, conditions which correspond to the substantive conditions in Article 3 of Directive 64/427, so that exceptional authorisation can be granted to the tradesman concerned. However, the possible grant of this authorisation by the Regierungspräsident does not guarantee entitlement to carry on the activities in question. Within the framework of a second stage of the procedure, the tradesman concerned must make a further application to be entered on the Skilled Trades Register to the competent Chamber, producing the exceptional authorisation, submitting a recent extract from the Business Register, and paying a further application fee. [9] Only after completion of that second stage, that is, being entered on the Skilled Trades Register and the issue of a German skilled tradesman's card, is the foreign tradesman

7 — See above, point 22 of my Opinion.

8 — See above, point 15 of my Opinion. In its written observations, and in particular at the hearing, Kreis Heinsberg cast doubt upon the correctness of the information supplied by the national court relating to the German legal framework. As far as that is concerned, it must be emphasised that the interpretation and exact determination of the national legal framework in Germany falls within the competence of the national court, and that the Court of Justice is not in a position to reach a decision on the doubts raised by Kreis Heinsberg. In addition, as I shall indicate later when analysing the various issues, the new version of national law which Kreis Heinsberg wishes to convey by means of the doubts it has expressed is not always entirely clear, and, in certain respects, does not appear to be of use in answering the questions on the interpretation of the Community law raised in the present case. The reply given by the Court to the question referred for a preliminary ruling can therefore only be based on the information provided to it by the national court. In any case, it falls to the latter court to cross-check the position in the light of the observations of Kreis Heinsberg and, if it revises its view, to adapt the conclusions of the Court accordingly, on the basis that it can, if it considers it necessary, refer a further question for a preliminary ruling to the Court.

9 — According to Kreis Heinsberg, it is not necessary to submit a recent extract from the Business Register, nor to pay a fee to obtain the extract. It is a matter for the national court to investigate the correctness of those assertions.

allowed to carry on skilled trade activities in Germany.

28. It follows from the above that entry on the Skilled Trades Register, which is stated in the order for reference to be provided for by German law and in respect of which the Court is requested to interpret the rules of Community law regarding the freedom to provide services, presents the two following characteristics:

Firstly, registration constitutes a *formal requirement* for the right to carry on skilled trade activities in a Member State, such as Germany.

Secondly, registration *is not an automatic consequence of the granting of exceptional authorisation* to carry on a skilled trade activity, because the authority which grants the exceptional authorisation does not send the details of the beneficiary of the grant directly to the relevant Chamber, so that he can be entered without further formality on the Skilled Trades Register; rather, a separate application procedure is required on the part of the foreign tradesman.[10]

(b) Directive 64/427

29. Directive 64/427 is intended 'to make it easier to attain freedom of establishment and freedom to provide services in a broad range of industrial and small craft activities in the manufacturing and processing industries, pending harmonisation of conditions for taking up those activities in the different Member States, which is an essential pre-

10 — On that point, it should be noted that Kreis Heinsberg stressed at the hearing that the presentation by the national court of the procedure for the recognition of experience under German law is erroneous in that it accepts that the tradesman concerned, presenting his exceptional authorisation, is requesting the relevant Chamber to enter him on the Skilled Trades Register. Initially, Kreis Heinsberg maintained that there is a right to be entered on the Register without any further requirement of checking, provided the documentation is submitted. Consequently, if the competent administrative authority has granted an exceptional authorisation to be registered, it transmits that document to the Chamber which proceeds officially to register the entry on the basis of the exceptional authorisation. Subsequently, Kreis Heinsberg stressed that, although the exceptional authorisation and entry on the Skilled Trades Register constitute two separate administrative acts and although it is correct that an application fee is payable for each one, it should be regarded as a single procedure. What is important is that the competent administrative authority takes the authorisation decision, having consulted the Chamber, which effects registration. Moreover, according to Kreis Heinsberg, anyone who requests exceptional authorisation to be registered obtains it, because national law so provides.
To the extent to which I can claim to have understood the procedure which Kreis Heinsberg describes, I consider that the latter does not essentially dispute the fact that, for registration on the Skilled Trades Register, which constitutes a separate administrative act, the foreign tradesman is required to make a separate application. What Kreis Heinsberg thus appears to mean, when it refers to automatic or official registration, is that, when the tradesman presents the exceptional authorisation, there is an obligation, that is, a mandatory duty, to enter him on the Register. The fact, however, that there is a substantive requirement to enter him does not obviate the obligation upon the tradesman to make a further, second application, and that therefore removes the 'automatic' character of registration.

