JUDGMENT OF THE COURT (Grand Chamber)

24 May 2011 (*)

(Failure of a Member State to fulfil obligations – Article 43 EC – Freedom of establishment – Civil-law notaries – Nationality condition – Article 45 EC – Connection with the exercise of official authority – Directive 89/48/EEC)

In Case C-47/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 11 February 2008,

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

applicant,

supported by:

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

intervener,

v

Kingdom of Belgium, represented by C. Pochet and L. Van den Broeck, acting as Agents, and by H. Gilliams and L. Goossens, avocats,

defendant,

supported by:

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

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

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

Republic of Lithuania, represented by D. Kriaučiūnas, acting as Agent,

Republic of Hungary, represented by J. Fazekas, R. Somssich, K. Veres and M. Fehér, 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'), the Kingdom of Belgium has failed to fulfil its obligations under Articles 43 EC and 45 EC and Directive 89/48.

Legal context

European Union law

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

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

'This Directive shall apply to any national of a Member State wishing to pursue a regulated profession in a host Member State in a self-employed capacity or as an employed person.

This Directive shall not apply to professions which are the subject of a separate Directive establishing arrangements for the mutual recognition of diplomas by Member States.'

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

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

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and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22) repealed Directive 89/48 with effect from 20 October 2007, pursuant to Article 62 of Directive 2005/36.

7 According to recital 41 in the preamble to Directive 2005/36, 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

8 In the Belgian legal system notaries practise as a liberal profession. The organisation of the profession of notary is governed by the Law of 25 Ventôse Year XI on the organisation of the

notarial profession (Loi du 25 ventôse an XI contenant organisation du notariat), as amended by the Law of 4 May 1999 ('the Law of Ventôse').

9 In accordance with Article 1(1) of the Law of Ventôse, notaries are 'public officials appointed to receive all instruments and agreements on which the parties must have or wish to have conferred the authentic character attached to acts of the public authorities, and to guarantee their date, keep them safe, and issue principal and additional copies of them'.

10 Article 5(1) of the Law of Ventôse provides that 'notaries shall carry out their functions in the judicial district in which they reside'. Under Article 9(1)(1) of that law, except in cases where the appointment of a notary by the court is provided for, all parties can choose a notary freely. The number, location and seat of notaries are determined by the King in accordance with Article 31 of the law.

11 Under Article 50 of the Law of Ventôse, a notary may practise his profession on his own, in association with one or more established notaries who reside in the same judicial district, or within a professional partnership of notaries.

12 The fees of notaries are fixed by law in accordance with the Royal Decree on the scale of fees of notaries (Arrêté royal portant tarif des honoraires des notaires) of 16 December 1950.

13 In accordance with Article 35(3) of the Law of Ventôse, to be appointed as an expectant notary, a person must in particular be Belgian.

Activities of notaries

14 As regards the activities of notaries in the Belgian legal system, it is not disputed that their principal task is to establish authentic instruments. The intervention of a notary may be mandatory or optional, depending on the instrument he is to authenticate. By his intervention the notary confirms that all the conditions required by law for the instrument to be drawn up are satisfied, and that the parties have legal personality and capacity to enter into legal transactions.

15 An authentic instrument is defined in Article 1317 of the Civil Code (Code civil), which appears in Book III, Title III, Chapter VI of the code, 'Proof of obligations and proof of payment'. According to that article, an authentic instrument is 'one which has been received in due and proper form by office-holders entitled to authenticate instruments in the place where the instrument was drawn up'.

16 Under Article 19 of the Law of Ventôse, a notarial act is good evidence before a court and is enforceable throughout the Kingdom of Belgium.

17 Article 1319 of the Civil Code specifies that an 'authentic instrument is complete proof of the agreement it embodies between the contracting parties and their heirs or persons claiming through them'.

18 Article 1322 of the Civil Code provides that a 'private document acknowledged by the person against whom it is adduced, or deemed by law to have been acknowledged, has the same probative force as an authentic instrument as between the signatories and their heirs or persons claiming through them'.

19 In accordance with Article 516 of the Judicial Code (Code judiciaire), bailiffs have sole power, subject to statutory provisions to the contrary, to enforce judicial decisions and documents or instruments that are enforceable. Articles 1395 and 1396 of that code provide that all applications relating in particular to means of enforcement are to be brought before the court responsible for attachment proceedings. That court ensures that the provisions concerning means of enforcement are complied with. It may, even of its own motion, call for a report on the state of the procedure from the office-holders or officials authenticating the act or commissioned by the court.

