

JUDGMENT OF THE COURT (Second Chamber)

16 December 2010 \*

In Case C-137/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Raad van State (Netherlands), made by decision of 8 April 2009, received at the Court on 15 April 2009, in the proceedings

**Marc Michel Josemans**

v

**Burgemeester van Maastricht,**

\* Language of the case: Dutch.

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas (Rapporteur), A. Ó Caoimh and P. Lindh, Judges,

Advocate General: Y. Bot,  
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 April 2010,

after considering the observations submitted on behalf of:

- Mr Josemans, by A. Beckers, advocaat,
- the Burgemeester van Maastricht, by S.A.R. Lely, advocaat,
- the Netherlands Government, by C. Wissels, M. Noort and J. Langer, acting as Agents,
- the Belgian Government, by C. Pochet and L. Goossens, acting as Agents,

- the German Government, by M. Lumma and J. Möller, acting as Agents,
- the French Government, by E. Belliard, G. de Bergues and A. Czubinski, acting as Agents,
- the European Commission, by H. van Vliet and I. Rogalski, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2010,

gives the following

### **Judgment**

- <sup>1</sup> This reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 18 EC, 29 EC and 49 EC.
- <sup>2</sup> The reference has been made in proceedings between Mr Josemans, who runs the 'Easy Going' coffee-shop, and the Burgemeester van Maastricht (the Mayor of the municipality of Maastricht) on the ground that the latter declared the establishment in question temporarily closed following two reports attesting that persons who are not resident in the Netherlands had been admitted to it contrary to the provisions in force in that municipality.

## Legal context

### *European Union legislation*

- 3 The necessity of combating drugs, inter alia by punishing the illegal trafficking in those drugs and by preventing the consumption of narcotic drugs and drug addiction, has been acknowledged by a number of measures and instruments of the European Union.
- 4 Recital 1 in the preamble to Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ 2004 L 335, p. 8) states that illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the European Union, and to the legal economy, stability and security of the Member States.
- 5 Article 2(1)(a) of Framework Decision 2004/757 states that each Member State is to take the necessary measures to ensure that the following intentional conduct when committed without right is punishable: the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs. Article 2(2) states that the conduct described in paragraph 1 is not included

in the scope of that framework decision when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law.

- 6 Under Article 1 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community by the Treaty of Amsterdam, 13 Member States of the European Union, amongst them the Kingdom of the Netherlands, are authorised to establish, within the institutional and legal framework of the European Union and the EU and EC Treaties, closer cooperation among themselves within the scope of the Schengen *acquis* as set out in the annex to that protocol.
- 7 The Convention implementing the Schengen Agreement, of 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed at Schengen (Luxembourg) on 19 June 1990 is part of the Schengen *acquis* so set out.
- 8 Article 71(1) of that convention provides that the Contracting Parties undertake as regards the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions, all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.
- 9 Article 71(2) to (4) specifies the various measures which the Parties undertake to adopt in connection with the prevention and punishment inter alia of the illegal export and import of narcotic drugs and psychotropic substances, including cannabis,

and in connection with the sale, supply and handing over of such products and substances. Article 71(5) states that the Parties are to do their utmost to prevent and combat the negative effects arising from the illicit demand for narcotic drugs and psychotropic substances.

- 10 Certain instruments of the European Union, such as the Council Resolution of 29 November 1996 on measures to address the drug tourism problem within the European Union (OJ 1996 C 375, p. 3) and the Joint Action of 17 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking (OJ 1996 L 342, p. 6), relate expressly to the fight against drug tourism.
- 11 The European Union is a party to the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, concluded in Vienna on 20 December 1988 (*United Nations Treaty Series*, Vol. 1582, No 1-27627). According to the declaration annexed to Council Decision 90/611/EEC of 22 October 1990 concerning the conclusion, on behalf of the European Economic Community, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (OJ 1990 L 326, p. 56), the Community is competent for questions of commercial policy relating to the substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances.

### *National legislation*

- 12 Under the 1976 Law on opium (Opiumwet 1976), the possession, dealing, cultivation, transportation, production, import and export of narcotic drugs, including cannabis

and its derivatives, are prohibited. Those acts are subject to criminal sanctions unless the substance or product in question is used for medical, scientific or educational purposes and prior authorisation has been given.