requisite for complete liberalisation in that field.'[11]

30. Having regard to the above aim, Directive 64/427 established a system of rules so that the pursuit of an occupational activity in a particular Member State should be recognised in another Member State within the framework of the freedom to provide services. Specifically, according to Article 4 of the Directive, the procedure for the recognition of experience gained abroad was to be based on the following principles:

First, the host Member State could make the pursuit of the relevant activity by undertakings from other Member States dependent upon prior authorisation.

Second, the host Member State was obliged to issue such authorisation when the conditions of Article 3 of the Directive were fulfilled, as well as any other requirement laid down in that Member State's provisions. Whilst checking that those conditions were fulfilled, the host Member State was bound by the declarations contained in the certificate issued by the original Member State.[12]

Third, the Member States were to inform each other of the principal characteristics of legally safeguarded occupations, by describing the activities covered. The host Member State was to supply to the original Member State the description of the occupation to which the latter should have regard when drawing up a certificate. The host Member State would have to grant authorisation to provide services when the activity certified coincided with the principal characteristics of the description of the occupation and provided that any other requirements laid down by the rules of that State were satisfied.

31. Here it should be noted that at no point in the above system of rules determining the procedure for recognising experience in other Member States does it appear that any issue arises of incompatibility with the rules of primary Community law safeguarding the freedom to provide services. Moreover, in the few cases in which the Court has been concerned with the inter-

11 — See Joined Cases C-193/97 and C-194/97 *De Castro Freitas and Escallier* [1998] ECR I-6747, paragraph 19.

12 — See on this point *De Castro Freitas and Escallier*, cited above, paragraph 29. However, as is mentioned in that judgment, where there are objective factors which lead the host State to consider that the certificate produced contains manifest inaccuracies, that State may approach the Member State of origin with a view to requesting additional information (paragraph 30).

pretation of Directive 64/427[13] no such issues have arisen.

32. Comparing the procedure for the recognition of experience in another Member State, such as has been laid down in Germany, with the equivalent procedure for recognition laid down by Directive 64/427, it must be accepted that, as far as the substantive elements of the first stage of the procedure in German law are concerned, questions of incompatibility do not appear to arise. From the description of German law given by the national court, there is no feature that could give rise to a presumption that the linked provisions of the HandwO and the EC skilled trades rules diverged from the three abovementioned principles of the Directive which determined the procedural framework for recognition of the essential conditions for carrying on skilled trade activity in the host Member State. In particular, it appears that the provisions of German law in fact base such recognition on the issue of an administrative authorisation, which takes account, as evidence of experience and specific knowledge acquired, of the certificate from the original Member State.

33. On the other hand, as far as the form of the first stage of the procedure is concerned, I consider that certain difficulties can be pinpointed. Specifically, as the Commission also observes, a *formal check* based on the certificate of the original Member State would not appear to justify a requirement that the application be made in person, nor the double-checking of that certificate by the competent Chamber and the Regierungspräsident.[14] The above make the whole procedure more difficult and could potentially jeopardise the practical effectiveness of the provisions of the Directive, as will be shown below regarding the analysis of the second stage of the procedure in German law, which relates directly to the disputed obligation to be entered on the Skilled Trades Register.

34. In relation to that second stage, the question of compatibility or not with Directive 64/427 appears to be more complex.

35. First of all it must be pointed out that, in laying down the basic principles of the

13 — Apart from the judgment in *De Castro Freitas and Escallier*, cited above, see Case 115/78 *Knoors* [1979] ECR 399 and Case 130/88 *Van der Bijl* [1989] ECR 3039.

