JUDGMENT OF THE COURT (Grand Chamber)

24 May 2011 *

In Case C-54/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 12 February 2008,

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

applicant,

supported by:

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

intervener,

* Language of the case: German.

v

Federal Republic of Germany, represented by M. Lumma, J. Kemper, U. Karpenstein and J. Möller, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by:

Republic of Bulgaria, represented by T. Ivanov and E. Petranova, acting as Agents,

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

Republic of Estonia, represented by L. Uibo, acting as Agent,

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

Republic of Latvia, represented by L. Ostrovska, K. Drēviņa and J. Barbale, acting as Agents,

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

Republic of Hungary, represented by R. Somssich, K. Veres and M. Fehér, acting as Agents,

Republic of Austria, represented by E. Riedl, G. Holley and M. Aufner, acting as Agents, with an address for service in Luxembourg,

Republic of Poland, represented by M. Dowgielewicz, C. Herma and D. Lutostańska, 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 condition 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'), and/or 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), the Federal Republic of Germany has failed to fulfil its obligations under Articles 43 EC and 45 EC and those directives.

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 repealed Directive 89/48 with effect from 20 October 2007, pursuant to Article 62 of Directive 2005/36.

7 Recital 9 in the preamble to Directive 2005/36 reads as follows:

'While maintaining, for the freedom of establishment, the principles and safeguards underlying the different systems for recognition in force, the rules of such systems should be improved in the light of experience. Moreover, the relevant directives have been amended on several occasions, and their provisions should be reorganised and rationalised by standardising the principles applicable. It is therefore necessary to replace [Directive 89/48].'

8 Recital 14 in the preamble to that directive states :

'The mechanism of recognition established by [Directive 89/48] remains unchanged. …'

9 According to recital 41 in the preamble to the directive, the directive 'is without prejudice to the application of Articles 39(4) [EC] and 45 [EC] concerning notably notaries.'

National legislation

General organisation of the profession of notary

10 In the German legal system with the exception of the *Land* of Baden-Württemberg notaries practise as a liberal profession. The organisation of the profession of notary is governed by the Federal Code of Notaries (Bundesnotarordnung) of 24 February 1961 (BGBl. 1961 I, p. 97), as amended by the Sixth Law amending the Federal Code of Notaries (Sechstes Gesetz zur Änderung der Bundesnotarordnung) of 15 July 2006 (BGBl. 2006 I, p. 1531) ('the BNotO').

11 In accordance with Paragraph 1 of the BNotO, notaries are appointed by the *Länder* as independent holders of public office entrusted with the authentication of legal acts and with other tasks in the field of the 'preventive administration of justice'.

12 The first sentence of Paragraph 4 of the BNotO provides that the number of notaries to be appointed must correspond to the requirements of the proper administration of justice.

13 Under the first sentence of Paragraph 10(1) and the first sentence of Paragraph 10(2) of the BNotO, a notary is assigned a particular place as his official seat, and is obliged to have his office there. The exercise of his activities is in principle confined to a specified geographical area, in accordance with Paragraphs 10a and 11 of the BNotO.

14 Under the first sentence of Paragraph 17 of the BNotO, notaries are to charge for their activities the fees laid down by law.

15 Under Paragraph 19(1) of the BNotO, a notary has sole liability for acts done in the course of his professional activity, with liability of the State being excluded.

16 In the Baden district of the *Land* of Baden-Württemberg, in accordance with the option provided for in Paragraph 115(1) of the BNotO, the functions of notaries are carried out by 'Notare im Landesdienst' (notaries in the service of the *Land*), who are officials employed by the *Land*. In the remainder of the Federal Republic of Germany, under Paragraph 3 of the BNotO, notaries practise their profession on a full-time basis or in combination with the profession of lawyer ('Anwaltsnotare'), depending on the *Land*.