- 13 The Kingdom of the Netherlands applies a policy of tolerance with regard to the sale and consumption of cannabis. That policy is based on a distinction between 'hard' drugs, which present an unacceptable risk to health, and 'soft' drugs, which although deemed to be 'risky' do not give rise to the same concerns.
- 14 The policy of tolerance has been implemented within the framework of the directives issued by the College van procureurs-general (College of public prosecutors). The competent authorities have relied on the principle of discretionary prosecution to pursue a policy of selective punishment. In the interest of the effectiveness of criminal prosecutions, the sale of cannabis, in strictly limited quantities and in controlled conditions, is tolerated, priority thus being given to the punishment of other offences which are considered to be more dangerous.
- 15 That policy of tolerance is reflected inter alia in the establishment of coffee-shops. In such establishments, which are classified as catering establishments, cannabis is sold and consumed in the same way as food and non-alcoholic beverages. The sale of alcoholic beverages is, however, prohibited.
- 16 The local authorities may authorise coffee-shops in compliance with certain criteria. Such establishments need an operating licence and must satisfy the same conditions relating to management and hygiene as are applicable to other catering establishments.

- 17 The conditions under which the marketing of cannabis in coffee-shops may be tolerated are defined, at national level, by the directives of the Openbaar Ministerie (the Public Prosecutor's Office). Those criteria, commonly known as 'the AHOJG criteria', are the following:
- 'A ("affichering") drugs may not be advertised; H ("harddrugs") no hard drugs may be sold; O ("overlast") the coffee-shop must not cause any nuisance; J ("jeugdigen") no drugs may be sold to minors (under the age of 18) nor may minors be admitted to the premises; G ("grote hoeveelheden") no more than five grams per person may be sold in any one transaction. Furthermore, the commercial stock ("handelsvoorraad" of a tolerated coffee shop must not exceed 500 grams.'
- 18 The municipality of Maastricht adopted a policy on cannabis by defining, inter alia, certain strict conditions in which a limited number of coffee-shops are tolerated. At the material time in the main proceedings, that number was set at 14.
- 19 In an effort to reduce drug tourism, indeed to prevent it, the Gemeenteraad (Municipal Council) of that municipality, by decision of 20 December 2005, inserted a residence criterion in the 2006 version of the General Maastricht Municipal Regulation (Algemene plaatselijke verordening Maastricht) ('the APV'). That amendment entered into force on 13 January 2006.
- 20 Pursuant to Article 2.3.1.3e(1) of the APV, the proprietor of an establishment as referred to in Article 2.3.1.1(1)(a)(3) of that regulation is forbidden to admit persons other than residents to the establishment or to permit them to remain in or at the establishment. The term 'establishment' is defined by the latter provision as a space to which the public has access and where food and/or non-alcoholic beverages are



provided commercially, whether or not by means of vending machines, for consumption on the premises. Under Article 2.3.1.1(1)(d), ‘residents’ means persons who have their actual place of residence in the Netherlands.

- 21 Article 2.3.1.3e(2) of the APV provides that the Burgemeester van Maastricht may specify that the rule laid down in subparagraph (1) does not apply to one or more types of establishment referred to in that ordinance throughout the municipality or in one or more parts of the municipality designated therein. By decision of 13 July 2006, the Burgemeester von Maastricht exempted, throughout the municipality of Maastricht, certain categories of establishment from the obligation to refuse access to non-residents, namely all the establishments referred to in Article 2.3.1.1(1)(a)(3) of the APV, with the exception of coffee-shops, tearooms and the like, by whatever designation they might be known.
- 22 Pursuant to Article 2.3.1.5a(f) of the APV, the Burgemeester van Maastricht may declare an establishment as referred to in Article 2.3.1.1(1)(a)(3) of that ordinance closed for a specified or unspecified period if the proprietor of the establishment acts contrary to Article 2.3.1.3e(1).

**The facts which gave rise to the dispute in the main proceedings and the questions referred for a preliminary ruling**

- 23 Mr Josemans runs the ‘Easy Going’ coffee-shop in the municipality of Maastricht, an establishment in which ‘soft’ drugs, non-alcoholic beverages and food are sold and consumed.