14 — On that point it is worth noting that, at the hearing, Kreis Heinsberg, whilst accepting that documentary evidence should be presented in German, doubted that the application had to be made in person, and insisted that it could be sent by post, either to the Chamber or to the competent administrative authority. Furthermore, Kreis Heinsberg stressed that only the Regierungspräsident is competent to grant an exceptional registration authorisation, after hearing the Chamber concerned.
Regarding the first point, it must be borne in mind that the Court is not in a position to judge whether it is really necessary for an application to be made in person. As regards the second point, however, I believe that Kreis Heinsberg does not essentially dispute that — for advisory or decision-making purposes — duplicate checks on the certificate from the original State are made by the competent Chamber and the competent administrative authority, despite the fact that the check is essentially formal, as, moreover, Kreis Heinsberg itself admitted. Lastly, it should be noted that the fact that it is open to the tradesman to address himself either to the Chamber or to the administrative authority does not prevent both of them from being involved in the procedure in question.

procedure for recognition of experience acquired in another Member State, Directive 64/427 did not in principle prohibit the host Member State from making the grant of authorisation to pursue the activity in question dependent upon other conditions, different from those referred to in the Directive. On the contrary, Article 4(3) of Directive 64/427 clearly provided for the possible imposition of such conditions by the host Member State.

36. On this point, it is worth noting that, in any case, the Directive could not in principle preclude the host State from being able to impose additional terms for the granting of authorisation to pursue the activities in question, whether those terms related to the substantive conditions for recognition of the right to pursue the activities in question, or whether they related to the procedure for recognition. As regards the case of terms relating to the substantive conditions, the Court favoured this point of view in its decision in *De Castro Freitas and Escallier*, [15] in which it held that, failing harmonisation of conditions for taking up and pursuing the activities in question, 'the Member States remain, in principle, competent to define the general, commercial or professional knowledge and ability necessary in order to engage in the activities in question and to require production of diplomas, certificates or other formal evidence attesting that applicants possess such knowledge and ability.' [16] In that connection, I consider that, as regards the conditions referred to in the recognition procedure concerning the requisite knowledge and ability for the pursuit of the activities in question, such as, in this case, the requirement to be entered in the Skilled Trades Register, *a fortiori* a similar position should be adopted. In other words, having regard to the transitional character of Directive 64/427 and the absence of harmonisation as regards the taking up and pursuit of various activities in the Member States, those States were in principle competent to determine the procedural conditions for the granting of authorisation to pursue the activities in question as well, even in a case in which those conditions did not fall within the scope of application of Article 56 of the Treaty relating to the protection of public policy, public security or public health. [17]

37. However, it cannot be doubted that the Member States could not exercise their above competence without being subject to any controls, in other words, without restrictions under Community law. As the Court indicated in *De Castro Freitas and Escallier*, [18] as regards the substantive conditions for the recognition of the right to provide services in host Member States, those States must, when exercising their powers in that area, 'respect both the basic freedoms guaranteed by Articles 52 and 59

15 — Cited above in footnote 11.

16 — Paragraph 21.

17 — Similarly, the Court has on the one hand stated that 'national rules which are not applicable to [the provision of] services without discrimination as regards their origin are compatible with Community law only if they can be brought within the scope of an express exemption, such as that contained in Article 56 of the Treaty', and, on the other hand, that 'in the absence of harmonisation of the rules applicable to services, or even of a system of equivalence, restrictions on the freedom guaranteed by the Treaty in this field may arise in the second place as a result of the application of national rules which affect any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of their State's legislation' (see Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraphs 11 and 12).

18 — Cited above in footnote 11.

of the Treaty and the effectiveness of a directive laying down transitional measures.'[19]

38. In view of the above, it must therefore be accepted that the power which a Member State such as Germany in principle has to provide that an undertaking which wishes to carry on a skilled trade activity in that State is required to be entered on the Skilled Trades Register should be exercised in such a way as to be compatible both with the principles governing the freedom to provide services which is guaranteed by Article 59 et seq. of the Treaty and with the effectiveness of the provisions of Directive 64/427. The compatibility of the way in which this power is exercised with Article 59 et seq. of the Treaty will be examined below. On that point I shall confine myself to examining its compatibility with the effectiveness of the provisions of Directive 64/427 and, more particularly, of the procedure for recognition of experience laid down in Article 4 of that Directive.