17 In accordance with Paragraph 5 of the BNotO, only a German national may be appointed as a notary.

Activities of notaries

18 In accordance with the first sentence of Paragraph 20(1) of the BNotO, a notary has authority to carry out authentications of all kinds and to certify signatures, manual signs and copies. The intervention of the notary may be mandatory or optional, depending on the document he is to authenticate. By his intervention the notary confirms that all the conditions required by law for the drawing up of the document are satisfied, and that the parties have legal personality and capacity to enter into legal transactions.

19 Under Paragraph 17(1) of the Law on authentication of documents (Beurkundungsgesetz) of 28 August 1969 (BGBl. 1969 I, p. 1513), as amended by the Law of 23 July 2002 (BGBl. 2002 I, p. 2850), the notary must ascertain the intentions of the persons concerned, elucidate the facts, inform the parties of the legal effects of the transaction, and clearly and unambiguously reproduce their statements in writing, so that mistakes and doubts may be avoided and inexperienced persons are not disadvantaged.

20 Under Paragraph 4 of that law, as amended, the notary must refuse authentication if it cannot be reconciled with the duties of his office, in particular where his assistance is sought for a manifestly unlawful or dishonest purpose.

21 Paragraph 286 of the Code of Civil Procedure (Zivilprozessordnung), in the version of 5 December 2005 (BGBl. 2005 I, p. 3202, corrigenda BGBl. 2006 I, p. 431, and BGBl. 2007 I, p. 1781) ('the ZPO'), lays down the principle that the court is unfettered in its assessment of the evidence.

22 Paragraph 415(1) of the ZPO, which appears in Book 2, Section 1, Title 9 of the code, 'Proof by documents', provides that documents drawn up in prescribed form by a public authority within the bounds of its authority or by a person invested with public confidence within the activities assigned to him (authentic instruments), where they have been drawn up concerning a declaration made before that authority or person, are complete proof of the act attested by the authority or person. Under Paragraph 415(2) of the ZPO, proof that the act was wrongly authenticated is in principle admissible.

23 Paragraph 418(1) of the ZPO provides that authentic instruments with a content other than that mentioned in Paragraph 415 constitute complete proof of the facts they attest if the attestation is based on the personal knowledge of the public authority or person entrusted with public confidence. Under Paragraph 418(2) of the ZPO, proof that the facts attested are incorrect is in principle admissible.

24 In civil law, Paragraph 125 of the Civil Code (Bürgerliches Gesetzbuch), in the version of 2 January 2002 (BGBl. 2002 I, p. 42, corrigenda BGBl. 2002 I, p. 2909, and BGBl. 2003 I, p. 738), provides that a legal transaction which is not in the form prescribed by law is void.

25 In this connection, certain transactions must be done by a notarial act, otherwise they are void. These include in particular contracts for the acquisition and transfer of the ownership of land, agreements for the transfer of assets, promises of gifts, marriage settlements, agreements on future successions and renunciations of inheritances or of the reserved portion of an estate.

26 In Bavaria, notaries with their office in that *Land* may, under the first sentence of Paragraph 1(1) of the Law implementing the Law on civil partnerships (Gesetz zur Ausführung des Lebenspartnerschaftsgesetzes) of 26 October 2001 (Bayerisches GVBl., p. 677), as amended by the Law of 10 December 2005 (Bayerisches GVBl., p. 586) ('the AGLPartG'), authenticate the declarations creating a civil partnership between persons of the same sex. In accordance with Paragraph 2 of the AGLPartG, the notary informs the competent register office of the establishment of the partnership, and the office is required to enter it in its register of civil partnerships.