- <sup>24</sup> The 'Easy Going' coffee-shop falls within the scope of the policy of tolerance applied by the Kingdom of the Netherlands with regard to the marketing of cannabis. The sale of cannabis, although illegal, does not give rise to criminal proceedings if it takes place in a recognised coffee-shop and if a certain number of conditions, inter alia 'the AHOJG criteria', are complied with.
- <sup>25</sup> Following two reports attesting that persons who are not resident in the Netherlands had been admitted to the coffee-shop in question contrary to Article 2.3.1.3e(1) of the APV, which establishes a criterion of residence, the Burgemeester van Maastricht, by decision of 7 September 2006, declared that establishment temporarily closed.
- <sup>26</sup> Mr Josemans lodged an objection against that decision. As that objection was dismissed by the Burgemeester van Maastricht by decision of 28 March 2007, Mr Josemans brought an action before the Rechtbank Maastricht (Maastricht Court). By judgment of 1 April 2008, that court annulled that decision and revoked the decision of 7 September 2006. According to that court, the prohibition set out in the APV of admitting persons who are not resident in the Netherlands to coffee-shops constitutes indirect discrimination on grounds of nationality, which is contrary to Article 1 of the Netherlands Constitution. By contrast, there is no infringement of European Union law. It considers that it is apparent from Case 289/86 *Vereniging Happy Family Rustenburgerstraat* [1988] ECR 3655 and Case C-158/98 *Coffeeshop 'Siberië'* [1999] ECR I-3971 that the trade in narcotic drugs is not covered by the EC Treaty.
- <sup>27</sup> Mr Josemans and the Burgemeester van Maastricht, on 5 and 8 May 2008 respectively, appealed against that judgment to the Raad van State (Council of State). The Burgemeester van Maastricht disputes the interpretation of the Netherlands Constitution. Mr Josemans submits that the legislation at issue in the main proceedings constitutes unjustified unequal treatment of citizens of the European Union and that, more

specifically, people who are not resident in the Netherlands are denied the possibility of buying legal products in coffee-shops, which is contrary to European Union law.

<sup>28</sup> In those circumstances, the Raad van State decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘1. Does a regulation, such as that at issue in the main proceedings, concerning the access of non-residents to coffee-shops, fall wholly or partly within the scope of the EC Treaty, with particular reference to the free movement of goods and/or services, or of the prohibition of discrimination laid down in Article 12 [EC] in conjunction with Article 18 [EC]?
2. In so far as the provisions of the EC Treaty concerning the free movement of goods and/or services are applicable, does a prohibition of the admission of non-residents to coffee-shops form a suitable and proportionate means of reducing drug tourism and the public nuisance which accompanies it?
3. Is the prohibition of discrimination against citizens on grounds of nationality, as laid down in Article 12 [EC] in conjunction with Article 18 [EC], applicable to the rules on the access of non-residents to coffee-shops if and in so far as the provisions of the EC Treaty concerning the free movement of goods and services are not applicable?
4. If so, is the resulting indirect distinction between residents and non-residents justified, and is the prohibition of the admission of non-residents to coffee-shops a suitable and proportionate means of reducing drug tourism and the public nuisance which accompanies it?’

## Consideration of the questions referred

### *Initial observations*

- <sup>29</sup> By its reference for a preliminary ruling the national court seeks to ascertain whether European Union law precludes municipal rules, such as those forming the subject-matter of the dispute in the main proceedings, which prohibit the admission of persons who are non-resident in the Netherlands to coffee-shops situated in the municipality in question. It refers more specifically to the free movement of goods under Article 28 EC et seq., the free movement of services under Article 49 EC et seq., and the principle of non-discrimination on grounds of nationality under Article 12 EC in conjunction with Article 18 EC, which relates to citizenship of the Union.
- <sup>30</sup> At the outset, it must be borne in mind that, as is apparent from paragraphs 15 to 17 of this judgment, coffee-shops constitute establishments covered by the category of catering establishments in which cannabis is marketed to consumers of at least 18 years of age. Such an establishment must have an operating licence and must, moreover, satisfy all of ‘the AHOJG criteria.’
- <sup>31</sup> It is common ground that the cannabis sold in coffee-shops is not distributed through channels strictly controlled by the competent authorities with a view to use for medical or scientific purposes.

- 32 Although, according to the Netherlands Government, there are such establishments whose sole activity is the marketing of cannabis, the fact remains that in a number of coffee-shops non-alcoholic beverages and food are also sold and consumed. According to the order for reference, that is the case as regards the 'Easy Going' coffee-shop.
- 33 In such circumstances, it is necessary to assess, in the light of the provisions referred to by the reference for a preliminary ruling, first, the marketing of cannabis in coffee-shops and, secondly, the question of whether the sale of non-alcoholic beverages and food in such establishments may have an effect on the answer to be given to the national court.