20 In addition to authentication activities, the Belgian legal system assigns the following tasks to notaries.

21 In accordance with Articles 1148 to 1173 of the Judicial Code, notaries exercise certain functions in connection with the apposition and removal of official seals. Appositions and removals are authorised by a magistrate. In cases of absolute necessity the magistrate may order the immediate removal of seals and appoint a notary to represent absent persons and a notary to draw up the inventory and keep the property safe.

22 Under Articles 1175 to 1184 of the Judicial Code, the notary is responsible for drawing up the inventory of a deceased person's estate or of property in joint ownership or co-ownership. Drawing up such an inventory is usually subject to authorisation by a magistrate, the inventory then being drawn up by a notarial act. If difficulties arise, the notary refers them to the magistrate.

23 The role of notaries in connection with certain sales of immovable property is governed by Articles 1186 to 1190 of the Judicial Code. To carry out those sales, the persons concerned must, in the cases laid down by law, make a prior application to a magistrate for authorisation. If the magistrate allows the application, he appoints a notary to conduct the sale.

24 Certain activities concerning the judicial division of estates are also entrusted to notaries under Articles 1207 to 1224 of the Judicial Code. The competent court must first order a judicial division and refer the parties, if appropriate under conditions it determines, to one or two notaries, appointed by the court if the parties cannot agree on the choice of notary. After the movable and immovable property has been valued or sold, the notary draws up a liquidated account with a view to division. The court decides any disputes and then approves the account or refers it to the commissioned notary for the purpose of drawing up a supplementary account or an account in accordance with the court's instructions.

25 Notaries also, under Article 1560 et seq. of the Judicial Code, perform certain activities in connection with the attachment of immovable property. Pursuant to those provisions, the enforceable instrument is first enforced by a bailiff, who issues the debtor with an order to pay. He then has a period within which to comply. Finally, on expiry of that period, if the debtor has not in the meantime complied, the immovable property concerned is attached by a bailiff's warrant, after which the warrant is entered in the register of changes over land. On application by the creditor, the court responsible for attachment proceedings appoints a notary to sell the property by auction or by private treaty, the latter subject to the court's authorisation, and to rank the creditors in order of priority. With a sale by auction, the notary draws up the sale documents, which state the date of the sale and contain an assignment to the creditors of the proceeds of sale. If the sale documents are the subject of a challenge, the notary prepares a report, suspends all actions and refers the question to the court. Articles 1395 and 1396 of the Judicial Code, mentioned in paragraph 19 above, apply to the attachment of immovable property.

26 Notaries are also involved, under Articles 1639 to 1654 of the Judicial Code, in the ranking procedure following a sale by auction. The notary appointed draws up the schedule of distribution of the proceeds of sale, or, if necessary, of the priority of preferential rights and mortgages. If no objection is made, the notary finalises the schedule and issues the creditors with certificates of priority in enforceable form. Any disputes that may arise are brought before the court.

27 In addition, certain transactions must be concluded by a notarial act if they are not to be void. These include gifts inter vivos, wills, marriage contracts and statutory cohabitation agreements.

28 Notaries also act in connection with company law and the law of associations. Thus, for example, winding-up decisions taken by general meetings of certain companies must take the form of an authentic instrument, pursuant to Article 181(4) of the Companies Code (Code des sociétés). The same applies, under Articles 27 and 46 of the Law on non-profit-making associations, international non-profit-making associations and foundations (Loi sur

les associations sans but lucratif, les associations internationales sans but lucratif et les fondations), to the acts constituting those associations and foundations. Associations and foundations, like companies, acquire legal personality following the filing of the constituent act with the registry of the commercial court (Articles 2(4) and 68 of the Companies Code and Articles 3, 26 *novies* (1), 29(1) and 31(1) of that law). In accordance with Articles 882 to 884 of the Companies Code, notaries also ascertain the lawfulness of a merger or division of companies or of a transfer of the registered office.

The administrative procedure

29 A complaint was made to the Commission concerning the nationality condition for access to the profession of notary in Belgium. After examining the complaint the Commission, by letter of 8 November 2000, gave the Kingdom of Belgium 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.