39. In so far as it constitutes a separate stage of the procedure for recognition of the right to carry on a skilled trade in Germany, which is procedurally independent of and subsequent to the stage at which the substantive conditions for recognition of the right in question are verified, at first sight the requirement to be entered in the Skilled Trades Register does not appear to have a negative effect on the general application of the procedural principles set out in Article 4 of the Directive, which appear to be observed during the first stage of the procedure laid down by the provisions of the HandwO and the EC skilled trades rules.[20] However, I consider that the effectiveness of those principles may be jeopardised in view of the particular characteristics of entry on the Skilled Trades Register as provided for in German law. Specifically, that requirement of registration, which constitutes an essential formality as regards the right to pursue a skilled trade in Germany that is only fulfilled by a further application submitted by the undertaking concerned, although it has been previously decided that the undertaking fulfils all the essential conditions for the legal pursuit of the skilled trade activity and consequently there is no further need for a check on the basis of the system provided for in Article 4 of Directive 64/427, appears to make significantly more difficult — in terms of time and expenditure — the procedure for granting the necessary authorisation, the first stage of which is already burdensome.[21] That overall encumbering effect can undermine — and in any event does not secure — the effectiveness of the procedural principles laid down in Article 4 of the Directive, just as it would have no practical importance if those principles could be observed formally, but the issuing of the relevant authorisation sought was not ultimately of any use because of the length of time taken, the possible high expenditure and the general difficulty of the whole procedure, particularly for undertakings which are interested in pursuing isolated or generally temporary activities in the host State. As I shall explain in more detail below, this

19 — Paragraph 23.

20 — See above, point 32 of my Opinion.

21 — See above, point 33 of my Opinion.

encumbering effect appears, furthermore, to be disproportionate to any overriding public interest which could justify the obligation to be entered on the Register.

40. It results from the above that the need to ensure the effectiveness of Directive 64/427 means that it precludes a national provision of a Member State from making the provision of skilled trade services in the Member State in question by an undertaking established in another Member State dependent upon that undertaking's being entered on the Skilled Trades Register of the host Member State, where the undertaking has already been issued with an exceptional authorisation, in the context of which it has been checked that that undertaking fulfils all the essential conditions provided for in the national provisions transposing Article 3 of Directive 64/427, and the required procedure for being entered on the Register burdens the undertaking in question with additional obligations and expenses.

(c) Article 59 et seq. of the Treaty

41. As the Commission correctly points out in its observations, in laying down the procedure for authorisation provided for in Article 4(3) of Directive 64/427, the host Member State should take into consideration the general principles which the Court has developed in its case-law relating to Article 59 et seq. of the Treaty which regulate the freedom to provide services, including skilled trade activities. [22]

42. According to that case-law, Article 59, which became directly applicable on the expiry of the transitional period, [23] 'requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services'. [24]

43. In the same way, according to settled case-law, 'as one of the fundamental principles of the Treaty, freedom to provide services may be restricted only by rules which are justified by overriding reasons in

22 — On that point it is worth noting that, in the present case, it could not be disputed — by way of analogy with Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16, according to which a measure which does not give rise to discrimination and which relates to selling arrangements does not fall within the field of application of Article 30 of the EEC Treaty — that the procedure in question falls under Article 59 of the EC Treaty. It is indubitable that the measures which regulate the procedures for the granting of authorisation to pursue skilled trade activities in Germany, which include the disputed obligation to be entered on the Skilled Trades Register, relate directly to access to the market for skilled trade services in the Member States and consequently constitute procedural restrictions on the inter-Community market for services (see also below, point 45 of my Opinion). In accordance therefore with Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraphs 28 and 33 to 38, in such a situation it is not possible to apply *Keck and Mithouard* by analogy.

23 — See, for example, Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 25.