27 In company law, the first sentence of Paragraph 23(1), Paragraph 30(1) and the first sentence of Paragraph 130(1) of the Law on share companies (Aktiengesetz) of

6 September 1965 (BGBl. 1965 I, p. 1089), as amended by the Law of 22 September 2005 (BGBl. 2005 I, p. 2802), provide that authentication by a notary is required for the statutes of a share company, the appointment of the first supervisory board of a newly formed share company, and the decisions of the general meeting of a share company. The first sentence of Paragraph 2(1) and the first sentence of Paragraph 53(2) of the Law on limited liability companies (Gesetz betreffend die Gesellschaften mit beschränkter Haftung, RGBl. 1898, p. 846), as amended by the Law of 4 July 1980 (BGBl. 1980 I, p. 836), require notarial form for the conclusion and amendment of a contract establishing a limited liability company. Similarly, all conversions of legal persons or entities by means of merger, divestment of assets or change of legal form must be done by a notarial document, in accordance with Paragraphs 6 and 163(3) and the first sentence of Paragraph 193(3) of the Law on the conversion of companies (Umwandlungsgesetz) of 28 October 1994 (BGBl. 1994 I, p. 3210, corrigendum BGBl. 1995 I, p. 428).

28 Under Paragraph 794(1)(5) of the ZPO, enforcement takes place, subject to certain conditions, on the basis of authentic instruments drawn up in prescribed form by a German notary acting within his authority, if the debtor has in the authentic instrument submitted to immediate enforcement in relation to the claim in question.

29 Under Paragraph 797(2) of the ZPO, the notary who keeps the authentic instrument issues copies for enforcement.

30 The action contesting the apposition of the authority to enforce provided for in Paragraph 797(3) of the ZPO allows complaints of form and substance to be raised against that authority. Paragraph 797(4) of the ZPO similarly allows the question of the claim attested in the authentic instrument to be raised in proceedings contesting enforcement.

The administrative procedure

31 A complaint was made to the Commission concerning the nationality condition for access to the profession of notary in Germany. After examining the complaint the Commission, by letter of 8 November 2000, gave the Federal Republic of Germany formal notice to submit its observations within two months on the compliance of the nationality condition with the first paragraph of Article 45 EC and on the failure to transpose Directive 89/48 with respect to the profession of notary.

32 The Federal Republic of Germany replied to the letter of formal notice by letter of 20 March 2001.

33 The Commission sent the Federal Republic of Germany a supplementary letter of formal notice on 10 July 2002, complaining that it had failed to fulfil its obligations under Article 43 EC, the first paragraph of Article 45 EC, and Directive 89/48.

34 The Federal Republic of Germany replied to the supplementary letter of formal notice by letter of 31 October 2002.

35 Since it was not persuaded by the arguments put forward by the Federal Republic of Germany, the Commission on 18 October 2006 sent it a reasoned opinion in which it concluded that that State 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 Federal Republic of Germany to take the necessary steps to comply with the reasoned opinion within two months from its receipt.

36 By letter of 18 December 2006, the Federal Republic of Germany stated why it considered that the position adopted by the Commission was not well founded.

37 In those circumstances, the Commission decided to bring the present action.

The action

First head of claim

Arguments of the parties

38 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 Federal Republic of Germany has failed to fulfil its obligations under Article 43 EC and the first paragraph of Article 45 EC.

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

40 It observes, in the first place, that Article 43 EC is one of the fundamental provisions of European Union law which aims 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.

41 The Commission and the United Kingdom of Great Britain and Northern Ireland 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).

42 The exception in 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).

43 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 are not for all that connected with the exercise of official authority.

44 Activities which are auxiliary to or cooperate with the exercise of official authority are likewise excluded from 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).

45 The Commission and the United Kingdom also observe 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.

46 The Commission examines, in the second place, the various activities of notaries in the German legal system.

47 As regards the authentication of documents and agreements, the Commission submits that the notary merely attests the wishes of the parties, after advising them, and gives legal effect to those wishes. In carrying out that activity, the notary has no decision-making powers with respect to the parties.

48 The fact that that activity is regarded in German law as belonging to the 'preventive administration of justice' does not call that analysis into question, since notaries are not connected with the exercise of official authority, because they do not have power to impose decisions.