### *The first question*

- 34 By its first question the national court asks, in essence, whether a coffee-shop proprietor may, when marketing, first, narcotic drugs which are not distributed through channels strictly controlled by the competent authorities with a view to use for medical or scientific purposes and, secondly, non-alcoholic beverages and food, rely on Articles 29 EC, 49 EC and/or 12 EC, the latter in conjunction with Article 18 EC, to object to municipal rules such as those at issue in the main proceedings.
- 35 As regards the marketing of cannabis, Mr Josemans submits that that activity falls within the scope of European Union law and that the rules at issue in the main proceedings are contrary to the principle of non-discrimination on grounds of nationality. The Burgemeester van Maastricht and the Netherlands, Belgian, German and French Governments submit, by contrast, that the activity in question does not fall within the

scope either of the freedoms of movement or of the principle of non-discrimination, in view of the existence of a prohibition on the offering for sale of narcotic drugs. The European Commission takes the view that it is not necessary, in order to give a decision on the reference for a preliminary ruling, to rule on the marketing of cannabis.

<sup>36</sup> In that connection it is important to bear in mind that, since the harmfulness of narcotic drugs, including those derived from hemp, such as cannabis, is generally recognised, there is a prohibition in all the Member States on marketing them, with the exception of strictly controlled trade for use for medical and scientific purposes (see, to that effect, Case 50/80 *Horvath* [1981] ECR 385, paragraph 10; Case 221/81 *Wolf* [1982] ECR 3681, paragraph 8; Case 240/81 *Einberger* [1982] ECR 3699, paragraph 8; Case 294/82 *Einberger* [1984] ECR 1177, paragraph 15; Case 269/86 *Mol* [1988] ECR 3627, paragraph 15; and *Vereniging Happy Family Rustenburgerstraat*, paragraph 17).

<sup>37</sup> That legal position complies with various international instruments which the Member States have cooperated on or acceded to, such as the United Nations Single Convention on Narcotic Drugs, concluded at New York on 30 March 1961, amended by the 1972 Protocol amending the Single Convention of 1961 (*United Nations Treaty Series*, Vol. 520, No 7515) ('the Single Convention') and the United Nations Convention on Psychotropic Substances, concluded at Vienna on 21 February 1971 (*United Nations Treaty Series*, Vol. 1019, No 14956). The measures provided for by those conventions were subsequently strengthened and supplemented by the Convention concluded at Vienna on 20 December 1988, to which all the Member States of the European Union are parties. Cannabis is among the substances and products referred to in those conventions.

<sup>38</sup> In the preamble to the Single Convention the parties declare themselves conscious of their duty to prevent and combat addiction to narcotic drugs, whilst recognising that

the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes. Under Article 4 of that convention, the parties are to take all the measures necessary to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs (see *Wolf*, paragraph 9, and Case 240/81 *Einberger*, paragraph 9).

<sup>39</sup> As regards more specifically European Union law, Framework Decision 2004/757 provides, in Article 2(1)(a), that each Member State is to take the necessary measures to ensure that, inter alia, the following intentional conduct when committed without right is punishable: offering, offering for sale, distribution, sale, delivery on any terms whatsoever and brokerage of drugs. Under Article 2(2) the conduct described in paragraph 1 is not to be included in the scope of that Framework Decision when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law. It is stated in Article 1(1) of that act that the term ‘drugs’ includes any of the substances covered by the Single Convention and by the United Nations Convention on Psychotropic Substances, concluded at Vienna on 21 February 1971.

<sup>40</sup> Furthermore, pursuant to Article 71(1) of the Convention implementing the Schengen Agreement, of 14 June 1985, the States who are parties to that convention undertook, as regards both the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.

- 41 It follows that narcotic drugs which are not distributed through channels which are strictly controlled by the competent authorities to be used for medical and scientific purposes are, because of their very nature, subject to a prohibition on importation and offering for sale in all the Member States (see, to that effect, *Wolf*, paragraph 10; Case 240/81 *Einberger*, paragraph 10; Case 294/82 *Einberger*, paragraph 15; *Mol*, paragraphs 15 and 18; *Vereniging Happy Family Rustenburgerstraat*, paragraphs 17 and 20; and *Coffeeshop 'Siberië'*, paragraph 14). The fact that some Member States describe a narcotic drug as a 'soft' drug is not capable of calling that finding into question (see, to that effect, *Vereniging Happy Family Rustenburgerstraat*, paragraph 25).
- 42 As narcotic drugs which are not distributed through such strictly controlled channels are prohibited from being released into the economic and commercial channels of the European Union, a coffee-shop proprietor cannot rely on the freedoms of movement or the principle of non-discrimination, in so far as concerns the marketing of cannabis, to object to municipal rules such as those at issue in the main proceedings.
- 43 That finding cannot be impugned by the fact that, as is apparent from paragraphs 12 to 14 of the present judgment, the Kingdom of the Netherlands applies a policy of tolerance to the sale of cannabis, even though trade in narcotic drugs is prohibited in that Member State. It is apparent from the case-law of the Court that such a prohibition is not affected by the mere fact that, in view in particular of their limited manpower and means, the national authorities responsible for implementing that prohibition give lower priority to bringing proceedings against a certain type of trade in drugs, because they consider other types to be more dangerous. Above all, such an approach cannot put illegal drugs dealing on the same footing as economic channels which are strictly controlled by the competent authorities in the medical and scientific field. The latter trade is actually legalised whereas illegal dealings, albeit tolerated, remain prohibited (see, to that effect, *Vereniging Happy Family Rustenburgerstraat*, paragraph 29).



