OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 18 March 2004 [1]

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1 — Original language: German.

I — Introduction

1. In this case, the Court of Justice has to clarify the extent to which national courts are entitled to rely on values espoused by their national constitutional law in bringing in measures that help to safeguard public policy in the Member State concerned but at the same time adversely affect fundamental freedoms.

2. The present proceedings relate to an order made by a national public order authority prohibiting simulated killing action in the course of a game. The ground invoked in that ban was the jeopardising of public order, with human dignity being one of the principles thereby safeguarded.

3. On the assumption that there are different thresholds of protection under fundamental law within the Member States, the question at issue is whether and in what manner those differences should affect the admissibility of such a national measure under Community law whilst having proper regard for the Community's commitment to fundamental rights.

II — Legal background

A — *Community law*

4. Under Article 6(1) EU, the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States. The second paragraph provides that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

5. Under Article 30 EC, restrictions on freedom of movement of goods are permitted in so far as they are justified, inter alia, on grounds of public policy.

6. In the context of freedom to provide services, it should be noted that where national provisions are uniformly applicable it is established case-law of the Court of Justice, in principle, to justify restrictions on so-called public interest grounds — that is to say, on grounds that are not expressly stipulated in primary legislation.

B — *National law*

7. Paragraph 14(1) of the Ordnungsbehördengesetz für das Land Nordrhein-Westfalen (Law governing the North Rhine-Westphalia police authorities, 'OBG NW') provides: 'The police authorities may take measures necessary to avert a risk to public order or safety in an individual case.'

III — Facts and proceedings

8. Omega Spielhallen- und Automatenaufstellungs-GmbH ('Omega') is a German company which operated a facility in Bonn under the name 'Laserdrome'. That facility is normally used to run a leisure occupation known as 'Lasersport', inspired by the film *Star Wars* and using modern laser technology.

9. The Court files show that the equipment used by Omega in its laserdrome was originally developed from the children's toy 'Laser Hit' that was available on the market and from shops in Bonn. Because that equipment proved technically unsatisfactory, Omega began, on an unspecified date after 2 December 1994, to use equipment that was supplied by the firm of Pulsar International Limited in Great Britain (now Pulsar Advanced Games System Ltd; 'Pulsar'). However, no franchise agreement was concluded with Pulsar until 29 May 1997.

10. Planning permission to expand the premises was granted on 7 September 1993. Even before the laserdrome came into operation, however, protests were directed at the project by members of the public. In a letter of 22 February 1994, the Oberbürgermeisterin (Mayor) of the City of Bonn (the 'police authority') asked Omega for a detailed description of the premises and threatened to serve a public order notice in the event of 'playing at killing' people taking place there. On 18 March 1994 Omega said that the idea was to hit fixed objects installed within the shooting ranges. The laserdrome was opened on 1 August 1994.

11. According to the public order authority's findings, an elaborate labyrinth had been set up using partitions in which, in addition to the 10 fixed sensory tags installed on the premises, people were also shot at. The equipment provided for the players consisted of sub-machine-gun-type laser targeting devices and fabric jackets to which one sensory tag was affixed in the chest area and one at the back. In order to portray the 'shots' optically, a laser beam was simultaneously projected with an infrared beam. Hits were indicated by an acoustic and optical signal. The aim of the contest was to obtain as many points as possible within a playing time of 15 minutes. Players were awarded points for each hit on a fixed sensory tag. Players who were hit had points deducted. Players who received five hits had to get their targeting devices recharged at a recharging point.

12. On 14 September 1994 the regulatory authority served a notice on Omega prohibiting it from 'facilitating or allowing the pursuit of games on its ... business premises the object of which is the deliberate shooting of people using laser beams or other technical devices (such as infrared, for example), that is to say, so-called "playing at killing" people based on recording hits'. The reason given for the notice was inter alia that public order was endangered because the simulated killing action and the associated portrayal of violence as inoffensive offended common fundamental values. The fine imposed for each infringement was DEM 10 000 per game played.

13. Omega's objection against that notice was dismissed by the Cologne district

authority on 6 November 1995. The Verwaltungsgericht Köln (Cologne Administrative Court) dismissed the subsequent court action in a judgment of 3 September 1998. The appeal lodged by Omega, for which leave had been granted in view of the fundamental importance of the issue, was dismissed by the Oberverwaltungsgericht (Higher Administrative Court) for the *Land* of North Rhine-Westphalia on 27 September 2000. Omega then appealed to the Bundesverwaltungsgericht (Federal Administrative Court) on a point of law.