49 Thus authentication by a notary merely confirms an agreement previously entered into by the parties. The fact that authentication is mandatory for certain acts is not relevant, since numerous procedures are mandatory without being manifestations of the exercise of official authority.

50 That also applies to the particular features of the rules of evidence regarding notarial acts, since similar probative force is also enjoyed by other documents which do not fall within the exercise of official authority, such as statements drawn up by sworn field watchmen, forest rangers, gamekeepers and water bailiffs. The fact that the notary's liability is engaged when he draws up notarial acts is not relevant either. That is the case with members of most professions, such as lawyers, architects or doctors.

51 As regards the enforceability of authentic instruments, the Commission submits that the endorsement of a document with the authority to enforce precedes the enforcement proper and is not part of it. Enforceability does not therefore confer any power of constraint on notaries. Moreover, any dispute that may arise will be decided not by the notary but by the court.

52 The activity of legal adviser, usually linked to that of authentication, carried on by notaries in the German legal system is also not connected with the exercise of official authority.

53 In the Commission's view, notaries, unlike registrars, do not as a rule make or amend entries in the register of births, marriages and deaths, but regulate the division of assets between partners. The functions entrusted to notaries in Bavaria in relation to civil partnerships between persons of the same sex do not enable any conclusions to be drawn as regards the assessment from the point of view of European Union law of a particular connection of notaries with the exercise of official authority.

54 In the third place, the Commission, with the United Kingdom, submits that the provisions of European Union law that contain references to the activities of notaries do not prejudge the application of Article 43 EC and the first paragraph of Article 45 EC to those activities.

55 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) and Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15) do no more, in the Commission's submission, than require the Member States to recognise and make enforceable documents which have been formally drawn up or registered as authentic instruments and are enforceable in another Member State.

56 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1), Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ 2003 L 207, p. 1) and Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ 2005 L 310, p. 1) are not relevant to the outcome of the present case, since they merely confer on notaries, and on other competent authorities appointed by the Member States, the task of certifying that certain acts and formalities have been carried out before the transfer of the registered office and the creation and merger of companies.

57 The European Parliament Resolution of 23 March 2006 on the legal professions and the general interest in the functioning of legal systems (OJ 2006 C 292 E, p. 105, 'the 2006 resolution') is a purely political act, whose terms are ambiguous because in point 17 the European Parliament asserts that Article 45 EC must be applied to the profession of notary, while in point 2 it reaffirms the position taken 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'), in which it expressed the wish that the nationality condition for access to the profession of notary laid down in the legislation of several Member States should be abolished.

58 The Commission and the United Kingdom further submit that Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española* [2003] ECR I-10391, referred to by several Member States in their written observations, concerned the exercise by masters and chief mates of merchant ships of a wide range of functions in connection with the maintenance of safety, police powers, and authority in respect of notarial matters and the registration of births, marriages and deaths. The Court did not therefore have occasion to make a detailed examination of the various activities carried out by notaries from the point of view of the first paragraph of Article 45 EC. Consequently, that judgment is not a sufficient basis for concluding that that provision applies to notaries.

59 Moreover, contrary to the submissions of the Federal Republic of Germany, the Court's case-law distinguishes notaries from public authorities by acknowledging that an authentic instrument may be drawn up by a public authority or any other authority empowered (Case C-260/97 *Unibank* [1999] ECR I-3715, paragraphs 15 and 21).

60 The Federal Republic of Germany, supported by the Republic of Bulgaria, the Czech Republic, the Republic of Estonia, the French Republic, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Austria, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, submits that the activities of notaries are connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC.

61 The Federal Republic of Germany takes the view, like the Commission, that the concept of 'official authority' within the meaning of the first paragraph of Article 45 EC must be given an autonomous interpretation and must be construed strictly. Together with the Republic of Estonia, the Republic of Poland and the Slovak Republic, however, it considers that the exercise of exceptional powers and powers of coercion and the existence of a hierarchical relationship with citizens are not the only forms of the exercise of official authority. The Republic of Latvia likewise observes that a

connection with the exercise of official authority is not limited solely to activities in which decisions are taken independently of the will of the parties.