44 As regards the marketing of non-alcoholic beverages and food in coffee-shops, Mr Josemans, the German Government and the Commission submit that the Court should assess the effects of the rules at issue in the main proceedings on the exercise of that activity. The German Government stresses that those goods are to be consumed on the premises. The Commission doubts that non-residents buy them with the intention of exporting them to their States of residence. Therefore, the provisions to be applied are those governing the freedom to provide services within the meaning of Article 49 EC and not those relating to the free movement of goods under Article 29 EC.

45 The Burgemeester van Maastricht and the Netherlands, Belgian, German and French Governments submit that the marketing of non-alcoholic beverages and food in such establishments is altogether secondary to the marketing of cannabis and cannot have any bearing on the outcome of the main proceedings.

46 That latter argument cannot be accepted. Although coffee-shops are primarily dedicated to the sale and consumption of cannabis, the fact remains that the marketing, in such establishments, of non-alcoholic beverages and food generally constitutes a not inconsiderable economic activity. In reply to a question asked by the Court, the Netherlands Government stated, at the hearing, that that activity generally represents between 2.5 % and 7.1 % of the turnover of coffee-shops in the municipality of Maastricht. As regards more specifically the economic situation of the 'Easy Going' coffee-shop, according to the information provided by Mr Josemans, the proportion of its turnover from the sale of such goods is in that bracket.

47 Consequently, it is necessary to examine whether, and, if so, to what extent, the rules at issue in the main proceedings are capable of affecting, in so far as concerns the marketing of non-alcoholic beverages and food, the exercise of the freedoms of

movement governed by Articles 29 EC and 49 EC or of undermining the principle of non-discrimination 'on grounds of nationality' within the meaning of Article 12 EC in conjunction with Article 18 EC.

- 48 In order to ascertain whether such an activity concerns the free movement of goods or the freedom to provide services, it must be borne in mind that an establishment is defined in Article 2.3.1.1(1)(a)(3) of the APV as a space to which the public has access and where food and/or non-alcoholic beverages are provided commercially, whether or not by means of vending machines, for consumption on the premises.
- 49 In such circumstances, as the Advocate General pointed out at point 76 of his Opinion, the marketing of non-alcoholic beverages and food in coffee-shops appears to constitute a catering activity characterised by an array of features and acts in which services predominate as opposed to the supply of the product itself (see, by analogy, Case C-491/03 *Hermann* [2005] ECR I-2025, paragraph 27).
- 50 Since the free movement of goods aspect is entirely secondary to that of the freedom to provide services and may be considered together with it, the Court will examine the rules at issue in the main proceedings only in the light of the latter fundamental freedom (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22; Case C-71/02 *Karner* [2004] ECR I-3025, paragraph 46; Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 26; Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 34; and Case C-233/09 *Dijkman and Dijkman-Laveleije* [2010] ECR I-6649, paragraph 33).
- 51 As regards the applicability of Article 12 EC, which lays down a general prohibition of all discrimination on grounds of nationality, it should be noted that that provision applies independently only to situations governed by European Union law for which the EC Treaty lays down no specific rules of non-discrimination (see, inter alia, Case

305/87 *Commission v Greece* [1989] ECR 1461, paragraphs 12 and 13; Case C-443/06 *Hollmann* [2007] ECR I-8491, paragraph 28; and Case C-269/07 *Commission v Germany* [2009] ECR I-7811, paragraph 98).

52 As the principle of non-discrimination has been implemented, in the area of the freedom to provide services, by Article 49 EC, Article 12 EC does not apply in circumstances such as those in the main proceedings.