24 — See Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 25.

the general interest and are applied to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established'. [25]

44. Lastly, according to the Court's case-law, restrictive provisions, as referred to above, must comply with the principle of proportionality. '[T]he application of national provisions to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules'. [26] In that connection, the Court has repeatedly held that 'a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions whose object is to guarantee the freedom to provide services'. [27]

45. In the light of the Court's case-law, the imposition of a requirement on an undertaking of a Member State seeking to pursue a skilled trade activity in Germany that it be entered on the Skilled Trades Register of that State, appears to constitute a restriction which could impede, defer, preclude or render less attractive the activities of the provider of services in the host Member State, in spite of the fact that the above requirement is applied without distinction to national providers of services as well as to those from other Member States. [28] I come to the above conclusion taking into consideration the features of the requirement to be entered on the Register in question, as well as the fact that German law not only requires every undertaking to be so registered, but also makes access to the freedom to provide skilled trade services dependent upon such registration. If, apart from the essential character of registration, account is also taken of the fact that the obligation to submit a further application in order to effect that registration makes the procedure more burdensome in terms of time and expenditure, it becomes apparent that the requirement to be entered on the Skilled Trades Register, as provided for in Germany, may make the pursuit of such activities in the host Member State less attractive. As the Commission rightly observes, the restrictive character of the requirement in question becomes more apparent in the case of undertakings wishing to carry out work in Germany occasionally, or even only once. In that case the obligation to submit a further application and pay an additional fee can reduce the anticipated profit, at least as regards small projects, to such an extent that the pursuit of activities in Germany by undertakings

25 — See Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 16.

26 — See *Collectieve Antennevoorziening Gouda*, cited above in footnote 17, at paragraph 15.

27 — See, for example, Case C-43/93 *Vander Elst*, cited above in footnote 25, at paragraph 17.

28 — It could also be maintained that the requirement to be entered on the Skilled Trades Register constitutes a restriction simply because it is a formal condition for access to the market in services, without there being any need to examine whether the condition could be easily satisfied (that constitutes a factor affecting the determination as to whether the restriction is justified or not). See, on this point, the Opinion of Advocate General Fennelly in Case C-190/98 *Volker Graf* [2000] ECR I-493, I-495 paragraphs 30 and 31.

established in other Member States would then seem even less attractive.

46. However, in spite of the fact that the requirement of registration appears to constitute a restriction upon the freedom to provide services, in order to decide whether it contravenes Article 59 of the Treaty, the following must be investigated: first, whether the obligation is *necessary*, that is to say, whether it is justified by overriding reasons relating to the public interest which are not safeguarded by the provisions of the State where the undertaking is established; secondly, whether it is *appropriate*, that is, whether it is really apt to serve the general interest objective; and, thirdly, whether it is *rational* (*proportionate, stricto sensu*), that is, whether it is restrictive to a degree really necessary for the attainment of the above objective and the advantages linked to the requirement exceed or are at least equal to the disadvantages.

47. Although it is a matter for the national court, which has better knowledge of the national law and the issues of fact in the case in the main proceedings, to ascertain whether the three different elements *lato sensu* of the *principle of proportionality* are applicable,[29] I consider it worth pointing to certain elements which stand out clearly when the criteria of the case-law and the features of the requirement to be entered on the Skilled Trades Register in Germany, as it is described in the order for reference, are compared.

48. As regards the necessity for undertakings which wish to pursue skilled trade activities in the host Member State to be entered on the Skilled Trades Register, there is no doubt that, although the national court does not make any mention of it, there are evident lawful overriding grounds of public interest which can justify the relevant restriction on access to freedom to provide services. More precisely, registration of the details of every undertaking which is operating in the territory of a Member State is undoubtedly an indispensable condition for the protection of the recipients of the services in question, since it provides them with information about that undertaking,[30] and for the effective application of other provisions of the host Member State (e.g. regulatory, disciplinary and other provisions, such as the legislation against black market work, which was applied in the case in the main proceedings).[31] For that reason, the requirement

29 — In this case it is all the more necessary to point to the competence of the national court as regards application of the principle of proportionality because of the existence of doubts on the part of Kreis Heinsberg relating to the national legal framework in question in Germany.

30 — Regarding the consideration of the protection of recipients of services as an overriding reason relating to the public interest capable of justifying restrictions upon the freedom to provide services, see Joined Cases 110/78 and 111/78 *Van Wesemael and Others* [1979] ECR 35, paragraphs 26 and 27, and *Collectieve Antennevoorziening Gouda*, cited above in footnote 17, paragaph 14.