62 According to the Federal Republic of Germany, other activities may also be embraced by the concept of the exercise of official authority where they are characterised by special powers as against citizens, are not merely preparatory or of a technical nature but binding on the decision-making authority, and are not merely occasional.

63 The Federal Republic of Germany submits that the activities entrusted to notaries in the German legal system form part of the 'preventive administration of justice', which is complementary to contentious proceedings. In their activities notaries maintain an attitude towards the parties that is as objective and independent as that of a court deciding a dispute.

64 All the activities entrusted to notaries in the German legal system are activities which have effects as against citizens. Moreover, the activities which are connected with the exercise of official authority are not occasional but make up the essential part of notaries' activities.

65 The 'preventive administration of justice' is thus transferred to notaries by the State in order to relieve the courts, except in the *Land* of Baden-Württemberg, where the State continues to fulfil that function itself. By authenticating a document or agreement, the notary makes a final and binding decision on whether a legal act that is subject to formal conditions has come into being in the manner desired by the parties. Before authenticating the act the notary ascertains whether the general conditions are satisfied and gives the parties impartial information on the legal consequences of the act. He also checks the lawfulness of the arrangements that have been agreed by the parties.

66 In addition, a notarial act has probative force which, according to the Federal Republic of Germany, binds the courts when they assess the evidence.

67 The Federal Republic of Germany submits, as regards the drawing up of enforceable documents and the apposition of the authority to enforce, that in the German legal system notarial acts are enforceable documents which can be compulsorily enforced on the basis of an authority to enforce endorsed by the notary, without action by the court.

68 Authentication of a document or agreement produces a binding authority which, if the debtor in that document or agreement submits to immediate enforcement, is equivalent to a judgment which has become final and binding.

69 Moreover, where enforcement takes place on the basis of a notarial act and a notarial authority to enforce, the enforcing authority is bound by the findings relating to the debt stated in that document and by the authority to enforce. Drawing up an enforceable document and endorsing it with the authority to enforce thus involve the exercise of special powers as against citizens, independently of their wishes; the parties may, however, ask for enforcement to be suspended and challenge the lawfulness of the apposition of the authority to enforce.

70 The Federal Republic of Germany further submits that in Bavaria notaries have power to solemnise civil partnerships between persons of the same sex.

71 Furthermore, the acts of European Union law mentioned in paragraphs 55 and 56 above rank notarial acts equally with judicial decisions.

72 The Federal Republic of Germany, the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Austria, the Republic of Poland and the Republic of Slovenia further submit that in *Colegio de Oficiales de la Marina Mercante Española* the Court held that, for the purposes of Article 39(4) EC, the notarial functions of masters of Spanish ships were connected with the exercise of official authority. In addition, it follows from *Unibank* that the establishment of authentic instruments by an office-holder such as a notary is directly and specifically connected with the exercise of official authority.

Findings of the Court

— Preliminary observations

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

74 This head of claim thus concerns solely the nationality condition laid down by the German legislation at issue for access to that profession, from the point of view of Article 43 EC.

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

76 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.

77 Similarly, as the application of the Treaty provisions on freedom of movement for workers is not the subject of the present claim, it does not concern the notarial functions exercised by 'Notare im Landesdienst' in the *Land* of Baden-Württemberg, who are officials employed by the *Land*.

— Substance

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

79 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).

80 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 their own nationals (*Commission* v *Austria*, paragraph 28).

81 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).

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

83 The Federal Republic of Germany 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 German legal system fall within that concept.

84 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; *Commission* v *Greece*, paragraph 8; and Case C-438/08 *Commission* v *Portugal* [2009] ECR I-10219, paragraph 35).

85 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 (*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).

86 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).

87 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).

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

89 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).

90 The Federal Republic of Germany and the Commission agree that the principal activity of notaries in the German legal system, which should be examined first, is the establishment of authentic instruments in due and proper form. In order to do this the notary must 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.

