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Case C-115/24

Request for a preliminary ruling

Date lodged:

13 February 2024

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

25 January 2024

Applicant:

Österreichische Zahnärztekammer

Defendant:

UJ

…

REPUBLIC OF AUSTRIA

OBERSTER GERICHTSHOF (SUPREME COURT)

The Oberste Gerichtshof … in the action brought by the applicant, Österreichische Zahnärztekammer, … Vienna … against the defendant UJ, … Klagenfurt am Wörthersee, … and the parties intervening in support of the defendant 1. Urban Technology GmbH, … Berlin, Germany, 2. DZK Deutsche Zahnklinik GmbH, … Düsseldorf, Germany … for a prohibitory order and publication of the judgment (value of the matter at issue in the interim proceedings EUR 32 000), in the proceedings relating to the defendant's appeal on a point of law against the order of the Oberlandesgericht Graz (Higher Regional Court, Graz), as appeal court, of 18 November 2022, … by which the order of the Landesgericht Klagenfurt (Regional Court, Klagenfurt of 26 September 2022), … was varied in part, … has made the following

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Order:

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant Article 267 TFEU:

1.1. Does the scope of Article 3(d) of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare (Patient Mobility Directive), under which, in the case of telemedicine, healthcare is considered to be provided in the Member State where the healthcare provider is established, extend only to the reimbursement of costs within the meaning of Article 7 thereof?

1.2. If the answer to Question 1.1. is in the negative, does Article 3(d) of the Patient Mobility Directive (Directive 2011/24/EU) lay down a general country-of-origin principle in respect of telemedicine services?

1.3. Does 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 (E-Commerce Directive) lay down a country-of-origin principle in respect of telemedicine services?

2.1. Does 'healthcare in the case of telemedicine' as provided for in Article 3(d) of the Patient Mobility Directive (Directive 2011/24/EU) relate exclusively to individual medical services which are provided (across borders) with the support of information and communication technologies (ICT) or to an entire treatment contract which can also include physical examinations in the patient's country of residence?

2.2. If physical examinations can be included, must ICT-supported services predominate for there to be 'healthcare in the case of telemedicine' and, if so, in accordance with which criteria is the predominance to be assessed?

2.3. Is medical treatment as a whole to be regarded as cross-border healthcare within the meaning of Article 3(d) and (e) of the Patient Mobility Directive (Directive 2011/24/EU) if, from the patient's perspective, the healthcare provider established in the other Member State, with whom the patient has concluded a treatment contract (in the present case: a dental clinic), provides part of the overall treatment with the support of ICT, whereas the other part of the overall service is provided by a healthcare provider (dentist) established in the same Member State as the patient?

3.1. Must Article 2(n) of the Patient Mobility Directive (Directive 2011/24/EU), in conjunction with Articles 3(d) and 4(a) thereof and Article 5(3) of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (Professional Qualifications Directive), be interpreted as meaning that a dental clinic established in Germany must, in cases of 'healthcare by telemedicine' in Austria, comply with the national professional rules of a professional, statutory or administrative nature which are

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applicable there (in particular Paragraphs 24, 26 and 31 of the Austrian Zahnärztegesetz (Law on dentists))?

3.2. Must Article 5(3) of the Professional Qualifications Directive (Directive 2005/36/EC) be interpreted as meaning that a healthcare provider moves to another Member State where such provider provides solely ICT-supported medical services? If that question is answered in the negative, does it constitute moving to another Member State if such provider undertakes physical examinations or treatment carried out by agents in the patient's Member State of residence?

4. Does the freedom to provide services pursuant to Article 56 et seq. TFEU preclude the requirements laid down the Austrian Zahnärztegesetz, which in Paragraph 24 et seq. thereof primarily provides for the direct and personal exercise of the profession and the free movement of services only 'temporarily' for 'nationals of a State that is a party to the EEA Agreement' under Paragraph 31 thereof, namely for situations such as the present, where a foreign dentist provides – in principle on a permanent basis – services in part supported by ICT from abroad (in the sense of cross-border services by correspondence) and in part in Austria by using an Austrian dentist authorised to practise the profession as an agent pursuant to a uniform treatment contract.