30 The Kingdom of Belgium replied to the letter of formal notice by letter of 1 February 2001.

31 The Commission sent the Kingdom of Belgium a supplementary letter of formal notice on 15 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.

32 The Kingdom of Belgium replied to the supplementary letter of formal notice by letter of 10 October 2002.

33 Since it was not persuaded by the arguments put forward by the Kingdom of Belgium, 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 Kingdom of Belgium to take the necessary steps to comply with the reasoned opinion within two months from its receipt.

34 By letter of 13 December 2006, the Kingdom of Belgium stated why it considered that the position adopted by the Commission was not well founded.

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

The action

First head of claim

Arguments of the parties

36 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 Kingdom of Belgium has failed to fulfil its obligations under Article 43 EC and the first paragraph of Article 45 EC.

37 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 condition has been abolished in other Member States, such as the Kingdom of Spain, the Italian Republic and the Portuguese Republic.

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

39 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).

40 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).

41 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.

42 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).

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

44 The Commission examines, secondly, the various activities of notaries in the Belgian legal system.

45 In the first place, 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. 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.

46 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. 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.

47 As to the enforceability of notarial acts, 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.

48 In the second place, as regards the activities of notaries in connection with the attachment of immovable property, the notary does no more than implement the decisions taken by the court. That also applies to the sale by auction of immovable property where there is no attachment.

49 In the third place, the notary's part in drawing up the inventory of a deceased person's estate or of property in joint ownership or co-ownership is limited to preparing that inventory under the supervision of the court. His involvement in the judicial division of estates is also circumscribed by decisions of the court.

50 In the fourth place, as regards notaries' functions in relation to certain acts such as gifts, marriage contracts, statutory cohabitation agreements and wills, the Commission submits that the notary does no more than endorse the wishes of the parties in accordance with the law.

51 That also applies, in the fifth place, to the functions of notaries in connection with company law and the law of associations.

52 Furthermore, the specific status of notaries in Belgian law, their appointment by the King and the supervision of their activities by departments of the State are not directly relevant in assessing the character of the activities in question.

53 The Commission submits, thirdly, with the United Kingdom, 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.

54 Both Article 1(5)(d) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1) and recital 41 in the preamble to Directive 2005/36 exclude from their scope the activities of notaries only to the extent that they involve a direct and specific connection with the exercise of public authority. This is thus merely a reservation which has no effect on the interpretation of the first paragraph of Article 45 EC. As to Article 2(2)(l) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), which excludes services provided by notaries from the scope of that directive, the Commission argues that the fact that the legislature chose to exclude a particular activity from the scope of that directive does not mean that the first paragraph of Article 45 EC applies to the activity.

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), Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, (OJ 2003 L 338, 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 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 392 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.

57 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.

58 The Kingdom of Belgium, supported by the Czech Republic, the French Republic, the Republic of Lithuania, the Republic of Hungary and the Slovak Republic, submits, first, that the Commission's interpretation of the first paragraph of Article 45 EC is too narrow. According to the Kingdom of Belgium, notaries are directly and specifically connected in the Belgian legal system with the exercise of official authority because of the exceptional legal effects attached to notarial acts and of the nature of the activities of notaries that are closely linked to the exercise of judicial power, such as their activities in non-contentious matters.

59 The Kingdom of Belgium also submits that the status of notaries in the Belgian legal system is equivalent to that of office-holders exercising official authority, since the procedure for appointing them and the rules prohibiting their removal are equivalent to those for judges.

60 The Kingdom of Belgium submits, secondly, as regards the various activities of notaries, that these include the establishment of authentic instruments, which is a specific manifestation of official authority. Contrary to the Commission's arguments, agreement between the parties does not suffice for the establishment of a notarial act. The notary must refuse to issue an authentic instrument if the conditions required by law are not satisfied.

61 Moreover, when authenticating an instrument, the notary acts as a collector of taxes, receiving payment of any registration fees and mortgage duty and giving receipts for payment.

62 Authentic instruments established by a notary moreover enjoy complete probative force and are enforceable.

63 Thus in the Belgian legal system the authentic statements in a notarial act, that is, the facts that the notary himself finds and declares to have seen, heard and done, have complete probative force between the parties, unless they are successfully challenged by means of an action for falsification. By contrast, private documents have no probative force unless they are acknowledged by the parties.