31 — Regarding the consideration of the protection of workers as an overriding reason relating to the public interest capable of justifying restrictions upon the freedom to provide services, see for example Case 279/80 *Webb* [1981] ECR 3305, paragraph 19, and *Collectieve Antennevoorziening Gouda*, cited above in footnote 17, paragraph 14.

that details of undertakings operating on national territory be entered on a register, which is in force in many Member States, is logical, as Kreis Heinsberg states in its written observations.[32] Moreover, the protection of recipients of services and the guarantee of the effective regulation of the relevant activities pursued contribute indirectly to a general improvement in the quality of skilled trade services provided in the host Member State.[33]

49. I am of the opinion that the need to serve the above grounds of public interest exists, not only in the case of the establishment of an undertaking in the host Member State, but also in the case of the mere supply of services which is not accompanied by establishment in that State. Contrary to the assertion of the Austrian Government, in my opinion it is indubitable that both the protection of the recipients of services by means of the collection, registration and making available of the details of the undertakings which are providing them and the ability to control the way in which those services are provided must also be safeguarded in the case of undertakings which provide them temporarily or even once only. More particularly, account must be taken of the fact that a single case of a provision of services of bad quality suffices to cause significant damage to the legitimate interests of the recipients of those services.

50. In that respect, it is worth noting that the above grounds of public interest could not have been served by any provisions of the Member State in which the undertaking is established, on the one hand because, by their nature, those grounds relate to the particular legal and practical regime which may be in force in the host Member State regarding access to certain activities and to their pursuit, combined with the particularities of that State in the fields of public security, public health and public policy,

32 — Regarding the requirement for foreign undertakings to be entered on national registers, Kreis Heinsberg puts forward evidence from the legal systems of Belgium, France, Greece, Italy, Luxembourg and Austria.
According to Kreis Heinsberg, the Skilled Trades Register functions as a public register, which contains information about tradesmen who pursue their activities in an independent capacity in the area covered by the local Chamber of Trades. In other words, the Register has a regulatory function and serves to inform the authorities and users of skilled trade services about the persons who have authorisation to provide, in an independent capacity, such services in the area covered by the local Chamber of Trades.

33 — As the Commission rightly indicated at the hearing, safeguarding the quality of the skilled trade services rendered could not, alone, directly justify the requirement to be entered on the Skilled Trades Register, inasmuch as that quality is sufficiently safeguarded by the exceptional authorisation to pursue the activities in question, which is granted before entry on the Register.
On that point it must also be noted that, according to the German Government, entry on the Skilled Trades Register results in compulsory membership of a Chamber of Trades, which serves to maintain the standard of services rendered and professional efficiency in the skilled trades sector, and contributes to their improvement by means of a system of dual training (practical and professional training) for the entire industrial and trades economy. As regards the above observations, it must be borne in mind that, first, it is a matter for the national court to investigate whether in fact compulsory membership of the Chamber of Trades can, under German law, justify the requirement to be entered on the Skilled Trades Register, and whether it serves the purposes cited by the German Government. I am of the opinion, however, that, in spite of the fact that those aims appear to constitute grounds of public interest within the strict framework of a German legal system, they could not be pleaded against foreign Community enterprises which wish to pursue activities in Germany temporarily or even only once, and which do not appear to take part in the system of educational training in that Member State. If, however, that is the case, and, particularly if compulsory membership of the Chamber of Trades entails the periodic payment of fees, then, applying the case-law of the Court cited above, the national court must examine whether that compulsory membership, following on from the requirement to be entered on the Register, constitutes a particular restriction upon the freedom to provide services which potentially contravenes Community law. In such a case, the national court may, if it considers it necessary, refer a further question for a preliminary ruling to the Court.

and, on the other hand, because in the absence of harmonisation of the conditions of access to the above activities and to their pursuit, and of a common register of undertakings, it would not be possible to serve the grounds of public interest in question in a Member State by means of the possible application of another Member State's rules.

51. As regards the suitability of the requirement to be entered on the Skilled Trades Register of the local German Chamber, I consider that such a form of registration does in fact serve the particular aims of ensuring that information is available, of controlling the manner in which the activities are pursued, and, above all, of protecting the recipients of skilled trade services supplied by undertakings established in other Member States. That requirement appears to constitute an effective measure for achieving the above aims, whilst it is difficult to imagine any other means by which the necessary details relating to an undertaking could be made available in one place.