II. … [remarks on national procedure]

Grounds:

I.:

A. Facts

1 The applicant, a legal person governed by public law established in Vienna, is obliged by law to represent the interests of Austrian dentists and dental practitioners. The defendant is a dentist established in Austria who is, it is common ground, authorised to examine and treat patients in Austria pursuant to a treatment contract which she has concluded with them.

2 The two intervening parties are part of a dental undertaking which operates worldwide. The first intervening party is a public limited company established in Germany whose object is to 'provide services in the field of lifestyle products for final customers'. It advertises a dental jaw alignment procedure using transparent splints, which is marketed under the brand name 'DrSmile'. Via its website www.drsmile.at, (potential) customers can select a desired location in Austria and request an appointment with the relevant 'partner dentist' (such as the defendant). Where such an appointment is made, the defendant establishes a medical history in her own practice, and carries out a consultation, a 3D scan of the teeth and any pre-treatments required for the splint therapy. Subsequently, the defendant sends the images and a recommendation regarding the jaw alignment procedure to the second intervening party. It is also a public limited company established in

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Germany. The shareholders of the intervening parties are not dentists. However, the second intervening party does have a licence and the other necessary permits under German law on hospitals to operate a dental care centre ('dental clinic') at a location in Germany.

3 In the present case, it can be assumed that (only) the second intervening party concludes a treatment contract with the patients, which covers all services in connection with a 'DrSmile' dental alignment. It obtains the splints via the first intervening party, who in turn orders them from third parties. Further care is provided via the second intervening party's app by patients regularly sending it pictures of their teeth. Furthermore, the second secondary intervening party has a contractual relationship with the defendant and remunerates it for the services which it provides for the relevant patients as part of the 'DrSmile treatment'.

B. Submission of the parties

4 The applicant asserts a right to bring an action for a prohibitory injunction under the Bundesgesetz gegen den unlauteren Wettbewerb (Federal law on unfair competition; 'the UWG)', under the category of breach of the law. It seeks (in so far as still relevant in the interim proceedings at third instance) an interim order prohibiting the defendant, until the judgment on the action for a prohibitory order becomes final, from participating in dental activities performed in Austria by foreign companies, which have neither the authority to practise the profession of dentist under the Zahnärztegesetz in Austria nor a hospital operating licence under Austrian law, for example by taking impressions of misaligned teeth, also digitally using an intraoral scanner, for the first or second intervening party.

5 The defendant objected that the second intervening party, with which it cooperates, is a private hospital licensed under German law, whose activities are permitted in Austria with regard to telemedicine. The same is true of cooperation with the defendant in connection with orthodontic treatment. The defendant carries out her activities directly, personally and independently.

C. Procedure to date

6 The court of first instance dismissed the safeguard application. It held that the defendant did not participate in the dental activities of the intervening parties. There were two treatment contracts which were to be regarded as separate from one another and therefore the defendant could not be classified as an agent and thus did not participate in third-party dental activities in Austria.

7 The appeal court essentially granted the safeguard application – with the exception of the mention, by way of example, of the co-operation in dental activities of the first intervening party. It ruled that the defendant acted as an agent of the second intervening party under the treatment contracts concluded between her and the patients. The second intervening party was not authorised to provide dental services in Austria. Its treatment services provided by the defendant as an agent in Austria were carried out directly and without the use of information and

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communication technology. The defendant therefore participated in dental activities which are provided by a foreign company in Austria without having the authority to practise as a dentist under the Zahnärztegesetz (ZÄG) or a hospital operating licence under Austrian law. Therefore (i) she infringed the rules on cooperation laid down in Paragraph 24 of the ZÄG and (ii) participated as facilitator of an infringement by a foreign public limited company of the requirement that dental treatment must only be provided personally by dentists (*'Zahnärztevorbehalt'*) laid down in Paragraphs 3 and 4(3) of the ZÄG and thus an infringement of the principle of fairness within the meaning of Paragraph 1 of the Bundesgesetz gegen den unlauteren Wettbewerb (UWG). The defendant could not rely on the justifiability of that view by reference to Decision 4 Ob 158/20v.