64 Notarial acts are also enforceable without it being necessary to obtain a judgment first. Establishing a notarial act produces an enforceable instrument which enables a bailiff to proceed directly to enforcement on the basis of the notarial act. If the debtor opposes enforcement, he must apply to the court responsible for attachment proceedings.

65 The Kingdom of Belgium submits, thirdly, that the Belgian legal system entrusts notaries with certain functions in the administration of justice, both contentious and non-contentious.

66 In the first place, the functions entrusted to notaries in connection with the contentious administration of justice, which include the attachment of immovable property, certain sales by auction, drawing up inventories of estates, joint property or property in co-ownership, the judicial division of estates, the ranking procedure and the removal of official seals, are in the Belgian Government's view closely connected to the exercise of judicial authority.

67 Notaries thus exercise functions that are independent and distinct from those of judges. In some cases a notary is empowered to take unilateral measures without the agreement of the parties being necessary. That is the case where he sells immovable property in the attachment procedure or draws up the liquidated account for the judicial division of an estate. With respect in particular to the attachment of property, after his appointment by the competent court the notary has sole charge of the procedure, the sale by auction being definitive and not subject to challenge. The court responsible for attachment proceedings can only hear a challenge to the lawfulness of the attachment or an application for the auction to be declared void.

68 In the second place, as regards the tasks of notaries in connection with the non-contentious administration of justice, relating in particular to wills, marriage contracts and statutory cohabitation agreements, these, in the Belgian Government's view, are intended to avert later legal disputes. Thus notaries and judges are entrusted with two distinct parts of the administration of justice, the former acting in non-contentious and the latter in contentious

procedures. The activities of notaries are not therefore activities that are ancillary or preparatory to those of judges.

69 Moreover, the Court confirmed in *Colegio de Oficiales de la Marina Mercante Española* that notarial activities relating to the preparation of wills are connected with the exercise of powers of official authority.

70 In the third place, in relation to company law, notaries act as representatives of official authority ensuring, in the public interest, that transactions comply with the law.

71 The Kingdom of Belgium and the Republic of Lithuania submit, fourthly, that the European Union legislature has confirmed that notaries are connected with the exercise of public authority. They cite the European Union acts mentioned in paragraph 54 above, which in their submission either exclude the activities of notaries from the scope of those acts because of their connection with the exercise of official authority or acknowledge that authentic instruments are drawn up by a public authority or any other authority empowered by the State. Moreover, it follows from the acts mentioned in paragraph 55 above that notarial acts are equated to judicial decisions as regards enforceability.

72 Those States add, finally, that the Parliament stated in its 1994 and 2006 resolutions that the profession of notary is 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 Kingdom of Belgium 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 Belgian 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 Belgian 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. Nor does it relate to the application of the Treaty provisions on freedom of movement for workers.

– Substance

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

78 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).

79 The freedom of establishment conferred on nationals of one Member State in the territory of another Member State includes in particular access to and exercise of activities of self-employed persons under the same conditions as are laid down by the law of the Member State of establishment for its own nationals (see, inter alia, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 13, and, to that effect, *Commission* v *Austria*, paragraph

27). In other words, Article 43 EC prohibits the Member States from laying down in their laws conditions for the pursuit of activities by persons exercising their right of establishment there which differ from those laid down for its own nationals (*Commission* v *Austria*, paragraph 28).

80 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).

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

82 The Kingdom of Belgium 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 Belgian legal system fall within that concept.

83 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).

84 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).

85 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).

86 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).

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

88 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).

89 The Kingdom of Belgium and the Commission agree that the principal activity of notaries in the Belgian legal system consists in 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.

90 It must be observed, in this respect, that the documents that may be authenticated under Belgian 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.

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

92 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.

93 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 Kingdom of Belgium.

94 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 the above conclusion into question either.

95 It is true that, as the Kingdom of Belgium 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.

96 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 falling within the exercise of official authority.

97 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.

98 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.

99 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.

100 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. Paragraph 1319 of the Civil Code, which determines the probative force of an authentic instrument, forms part of Chapter VI of that code, 'Proof of obligations and proof of payment'. 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).

101 Moreover, as the Kingdom of Belgium concedes, a private document acknowledged by the person against whom it is adduced, or deemed by law to have been acknowledged, under Article 1322 of the Civil Code has 'the same probative force as an authentic instrument' as between the signatories and their heirs and persons claiming through them.