52. However, as regards its proportionality *stricto sensu*, it is undoubtedly apparent that the requirement to be entered on the Skilled Trades Register, as provided for by the provisions of German law, does not constitute the most rational choice which could have been made.

53. More particularly, the registration procedure provided for in German law appears to restrict — in the sense that it makes it less attractive — the provision of services, to a degree which is not really essential in order to satisfy the overriding public interest in being able to regulate the provision of skilled trade services and in the protection of the recipients of those services. In fact, it is not justified, because, in order to ensure the necessary entry on the Register, another procedure has to be set in motion, with the submission of an application and certificates and the payment of fees. That further procedure does not appear to serve the above overriding public interest at all, whilst at the same time it makes the whole procedure to secure the right to pursue skilled trade activities in the host Member State more difficult. The public interest in question could be better served by *automatic* registration, via the administration, on the basis of data collected at the stage when exceptional authorisation is granted, without delaying and complicating the possibility of providing services or making the provision of services more difficult by

imposing additional requirements and costs. [34] same day, on mere presentation of confirmation of the exceptional authorisation.

54. In that connection, Kreis Heinsberg, drawing attention to lacunae in the description of the national legal framework in the order for reference, observes that for reasons related to the person making the application or because of particular difficulties (for example, if there is a great distance between the place where the undertaking is based and the Chamber), entry on the Skilled Trades Register and the issuing of the card can take place on the

55. Regarding the above observation, it must of course be remembered that the interpretation and exact determination of the German national legal framework falls to the national court and that the Court of Justice is not in a position to rule on the doubts raised by Kreis Heinsberg concerning the description of the national provisions governing entry on the Skilled Trades Register. However, I consider that, since it is not essentially disputed that entry on the Skilled Trades Register is not automatic, because a further application by the undertaking concerned is required, the disproportionate character of the procedure does not appear to be curable, either by making provision on an exceptional basis — that is to say, in special circumstances — for speeding-up procedures, or by the possible reduction or abolition of certain requirements for certificates or application fees. Since registration is an essential formality for access to the provision of services, in any case in which registration is not automatic, the existing disadvantages do not in principle appear to be justified by advantages relating to considerations of overriding public interest, and, for that reason, the requirement to be entered on the Skilled Trades Register, as provided for in German law, contravenes Article 59 et seq. of the Treaty guaranteeing the freedom to provide services.

34 — See, for example, the rules in Article 22(1) of Council Directive 85/384/EEC of 10 June 1985 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (OJ 1985 L 223, p. 15). *Inter alia* that article provides: 'Where a Member State requires of its own nationals wishing to take up or pursue the activities referred to in Article 1 either an authorisation from or membership of or registration with a professional organisation or body, that Member State shall, in the case of provision of services, exempt nationals of other Member States from that requirement.
The person concerned shall provide services with the same rights and obligations as nationals of the host Member State; in particular he shall be subject to the rules of conduct of a professional or administrative nature which apply in that Member State.
For this purpose and in addition to the declaration referred to in paragraph 2 relating to the provision of services, Member States may, so as to permit the implementation of the provisions relating to professional conduct in force in their territory, require automatic temporary registration or pro forma registration with a professional organisation or body or in a register, provided that this registration does not delay or in any way complicate the provision of services or impose any additional costs on the person providing the services' (my emphasis). Rules similar to the above are, moreover, enacted in Article 17(1) of Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors, and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ 1993 L 165, p. 1).

VI — Conclusion

56. On the basis of the above, I propose that the Court should reply to the question submitted for a preliminary ruling by the Amtsgericht Heinsberg as follows:

Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 4 of Directive 64/427/EEC of the Council of 7 July 1964 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23-40 (Industry and small craft industries) should be interpreted as meaning that they preclude a national provision of a Member State from making the provision of skilled trade services in the Member State in question by an undertaking established in another Member State dependent upon that undertaking's being entered on the skilled trades register of the host Member State, where the undertaking has already been issued with an exceptional authorisation, in the context of which it has been checked that that undertaking fulfils all the essential conditions provided for in the national provisions transposing Article 3 of Directive 64/427, and the required procedure for being entered on the Skilled Trades Register is not automatic, but burdens the undertaking in question with additional requirements and costs, and in any case, delays and complicates the provision of services.