8 The Oberster Gerichtshof has to rule on the defendant's appeal on a point of law, by which the defendant requests that the applicant's application for an interim order be dismissed in its entirety.

D. Applicable European Union law

9 1.1. Under Article 56 TFEU, restrictions on freedom to provide services within the Union are to be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

10 1.2. Under Article 62 TFEU, Articles 51 to 54 TFEU on the freedom of establishment are also applicable in connection with the freedom to provide services.

11 1.3. Under Article 54 TFEU, companies with their registered office within the Union are in principle to be treated in the same way as nationals of Member States.

12 2.1. Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare (Patient Mobility Directive) provides, according to Article 1(1) thereof,

> *rules for facilitating the access to safe and high-quality cross-border healthcare and promotes cooperation on healthcare between Member States, in full respect of national competencies in organising and delivering healthcare. This Directive also aims at clarifying its relationship with the existing framework on the coordination of social security systems, Regulation (EC) No 883/2004, with a view to application of patients' rights.*

13 In Article 4, it defines the responsibilities of the Member States with regard to cross-border healthcare. It states:

> *Taking into account the principles of universality, access to good quality care, equity and solidarity, cross-border healthcare shall be provided in accordance with: (a) the legislation of the Member State of treatment; […]*

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14 According to the definitions of terms in Article 3(e),

> *'cross-border healthcare' means healthcare provided or prescribed in a Member State other than the Member State of affiliation.*

15 2.2. Under Article 3(d),

> *'Member State of treatment' means the Member State on whose territory healthcare is actually provided to the patient. In the case of telemedicine, healthcare is considered to be provided in the Member State where the healthcare provider is established.*

16 The Patient Mobility Directive does not contain a more detailed definition of and rules on 'telemedicine'.

17 2.3. However, the Patient Mobility Directive does provide rules on the reimbursement of costs for telemedicine services.

18 Recital 26 states:

> *The right to reimbursement of the costs of healthcare provided in another Member State by the statutory social security system of patients as insured persons has been recognised by the Court of Justice in several judgements. The Court of Justice has held that the Treaty provisions on the freedom to provide services include the freedom for the recipients of healthcare, including persons in need of medical treatment, to go to another Member State in order to receive it there. The same should apply to recipients of healthcare seeking to receive healthcare provided in another Member State through other means, for example through eHealth services.*

19 Accordingly, Article 7(7) provides:

> *The Member State of affiliation may impose on an insured person seeking reimbursement of the costs of cross-border healthcare, including healthcare received through means of telemedicine, the same conditions, criteria of eligibility and regulatory and administrative formalities, whether set at a local, regional or national level, as it would impose if this healthcare were provided in its territory. […]*

20 2.4. Lastly, there are also rules of a general nature in the Patient Mobility Directive:

21 According to recital 56:

> *Technological developments in cross-border provision of healthcare through the use of ICTs may result in the exercise of supervisory responsibilities by Member States being unclear, and can thus hinder the free movement of healthcare and give rise to possible additional risks to*

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health protection. Widely different and incompatible formats and standards are used for provision of healthcare using ICTs throughout the Union, creating both obstacles to this mode of cross-border healthcare provision and possible risks to health protection. It is therefore necessary for Member States to aim at interoperability of ICT systems. The deployment of health ICT systems, however, is entirely a national competence. This Directive therefore should recognise the importance of the work on interoperability and respect the division of competences by providing for the Commission and Member States to work together on developing measures which are not legally binding but provide additional tools that are available to Member States to facilitate greater interoperability of ICT systems in the healthcare field and to support patient access to eHealth applications, whenever Member States decide to introduce them.