91 It must be observed, in this respect, that the documents that may be authenticated under German 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 produce a document or agreement to the notary for authentication. The notary's intervention thus presupposes the prior existence of an agreement or consensus of the parties.

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

93 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.

94 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 rules laid down, to formal requirements or even compulsory validation procedures. That fact is not therefore enough to bear out the arguments of the Federal Republic of Germany.

95 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.

96 It is true that, as the Federal Republic of Germany observes, the notary's verification 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.

97 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 for the persons concerned to pursue such an objective, without those activities falling within the exercise of official authority.

98 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 restrictions which derive from the procedures by which they are appointed, the limitation of their numbers and their territorial jurisdiction, or the rules governing their remuneration, independence, disqualification from other offices and protection against removal, provided that those restrictions enable those objectives to be attained and are necessary for that purpose.

99 It is also true 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.

100 As to the probative force and the enforceability of notarial acts, these indisputably endow those 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.

101 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. Paragraphs 415 and 418 of the ZPO, which determine

the probative force of an authentic instrument, form part of Book 2, Section 1, Title 9 of that code, 'Proof by documents'. 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).

102 Moreover, as follows in particular from Paragraphs 415(2) and 418(2) of the ZPO, proof that the act was wrongly authenticated or that the facts attested are incorrect is in principle admissible.

103 It cannot therefore 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. The principle of the unfettered assessment of the evidence by the court is moreover laid down in Paragraph 286 of the ZPO.

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

105 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. As follows from Paragraph 794(1)(5) of the ZPO, the enforceability of a notarial act is conditional in particular on the debtor's agreement to submit to enforcement of the act with no prior proceedings being brought. It follows that the notarial act is not enforceable without the consent of the debtor. So, while the notary's endorsement of the authority to enforce on the authentic instrument does

give it enforceable status, that status is based on the intention of the parties to enter into a document or agreement, after its conformity with the law has been checked by the notary, and to make it enforceable.

106 The above considerations apply *mutatis mutandis* to transactions which must be done by means of a notarial act if they are not to be void, such as contracts for the acquisition and transfer of the ownership of land, agreements for the transfer of assets, promises of gifts, marriage settlements, agreements on future successions and renunciations of inheritances or of the reserved portion of an estate.

107 The same considerations also apply to the actions of notaries in connection with company law described in paragraph 27 above.

108 Nor can the Federal Republic of Germany base its argument on the power of notaries, conferred on them only in the *Land* of Bavaria, to authenticate the declarations establishing a same-sex civil partnership, since, in addition to the foregoing, it follows from Paragraph 2 of the AGLPartG that for such a partnership to take effect it must also be entered in the register of civil partnerships by the register authority, which is moreover responsible for the administration of that register.

109 As regards, secondly, the particular status of notaries in the German legal system, it need only be recalled that, as follows from paragraphs 86 and 89 above, 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.

110 Two points must be made here, however. In the first place, it is not disputed that, in principle, 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 limits 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.

111 In the second place, in accordance with Paragraph 19(1) of the BNotO, the notary bears sole liability for the actions carried out in his professional activity.

112 Thirdly, the argument which the Federal Republic of Germany bases on certain European Union acts also fails to convince. The regulations mentioned in paragraph 55 above relate to the recognition and enforcement of authentic instruments formally drawn up or registered and enforceable in a Member State, and do not therefore affect the interpretation of the first paragraph of Article 45 EC. Nor is that interpretation called into question by the European Union acts mentioned in paragraph 56 above, in that, as the Commission rightly submits, they are confined to entrusting to notaries and to other competent authorities appointed by the Member States the task of certifying that certain acts and formalities have been carried out before the transfer of the registered office and the creation and merger of companies.