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

103 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. 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.

104 It must also be ascertained whether the other activities entrusted to notaries in the Belgian legal system, referred to by the Kingdom of Belgium, involve a direct and specific connection with the exercise of official authority.

105 As regards, first, the functions of notaries in connection with the attachment of immovable property, it must be recalled that the notary is principally responsible for implementing the sale by auction or by private treaty, if the latter has been authorised by the court, under the conditions determined by the court. The notary must also arrange the inspection of the premises and draw up the documentation, which indicates the date of the sale and contains a clause assigning the proceeds of the sale to the creditors.

106 It is thus clear that the notary does not have power to carry out the attachment himself. In addition, it is the court responsible for attachment proceedings which appoints the notary and entrusts him with carrying out the sale by auction or by private treaty and the determination of priorities. It is for the court to ensure that the provisions concerning means of enforcement are complied with. As follows from Article 1396 of the Judicial Code, the court may, even of its own motion, call for a report on the state of the procedure from the office-holders or officials authenticating the act or commissioned by the court. If disputes arise, the decision is for the court to take, the notary being obliged to draw up a statement of the objections, suspend all actions and refer the question to the court.

107 The functions of notaries in connection with the attachment of immovable property can thus be seen to be exercised under the supervision of the court, to which the notary must refer

any disputes, and which takes the final decision. Those functions cannot therefore be regarded as directly and specifically connected, as such, with the exercise of official authority (see, to that effect, *Thijssen*, paragraph 21; Case C-393/05 *Commission* v *Austria*, paragraphs 41 and 42; *Commission* v *Germany*, paragraphs 43 and 44; and *Commission* v *Portugal*, paragraphs 37 and 41).

108 The same conclusion follows, secondly, with respect to the functions entrusted to notaries under Articles 1186 to 1190 of the Judicial Code in connection with certain sales of immovable property. It is apparent from those provisions that the decision whether or not to authorise those sales is for the court.

109 As regards, thirdly, the activities of notaries in relation to inventories of deceased persons' estates and property in joint ownership or co-ownership, and to the affixing and removal of official seals, those activities are subject to authorisation by a magistrate. In the event of difficulties, the notary refers the question to the magistrate, pursuant to Article 1184 of the Judicial Code.

110 As regards, fourthly, the activities of notaries in relation to the judicial division of estates, it must be noted that it is for the court to order the division and refer the parties, if appropriate under conditions it determines, to a notary whose task it is, in particular, to prepare the inventory and establish the total estate and define the shares. It is also for the court to decide any dispute that may arise and to approve the liquidated account drawn up by the notary or to refer it to him for the purpose of drawing up a supplementary account or an account in accordance with the court's instructions. Consequently, those activities do not involve the notary in the exercise of official authority.

111 That is also the case, fifthly, with the procedure for ranking the creditors following a sale by auction. In that procedure the notary is responsible for drawing up the report of the distribution of the proceeds of sale or, if necessary, the priority of preferential rights and mortgages. Any disputes must be brought before the court.

112 It should also be pointed out, as regards the activities of notaries mentioned in paragraphs 105 to 111 above, that, as recalled in paragraph 86 above, professional activities cooperating, even on a compulsory basis, with the functioning of the courts are not as such connected with the exercise of official authority (*Reyners*, paragraph 51).

113 Sixthly, as regards acts such as gifts inter vivos, wills, marriage contracts and statutory cohabitation agreements, which must be concluded by a notarial act if they are not to be void, reference is made to the considerations in paragraphs 90 to 103 above.

114 The same considerations apply, seventhly, in relation to acts constituting companies, associations and foundations, which must be done by authentic instrument if they are not to be void. It should be added, moreover, that those legal persons acquire legal personality only following the filing of the constituent act with the registry of the commercial court.

115 As regards, eighthly, the tax-collecting functions of notaries when they receive payment of registration fees or mortgage duties, these cannot be regarded in themselves as directly and specifically connected with the exercise of public authority. It should be pointed out in this respect that the collection is done by the notary on behalf of the person owing the tax, is followed by the remittal of the corresponding sums to the relevant State department, and is not therefore fundamentally different from the collection of value added tax.

116 With respect to the particular status of notaries in the Belgian legal system, it need only be recalled that, as follows from paragraphs 85 and 88 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.