22 Accordingly, Articles 14 and 15 on 'eHealth' and 'Cooperation on health technology assessment' (only) contain rules on a voluntary network.

23 2.5. Under Article 2(n), the Patient Mobility Directive is to apply 'without prejudice' to Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (Professional Qualifications Directive).

24 3. Article 5 of the Professional Qualifications Directive (Directive 2005/36/EC) lays down the '*principle of the free provision of services*' and states:

(1) Without prejudice to specific provisions of Community law, as well as to Articles 6 and 7 of this Directive, Member States shall not restrict, for any reason relating to professional qualifications, the free provision of services in another Member State,

(a) if the service provider is legally established in a Member State for the purpose of pursuing the same profession there …, and

(b) […].

(2) The provisions of this title shall only apply where the service provider moves to the territory of the host Member State to pursue, on a temporary and occasional basis, the profession referred to in paragraph 1.

The temporary and occasional nature of the provision of services shall be assessed case by case, in particular in relation to its duration, its frequency, its regularity and its continuity.

(3) Where a service provider moves, he shall be subject to professional rules of a professional, statutory or administrative nature which are directly linked to professional qualifications, such as the definition of the profession, the use of titles and serious professional malpractice which is directly and specifically linked to consumer protection and safety, as well as disciplinary

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provisions which are applicable in the host Member State to professionals who pursue the same profession in that Member State.

25 Under Article 7, Member States may impose declaration and evidence requirements where a service provider moves from one Member State to another to provide services.

26 Recital 4 further states that:

In the case of information society services provided at a distance, the provisions 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, should also apply.

27 4. It seems reasonable also to interpret the term 'telemedicine' by reference to 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 (E-Commerce Directive).

28 Under Article 2(a) of Directive 98/34/EC, in conjunction with Article 1(2) thereof, as amended by Directive 98/48/EC, an *Information Society service* is

any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. For the purposes of this definition: 'at a distance' means that the service is provided without the parties being simultaneously present.

29 Under Article 2(ii), the coordinated field does not cover requirements applicable to services not provided by electronic means.

30 Recital 18 states:

[…] activities which by their very nature cannot be carried out at a distance and by electronic means, such as […] or medical advice requiring the physical examination of a patient are not information society services.

E. National law

31 1. The Austrian law implementing the Patient Mobility Directive (Directive 2011/24/EU), the EU-Patientenmobilitätsgesetz (Law on EU patient mobility) (EU-PMG, BGBl. I, No 32/2014), and the government bill thereon (33 dB XXV GP) contain no regulations or statements on telemedical services, nor does the Zahnärztegesetz.

32 2. Under Paragraph 3(1) of the Zahnärztegesetz (ZÄG), the dental profession may only be practised in accordance with that federal law.

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33 Under Paragraph 4(2) of ZÄG, the dental profession includes any activity based on knowledge of dental science, including complementary and alternative medical treatments, which is carried out directly on humans or indirectly for humans.

34 Under Paragraph 4(3) of the ZÄG, the scope of activities reserved for members of the dental profession includes, inter alia, examination for the presence or absence of diseases and anomalies of the teeth, the treatment thereof, which also includes cosmetic and aesthetic dental procedures, in so far as that they require a dental examination and diagnosis, and the prescribing of remedies, therapeutic aids and dental diagnostic aids.

35 Under Paragraph 24(1) of the ZÄG, members of the dental profession must practise their profession personally and directly, at best in cooperation with other members of the dental profession or members of other healthcare professions, in particular in the form of surgery and equipment sharing associations (Paragraph 25) or group practices (Paragraph 26). Furthermore, they may make use of assistants in practising their profession if those assistants act in accordance with their precise instructions and under their constant supervision (Paragraph 24(2) of the ZÄG).