113 As to the 1994 and 2006 resolutions, mentioned in paragraph 57 above, it is clear that they have no legal effect, since such resolutions are by nature not legally binding. Moreover, although they state that the profession of notary comes under Article 45 EC, the Parliament specifically expressed the wish in the 1994 resolution that

measures should be taken to abolish the nationality condition for access to the profession of notary, that position being implicitly confirmed again in the 2006 resolution.

114 As regards, fourthly, the argument which the Federal Republic of Germany bases on *Colegio de Oficiales de la Marina Mercante Española*, it must be observed that that case concerned the interpretation of Article 39(4) EC, not the first paragraph of Article 45 EC. Moreover, it follows from paragraph 42 of that judgment that, when the Court held that the functions entrusted to masters and chief mates of ships were connected with the exercise of rights under powers conferred by public law, it was referring to the totality of the functions exercised by them. The Court thus did not examine the single notarial power conferred on masters and chief mates of ships, namely the power to receive, safeguard and dispatch wills, separately from their other powers, such as their powers of coercion and punishment.

115 As to the *Unibank* case, also relied on by the Federal Republic of Germany, it is clear that that case had nothing to do with the interpretation of the first paragraph of Article 45 EC. Moreover, the Court held, in paragraph 15 of *Unibank*, that for a document to be an 'authentic' instrument within the meaning of Article 50 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), the involvement of a public authority or any other authority empowered by the State of origin is necessary.

116 In those circumstances, it must be concluded that the activities of notaries as defined in the current state of the German legal system are not connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC.

117 Consequently, the nationality condition required by German legislation for access to the profession of notary constitutes discrimination on grounds of nationality prohibited by Article 43 EC.

118 In the light of all the above considerations, the first head of claim is well founded.

Second head of claim

Arguments of the parties

119 The Commission claims that the Federal Republic of Germany has failed to transpose, as regards the profession of notary, Directive 89/48 for the period up to 20 October 2007 and Directive 2005/36 for the period from that date. According to the Commission, the scope of Directive 2005/36 does not exceed that of Directive 89/48 as far as notaries are concerned.

120 The Commission submits, as does the United Kingdom, that the profession of notary is a regulated profession within the meaning of Article 1(c) of Directive 89/48 and consequently falls within the scope of that directive. Recital 41 in the preamble to Directive 2005/36 does not have the effect of excluding that profession from the scope of that directive unless the profession comes under the first paragraph of Article 45 EC, which the Commission denies. Moreover, if the European Union legislature had intended to exclude the profession of notary from the scope of Directive 2005/36, it would have done so expressly.

121 The Commission notes that Directives 89/48 and 2005/36 allow the Member States to prescribe an aptitude test or an adaptation period capable of ensuring the high level of qualifications required of notaries. In addition, the application of those directives does not have the effect of preventing the recruitment of notaries by means of competitions, but only of giving nationals of the other Member States access to those competitions. That application also has no effect on the procedure for appointing notaries.

122 The Federal Republic of Germany submits, in agreement with the Republic of Latvia and the Republic of Slovenia, that the Commission's second head of claim is inadmissible in so far as it concerns the alleged failure to transpose Directive 89/48 as well as Directive 2005/36.

123 First, in its reasoned opinion the Commission complained of the failure to transpose Directive 89/48 even though, on the date on which that reasoned opinion was issued, Directive 2005/36, which repealed Directive 89/48, had been adopted.

124 Second, the reference to Directive 2005/36, which the Commission made for the first time in the application, has the effect of extending the subject-matter of the dispute beyond what was determined in the administrative proceedings. The scope of that directive far exceeds that of Directive 89/48.

125 As to the substance, the Federal Republic of Germany, the Republic of Bulgaria, the Republic of Latvia, the Republic of Hungary, the Republic of Austria, the Republic of Poland, the Republic of Slovenia and the Slovak Republic submit that those directives do not apply to notaries because the activities carried out by notaries are connected with the exercise of official authority.

Findings of the Court

— Admissibility

126 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).