53 As regards the applicability of Article 18 EC, that provision, which lays down generally the right for every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in the provisions guaranteeing the freedom to provide services (see, inter alia, Case C-92/01 *Stylianakis* [2003] ECR I-1291, paragraph 18; Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849, paragraph 34; and Case C-56/09 *Zanotti* [2010] ECR I-4517, paragraph 24). As citizens of the European Union who do not reside in the Netherlands and wish to go into coffee-shops in the municipality of Maastricht to consume lawful goods there are to be regarded as ‘persons for whom’ services ‘are intended’ within the meaning of Article 49 EC, it is not necessary for the Court to rule on the interpretation of Article 18 EC.

54 Consequently, the answer to the first question is that, in the course of marketing narcotic drugs which are not distributed through channels strictly controlled by the competent authorities with a view to use for medical or scientific purposes, a coffee-shop proprietor may not rely on Articles 12 EC, 18 EC, 29 EC or 49 EC to object to municipal rules such as those at issue in the main proceedings, which prohibit the admission of persons who are non-resident in the Netherlands to such establishments.

As regards the marketing of non-alcoholic beverages and food in those establishments, Article 49 EC et seq. may be relied on by such a proprietor.

*The second question*

- 55 The second question was asked in the event that the provisions governing the free movement of goods or those relating to the freedom to provide services apply in the circumstances of the dispute in the main proceedings. It relates, in essence, to whether municipal rules, such as those at issue in the main proceedings, constitute a restriction on the exercise of one of those freedoms and, if so, whether that measure may be justified by the objective of combating drug tourism and the accompanying public nuisance and, lastly, whether it constitutes a proportionate measure in relation to that objective.
- 56 Having regard to the answer to the first question, that question must be assessed solely in the light of Article 49 EC et seq. and limited to an examination of the effects of those rules on the marketing, in coffee-shops, of non-alcoholic beverages and food.
- 57 It is common ground that, under the rules at issue in the main proceedings, only 'residents' are admitted to coffee-shops. That term covers, under Article 2.3.1.1(1)(d) of the APV, any person who has his actual place of residence in the Netherlands. Consequently, the proprietors of such establishments are not entitled to provide catering services to persons residing in other Member States and those persons are precluded from enjoying such services.

- 58 It is clear from the Court's case-law that the principle of equal treatment, of which Article 49 EC embodies a specific instance, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, *inter alia*, Case C-3/88 *Commission v Italy* [1989] ECR 4035, paragraph 8; Case C-388/01 *Commission v Italy* [2003] ECR I-721, paragraph 13; Case C-28/04 *Tod's and Tod's France* [2005] ECR I-5781, paragraph 19; and Case C-147/03 *Commission v Austria* [2005] ECR I-5969, paragraph 41).
- 59 That is true, in particular, of a measure under which a distinction is drawn on the basis of residence, in that that requirement is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners (see, *inter alia*, Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 14; Case C-388/01 *Commission v Italy*, paragraph 14; Case C-103/08 *Gottwald* [2009] ECR I-9117, paragraph 28; and Case C-73/08 *Bressol and Others* [2010] ECR I-2735, paragraph 45).
- 60 It must, however, be examined whether such a restriction may be justified by legitimate interests which European Union law recognises.
- 61 The German Government takes the view that the rules at issue in the main proceedings are justified by the derogating provisions set out in Article 46(1) EC in conjunction with Article 55 EC, namely grounds of public policy, public security or public health. The Burgemeester van Maastricht and the Belgian Government rely, in the alternative, on grounds of public policy and public security. According to the Netherlands Government, the need to combat drug tourism constitutes a public-interest objective for the purposes of the line of case-law initiated in '*Cassis de Dijon*' (Case 120/78 *Rewe-Zentral* [1979] ECR 649).

- <sup>62</sup> While acknowledging the importance of the fight against drug tourism, the Commission submits that, as they are discriminatory, those rules can be compatible with European Union law only if they are covered by an express derogating provision, namely Article 46 EC in conjunction with Article 55 EC. The derogations provided for by those provisions should be interpreted restrictively. As regards more specifically grounds of public policy, they may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see, inter alia, Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35).
- <sup>63</sup> In the present case, it is common ground that the rules at issue in the main proceedings are intended to put an end to the public nuisance caused by the large number of tourists wanting to purchase or consume cannabis in the coffee-shops in the municipality of Maastricht. According to the information provided by the Burgemeester van Maastricht at the hearing, the 14 coffee-shops in the municipality attract around 10 000 visitors per day and a little more than 3.9 million visitors per year, 70 % of which are not resident in the Netherlands.
- <sup>64</sup> The Burgemeester van Maastricht and the Netherlands Government state that the problems associated with the sale of 'soft' drugs which arise in that commune, such as the various forms of public nuisance and crime and the increasing number of illegal points of sale of drugs, including 'hard' drugs, have been exacerbated by drug tourism. The Belgian, German and French Governments refer to the public order problems to which that phenomenon, including the illegal export of cannabis, gives rise in Member States other than the Kingdom of the Netherlands, in particular in neighbouring States.
- <sup>65</sup> It must be pointed out that combating drug tourism and the accompanying public nuisance is part of combating drugs. It concerns both the maintenance of public order and the protection of the health of citizens, at the level of the Member States and also of the European Union.