117 Two points must be made here, however. The first is that it is not disputed that, apart from the cases in which a notary is appointed by law, every party can choose a notary freely, in accordance with Article 9 of the Law of Ventôse. While notaries' fees are indeed fixed by law,

the quality of the services they provide may none the less 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.

118 The second point is that, as the Commission submits without being contradicted by the Kingdom of Belgium, notaries are directly and personally liable to their clients for loss arising from any default in the exercise of their activities.

119 Moreover, the argument which the Kingdom of Belgium bases on certain European Union acts also fails to convince. As regards the acts mentioned in paragraph 54 above, it must be stated that the fact that the legislature chose to exclude the activities of notaries from the scope of a particular act does not mean that those activities necessarily fall within the exception in the first paragraph of Article 45 EC. With respect to Directive 2005/36 in particular, the very wording of recital 41 in the preamble, according to which the directive 'is without prejudice to the application of Articles … 45 [EC] concerning notably notaries', shows that the European Union legislature precisely did not take a position on the applicability of the first paragraph of Article 45 EC to the profession of notary.

120 The argument based on the regulations mentioned in paragraph 55 above is also immaterial. Those regulations 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. It follows, moreover, from the case-law, applicable by analogy to Regulation No 44/2001, that for an instrument to be authentic within the meaning of that regulation the involvement of a public authority or any other authority empowered by the State is necessary (see, to that effect, Case C-260/97 *Unibank* [1999] ECR I-3715, paragraphs 15 and 21).

121 As to the 1994 and 2006 resolutions, mentioned in paragraph 56 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.

122 As regards the argument which the Kingdom of Belgium 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.

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

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

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

Second head of claim

Arguments of the parties

126 The Commission claims that the Kingdom of Belgium has failed to transpose Directive 89/48 with respect to the profession of notary. In its view, that profession cannot be excluded from the scope of that directive, as notaries are not directly and specifically connected with the exercise of official authority.

127 The Commission notes that Directive 89/48 allows 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.

128 The United Kingdom further submits that the reference to the profession of notary in recital 41 in the preamble to Directive 2005/36 does not exclude that profession as a whole from the scope of that directive.

129 Without raising a formal plea of inadmissibility, the Kingdom of Belgium observes that the second head of claim alleges failure to transpose not Directive 2005/36 but Directive 89/48. However, Directive 2005/36 repealed Directive 89/48 with effect from 20 October 2007.

130 On the substance, the Kingdom of Belgium, the Republic of Lithuania, the Republic of Hungary and the Slovak Republic submit that recital 41 in the preamble to Directive 2005/36 expressly states that it 'is without prejudice to the application of Articles 39(4) [EC] and 45 [EC] concerning notably notaries'. That reservation confirms that the profession of notary is covered by the first paragraph of Article 45 EC, so that Directive 2005/36 does not apply to that profession. In addition, the Republic of Lithuania observes that there is a less specific but similar reservation in the 12th recital in the preamble to Directive 89/48.

Findings of the Court

– Admissibility

131 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).

132 In the present case, that period ended 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, a claim based on failure to transpose Directive 89/48 is not devoid of purpose (see, by analogy, judgment of 11 June 2009 in Case C-327/08 *Commission* v *France*, paragraph 23).

133 The objection put forward by the Kingdom of Belgium must therefore be rejected.

– Substance

134 The Commission complains that the Kingdom of Belgium has not transposed Directive 89/48 with respect to the profession of notary. The Court must therefore examine whether that directive applies to that profession

135 The legislative context of the directive must be taken into account here.

136 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.

137 At the time of adoption of Directive 89/48, 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.

138 Over the years following the adoption of Directive 89/48, the Parliament, in its 1994 and 2006 resolutions mentioned in paragraphs 56 and 121 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.

139 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'. As stated in paragraph 119 above, 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.

140 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.

141 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 Directive 89/48 with respect to the profession of notary.

142 The second head of claim must therefore be rejected.

143 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 Kingdom of Belgium has failed to fulfil its obligations under Article 43 EC, and the action must be dismissed as to the remainder.

Costs

144 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.

145 Under the first subparagraph of Article 69(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs. The Czech Republic, the French Republic, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, 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 Kingdom of Belgium has failed to fulfil its obligations under Article 43 EC;**

2. **Dismisses the action as the remainder;**

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

[Signatures]

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* Language of the case: French.