36 Under Paragraph 26(1)(2) of the ZÄG, a group practice may be operated in the legal form of a public limited company. However, it is a requirement, inter alia, that all shareholders are members of the dental profession who are authorised to practise independently (Paragraph 26(3)(1) of the ZÄG).

37 Paragraph 31 of the ZÄG lays down the 'freedom to provide services' and reads, in extract:

> *(1) Nationals of a State that is a party to the EEA Agreement or of the Swiss Confederation who lawfully practise the dental profession in one of the other States that are a party to the EEA Agreement or the Swiss Confederation may temporarily operate as dentists in Austria from their foreign place of establishment or employment by way of freedom to provide services without being registered as a dentist.*
>
> *(2) Before providing a dental service in Austria for the first time, which requires a temporary stay in federal territory, the service provider must notify the Austrian Dental Association in writing via the dental association of the federal state in which the service is to be provided, enclosing the following documents: […]*

38 According to previous case-law concerning competition law, that provision applies only to persons authorised to practise the profession, but not public limited companies, especially if their shareholder structure does not comply with Paragraph 26 of the ZÄG (see 4 Ob 158/20v).

39 3. An infringement of the requirement that dental treatment must only be provided personally by dentists laid down the ZÄG does not only trigger penalties under

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administrative law. Rather, according to the established case-law of the Austrian courts, anyone who, as a competitor, interferes with the statutory reserved area of another person's licence or a profession (such as doctors, dentists, lawyers, civil engineers) acts unfairly within the meaning of Paragraph 1 of the Bundesgesetz gegen den unlauteren Wettbewerb (UWG) if his, her or its conduct is capable of affecting competition to the detriment of law-abiding competitors to a more than negligible degree (RS0077985 [T14]).

40 In addition, it has already been established in case-law that a member of a liberal profession established abroad must comply with the professional and ethical rules applicable in Austria as soon as he or she also operates in Austria (RS0051613 [T2]).

41 According to case-law, not only the direct perpetrator but also joint perpetrators, aider or abetters – who can also be independent traders if they have undertaken to provide certain services for a client – can be subject to a prohibitory order, if they are aware of the circumstances of the offence which render their conduct unlawful. The voluntary ignorance of those circumstances is to be equated with knowledge of those circumstances (see RS0079765 [T28], RS0031329).

F. Grounds for the questions referred

42 1. First, it must be clarified whether the defendant participates at all in dental activities performed in Austria by foreign companies within the meaning of the claim.

43 1.1. On the basis of the facts deemed to be certified by the appeal court, it must be concluded that there is a uniform treatment contract and that the defendant is only acting, as part of her contractual relationship with the second intervening party, as its agent and therefore the second intervening party is the service provider vis-à-vis the patient in the legal sense.

44 1.2. From the point of view of the referring court, the first question therefore relates to where the dental services are 'provided' in legal terms, in particular whether the country-of-origin principle applies and the place of supply is therefore Germany, where the second intervening party lawfully operates a dental clinic.

45 1.3. Therefore, the initial question is (1) whether the scope of Article 3(d) of the Patient Mobility Directive (Directive 2011/24/EU), under which, in the case of telemedicine, healthcare is considered to be provided in the Member State where the healthcare provider is established, extends only to the reimbursement of costs within the meaning of Article 7 thereof, and whether it lays down a general country-of-origin principle for telemedical services, or whether that can be derived from the E-Commerce Directive.

46 2.1. In order to clarify the application of the Patient Mobility Directive to the present case, it is also necessary to answer the question (2) whether 'healthcare in the case of telemedicine' as provided for in Article 3(d) of the Patient Mobility

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Directive relates exclusively to individual medical services which are provided (across borders) with the support of information and communication technologies (ICT), or to an entire treatment contract, which can also include physical examinations in the patient's country of residence, and whether the ICT-supported services must predominate in order to for there to be 'healthcare in the case of telemedicine'. In the case of a connection between those two types of services (as in the present case), it is necessary to clarify whether a cross-border healthcare within the meaning of Article 3(d) and (e) of the Patient Mobility Directive can be found to exist.