- <sup>66</sup> Given the commitments entered into by the European Union and its Member States, there is no doubt that the abovementioned objectives constitute a legitimate interest which, in principle, justifies a restriction of the obligations imposed by European Union law, even under a fundamental freedom such as the freedom to provide services.
- <sup>67</sup> In that connection, it is important to bear in mind, as is apparent from paragraphs 11, 37 and 38 of this judgment, that the need to combat drugs has been recognised by various international conventions which the Member States, and even the European Union, have cooperated on or acceded to. The preambles to those instruments mention the danger to the health and well-being of individuals constituted, in particular, by demand for and the illicit traffic in narcotic drugs and psychotropic substances, as well as their harmful effects on the economic, cultural and political bases of society.
- <sup>68</sup> Furthermore, the need to fight drugs, in particular by preventing drug addiction and punishing the illicit trafficking in such products or substances, has been set out in Article 152(1) EC and in Articles 29 EU and 31 EU. As regards provisions of secondary law, the first recital in the preamble to Framework Decision 2004/757 states that illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the European Union, and to the legal economy, stability and security of the Member States. Furthermore, as is apparent from paragraph 10 of this judgment, certain instruments of the European Union relate expressly to the prevention of drug tourism.
- <sup>69</sup> However, measures which restrict the freedom to provide services may be justified by the objective of combating drug tourism and the accompanying public nuisance only if they are suitable for securing the attainment of that objective and do not go beyond what is necessary in order to attain it (see, to that effect, *Omega*, paragraph 36; Case

C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779, paragraph 75; and Case C-244/06 *Dynamic Medien* [2008] ECR I-505, paragraph 42).

<sup>70</sup> In that connection it is important to bear in mind that a restrictive measure can be considered to be suitable for securing the attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner (see, to that effect, Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 55; Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, paragraph 42; and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraphs 59 to 61).

<sup>71</sup> Mr Josemans calls into question the suitability and proportionality of the rules at issue in the main proceedings. They relate exclusively to coffee-shops. Under 'the AHOJG criteria', those establishments are required, unlike the illegal premises selling drugs in the municipality of Maastricht, to fight against the public nuisance caused by their customers. Furthermore, those rules are liable to drive drug tourists to use illegal channels.

<sup>72</sup> The Commission expresses doubts as to the necessity of the rules at issue in the main proceedings and as to their consistency. It states that the national measures to combat the public nuisance caused by the consumption of drugs should be based on objective and non-discriminatory criteria. It refers, in that connection, to the judgment in Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, concerning the right of residence or establishment of prostitutes, and to the case-law deriving from it.



- 73 The Burgemeester van Maastricht and the Netherlands, Belgian and German Governments take the view, by contrast, that the rules at issue in the main proceedings constitute an appropriate and proportionate means of combating drug tourism and the accompanying public nuisance. The Burgemeester van Maastricht and the Netherlands Government state that the various measures adopted by municipalities applying a policy of tolerance with regard to coffee-shops in order to deal with that phenomenon have not achieved the objective pursued.
- 74 In the present case, it cannot be denied that the policy of tolerance applied by the Kingdom of the Netherlands with regard to the sale of cannabis encourages persons who are resident in other Member States to travel to that State, and more specifically to the municipalities in which coffee-shops are tolerated, in particular in border regions, in order to buy and consume that drug. Furthermore, according to the information in the case-file, some of those persons purchase cannabis in such establishments in order to export it illegally to other Member States.
- 75 It is indisputable that a prohibition on admitting non-residents to coffee-shops, such as that which is the subject-matter of the dispute in the main proceedings, constitutes a measure capable of substantially limiting drug tourism and, consequently, of reducing the problems it causes.
- 76 In that connection, it is important to point out that the discriminatory nature of the rules at issue in the main proceedings does not, on its own, mean that the way in which they pursue the intended objective is inconsistent. Although the Court took the view in *Adoui and Cornuaille* that a Member State cannot validly rely on grounds of public policy with regard to the behaviour of a non-national inasmuch as it does not adopt repressive measures or other genuine and effective measures with respect to the same conduct on the part of its own nationals, the fact remains that the dispute in the main proceedings is part of a different legal context.