127 In the present case, that period closed on 18 December 2006. On that date Directive 89/48 was still in force, since Directive 2005/36 repealed it only with effect from 20 October 2007. Consequently, in so far as the present claim is based on the alleged failure to transpose Directive 89/48, it is not devoid of purpose (see, by analogy, judgment of 11 June 2009 in Case C-327/08 *Commission* v *France*, paragraph 23).

128 As to the admissibility of the claim in so far as it concerns the alleged failure to transpose Directive 2005/36, it must be recalled that, as the Court has previously held, although the claims as stated in the application cannot in principle be extended beyond the infringements alleged in the operative part of the reasoned opinion and in the letter of formal notice, the fact nevertheless remains that the Commission has standing to seek a declaration that a Member State has failed to fulfil obligations which were created in the original version of a European Union measure, subsequently amended or repealed, and which were maintained in force under the provisions of a new European Union measure. Conversely, the subject-matter of the dispute cannot be extended to obligations arising under new provisions which have no equivalent in the original version of the measure concerned, for otherwise it would constitute a breach of the essential procedural requirements of infringement proceedings (see, to that

effect, Case C-365/97 *Commission* v *Italy*, paragraph 36; Case C-363/00 *Commission* v *Italy* [2003] ECR I-5767, paragraph 22; and Case C-416/07 *Commission* v *Greece* [2009] ECR I-7883, paragraph 28).

129 Consequently, the claims in the Commission's application seeking a declaration that the Federal Republic of Germany has failed to fulfil its obligations under Directive 2005/36 are in principle admissible, on condition that the obligations arising under that directive are analogous to those arising under Directive 89/48 (see, by analogy, Case C-416/07 *Commission* v *Greece*, paragraph 29).

130 As appears from recital 9 in the preamble to Directive 2005/36, while aiming to improve, reorganise and rationalise the existing provisions by standardising the principles applicable, that directive maintains, for freedom of establishment, the principles and safeguards underlying the different systems of recognition in force, such as those established by Directive 89/48.

131 Similarly, recital 14 in the preamble to Directive 2005/36 states that the mechanism of recognition established inter alia by Directive 89/48 remains unchanged.

132 In the present case, the Commission's complaint against the Federal Republic of Germany relates, as far as the profession of notary is concerned, to the failure to transpose not a particular provision of Directive 2005/36 but that directive as a whole.

133 In those circumstances, the alleged obligation to transpose Directive 2005/36 as regards the profession of notary is analogous to that arising under Directive 89/48 in so

far as the principles and safeguards underlying the system of recognition established by that directive are maintained in Directive 2005/36 and the mechanism of recognition established by Directive 89/48 remained unchanged after the adoption of Directive 2005/36.

134 This head of claim must therefore be regarded as admissible.

— Substance

135 The Commission complains that the Federal Republic of Germany has not transposed Directives 89/48 and 2005/36 with respect to the profession of notary. The Court must therefore examine whether those directives apply to that profession.

136 The legislative context of those directives must be taken into account here.

137 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.

138 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.

139 Over the years following the adoption of Directive 89/48, the Parliament, in its 1994 and 2006 resolutions mentioned in paragraphs 57 and 113 above, 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 condition for access to that profession should be abolished.

140 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.

141 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 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.

142 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 close of the period prescribed in the reasoned opinion, there existed a sufficiently clear obligation for the Member States to transpose Directives 89/48 and 2005/36 with respect to the profession of notary.

143 The second head of claim must therefore be rejected.

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

Costs

145 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.

146 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 Republic of Bulgaria, the Czech Republic, the Republic of Estonia, the French Republic, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Austria, the Republic of Poland, 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 condition for access to the profession of notary, the Federal Republic of Germany has failed to fulfil its obligations under Article 43 EC;

2. Dismisses the action as the remainder;

3. Orders the European Commission, the Federal Republic of Germany, the Republic of Bulgaria, the Czech Republic, the Republic of Estonia, the French Republic, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Austria, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.

[Signatures]