47 2.2. The Court of Justice of the European Union has held, for example, that an intermediation service can be classified as an 'information society service', but that cannot be the case if it appears that that service forms an integral part of an overall service whose main component is a service coming under another legal classification (C-390/18, *Airbnb Ireland*, paragraph 50).

48 3.1. With regard to the question of the law applicable to 'telemedicine', the interaction between the Patient Mobility Directive and the Professional Qualifications Directive is also of decisive importance in the present case, in particular (with regard to 'telemedicine') the relationship between Articles 2(n), 3(d) and 4(a) of the Patient Mobility Directive, on the one hand, and Article 5(3) of the Professional Qualifications Directive, on the other, under which a service provider who 'moves' to another Member State is to be subject to professional rules of a professional, statutory or administrative nature in the host Member State, and also the relationship between the Directive on e-commerce – namely Article 2(a)(ii) and recital 18 thereof – and the Professional Qualifications Directive, in particular Article 5 and recital 4 thereof, and Articles 2(n), 3(d) and Article 4(a) of the Patient Mobility Directive.

49 3.2. In another context, the Court of Justice of the European Union has ruled that professional assistance in tax matters which is provided across borders without the persons active on behalf of the company concerned moving to the other Member State does not fall within Article 5 of the Professional Qualifications Directive (Directive 2005/36/EC) because it applies only where the service provider moves to the territory of the host Member State (C-342/14, *X-Steuerberatungsgesellschaft* v *FA*, paragraph 34 et seq.).

50 3.3. However, precisely in the case of healthcare services, it could be argued for the protection of patients that the professional rules of the patient's country of residence must be complied with also in the case of pure (cross-border) correspondence services and irrespective of the country-of-origin principle.

51 4.1. If it is concluded that the dental services rendered by the defendant are 'provided' not only in fact but also in law in Austria, it will subsequently have to be assessed whether the defendant, by not operating on the basis of her own treatment contract but only as an agent of the second intervening party, is involved in an infringement of the principle of fairness in the sense of a breach of law by

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infringing the requirement that dental treatment must only be provided personally by dentists.

52 4.2. Although the second intervening party has a licence as a private clinic in Germany, it does not have an operating licence under hospital law or authorisation under the ZÄG in Austria. Its shareholder structure also contradicts the requirements laid down in the ZÄG.

53 4.3. In that respect, the question arises as to whether the provisions of the Zahnärztegesetz, which in Paragraphs 24 et seq. primarily provides for the direct and personal exercise of the profession and the free movement of services only ‘temporarily’ for ‘nationals of a State that is a party to the EEA Agreement’ (natural persons according to case-law) under Paragraph 31 thereof, can be rendered compatible with the freedom to provide services under Article 56 et seq. TFEU, in particular in situations such as the present, where a foreign dentist provides – in principle permanently – services in part supported by ICT from abroad (in the sense of a cross-border correspondence service) and in part in Austria by using an Austrian dentist authorised to practise the profession as an agent pursuant to a uniform treatment contract.

54 4.4. With regard to the second intervening party, it is also questionable whether an (analogous) application of the provisions on group practices in Paragraph 26 of the ZÄG, under which only dentists may be shareholders, also infringes the freedom to provide services.

55 This is doubtful in view of the case-law of the Court of Justice of the European Union (C-158/96, paragraph 51), according to which Member States are permitted to restrict the freedom to provide medical and hospital services in so far as the maintenance of a treatment facility or medical service on national territory is essential for public health and even the survival of the population (see also C-385/99), especially since it is not necessarily the case that natural persons can guarantee a higher level than legal persons.

II.:

56 … [Information on national proceedings]

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