- <sup>77</sup> As was pointed out in paragraph 36 of this judgment, there is, under international law and European Union law, a prohibition in all the Member States on marketing narcotic drugs, with the exception of strictly controlled trade for use for medical and scientific purposes. By contrast, prostitution, the behaviour referred to in *Adoui and Cornuaille*, aside from trafficking in human beings, is tolerated or regulated in a number of Member States (see, to that effect, Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 57).
- <sup>78</sup> It cannot be held to be inconsistent for a Member State to adopt appropriate measures to deal with a large influx of residents from other Member States who wish to benefit from the marketing — tolerated in that Member State — of products which are, by their very nature, prohibited in all Member States from being offered for sale.
- <sup>79</sup> As regards the scope of rules such as those at issue in the main proceedings, it is important to bear in mind that they apply only to establishments the main activity of which is the marketing of cannabis. They do not preclude a person who is not resident in the Netherlands from going, in the municipality of Maastricht, into other catering establishments in order to consume non-alcoholic beverages and food. According to the Netherlands Government, there are more than 500 such establishments.
- <sup>80</sup> As regards the possibility of adopting measures which are less restrictive of the freedom to provide services, according to the case-file, in the municipalities which apply a policy of tolerance with regard to coffee-shops, various measures relating to combating drug tourism and the accompanying public nuisance have been implemented, such as a restriction on the number of coffee-shops or their opening hours, the implementation of a card system which allows customers access to them or even

a reduction in the amount of cannabis per person which may be bought. According to the information provided by the Burgemeester van Maastricht and the Netherlands Government, those measures have nevertheless proved to be insufficient and ineffective in the light of the objective pursued.

- <sup>81</sup> As regards more specifically the possibility of granting non-residents access to coffee-shops whilst refusing to sell cannabis to them, it must be pointed out that it is not easy to control and monitor with accuracy that that product is not served to or consumed by non-residents. Furthermore, there is a danger that such an approach would encourage the illegal trade in or the resale of cannabis by residents to non-residents inside coffee-shops.
- <sup>82</sup> Member States cannot be denied the possibility of pursuing the objective of combating drug tourism and the accompanying public nuisance by the introduction of general rules which are easily managed and supervised by the national authorities (see, by analogy, Case C-110/05 *Commission v Italy* [2009] ECR I-519, paragraph 67, and Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273, paragraph 36). In the present case, nothing in the case-file gives grounds to assume that the objective pursued could be achieved to the extent envisaged by the rules at issue in the main proceedings by granting non-residents access to coffee-shops whilst refusing to sell them cannabis.
- <sup>83</sup> In such circumstances, it must be stated that rules such as those at issue in the main proceedings are suitable for attaining the objective of combating drug tourism and the accompanying public nuisance and do not go beyond what is necessary in order to attain it.

- <sup>84</sup> Having regard to all of the foregoing considerations, the answer to the second question is that Article 49 EC must be interpreted as meaning that rules such as those at issue in the main proceedings constitute a restriction on the freedom to provide services laid down by the EC Treaty. That restriction is, however, justified by the objective of combating drug tourism and the accompanying public nuisance.

### *The third and fourth questions*

- <sup>85</sup> The third and fourth questions were asked in the alternative and relate to the application of the principle of non-discrimination on grounds of nationality laid down in Article 12 EC in conjunction with Article 18 EC, which governs the free movement of citizens of the European Union.
- <sup>86</sup> Having regard to the answer given to the first question, there is no need to answer those questions.

### **Costs**

- <sup>87</sup> Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

- 1. In the course of marketing narcotic drugs which are not distributed through channels strictly controlled by the competent authorities with a view to use for medical or scientific purposes, a coffee-shop proprietor may not rely on Articles 12 EC, 18 EC, 29 EC or 49 EC to object to municipal rules, such as those at issue in the main proceedings, which prohibit the admission of persons who are non-resident in the Netherlands to such establishments. As regards the activity of marketing non-alcoholic beverages and food in those establishments, Article 49 EC et seq. may be relied on by such a proprietor.**
- 2. Article 49 EC must be interpreted as meaning that rules such as those at issue in the main proceedings constitute a restriction on the freedom to provide services laid down by the EC Treaty. That restriction is, however, justified by the objective of combating drug tourism and the accompanying public nuisance.**

[Signatures]