14. Omega has raised numerous procedural objections in support of its appeal. It is claiming on the merits of the case that the ban violates its fundamental rights, particularly its right to set up and run a business operation and its right to free choice of profession. It is claiming that the principle of equality before the law has been infringed by the fact that it has been put at a disadvantage compared to other laserdrome operators in Germany as well as operators of other games such as 'Paintball' or 'Gotcha'. It is also claiming that the notice is too uncertain and not based on valid authority because the concept of public order contained in Paragraph 14 OBG NW is too imprecise. It says that the public order notice is also in violation of European Community law and conflicts, in particular, with freedom to provide services under Article 49 EC as the equipment and technology to be used in the laserdrome was supplied by the British firm Pulsar.

15. Omega is applying for the judgments of the lower courts and the administrative authority's notice served on it to be set aside and, in the alternative, for the matter to be referred to the Court of Justice of the European Communities for a preliminary ruling. The defendant public order authority contends that the appeal should be dismissed.

16. In the opinion of the national court Omega's appeal would have to be dismissed if national law were to apply. However, it questions whether that outcome is reconcilable with Community law, particularly Articles 49 EC to 55 EC on freedom to provide services and Articles 28 EC to 30 EC on the free movement of goods.

17. The national court states that the Oberverwaltungsgericht applied federal German law, and particularly the principles of the German Constitution, in construing the general powers under *Land* (German individual state) law afforded by Paragraph 14(1) OBG NW. The Oberverwaltungsgericht rightly concluded that the commercial staging of 'playing at killing' within Omega's laserdrome was a violation of the principle of human dignity enshrined in the first sentence of Article 1(1) of the German Grundgesetz (Basic (Constitutional) Law).

18. It observes that human dignity is a constitutional principle that can be violated by degrading treatment of an opponent — which was not the case here — or by inspiring or fostering an attitude in players that denies the fundamental right of every human being to regard and respect, such as in this case the portrayal of fictitious acts of violence for entertainment purposes. A cardinal principle of the Constitution such as human dignity cannot be waived in the context of a game. The fundamental rights invoked by Omega could not alter that conclusion in the field of national law.

19. As far as the application of Community law is concerned, the notice in question particularly impinges on the freedom to provide services under Article 49 EC. In the opinion of the national court, the compatibility of the contested public order notice with Community law essentially depends upon whether, and to what extent, that restriction can be justified on public policy grounds.

20. The core issue that appears to the national court to be unclear is whether the power of Member States to restrict fundamental freedoms arising from the Treaty due to overriding reasons relating to the public interest — in this case, freedom to provide services and freedom of movement of goods — is subject to that restriction being based on general legal opinion in all the Member States. The national court considers that the possibility of such an essential requirement can be construed from the observations of the Court in Case C-275/92 *Schindler* and from certain arguments posited by German academic writers. If this point of view were correct, the claim would have to be allowed here as the operation of a laserdrome is at least lawful in Great Britain. If it were not correct, the court concludes, the claimant's action would have to be dismissed in accordance with the findings of the lower courts and no further considerations of the proportionality and reasonableness of the measure, in particular, would be necessary due to the fundamental importance of the violation of the right to human dignity.

21. In the light of the foregoing, the national court has stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Is it compatible with the provisions on freedom to provide services and the free movement of goods contained in the Treaty establishing the European Community for a particular commercial activity — in this case the operation of a so-called "laserdrome" involving simulated killing action — to be prohibited under national law because it offends against the values enshrined in the [German] Basic (Constitutional) Law?'

IV — Question referred for a preliminary ruling

A — *Admissibility*

1. Arguments of the public order authority

22. The *police authority* considers the question referred for a preliminary ruling to be inadmissible because it has no cross-border implications. It essentially argues that there had been no business contact with Pulsar until after the contested public order notice was pronounced on 28 September 1994 so that there had been no cross-border implications until that date. Even after such contact had been made, the existence of such implications was doubtful since the public order notice banned neither the installation nor the use of the equipment supplied and looked after by Pulsar, but just a variation of the game. Although a franchise agreement was concluded between Omega and Pulsar in relation to the banned variation of the game, that was not done until 29 May 1997 and hence some considerable time after the contested public order notice was issued.

23. The *German Government* essentially endorsed that argument in the oral procedure.

2. Assessment

24. The reservations expressed by the public order authority with regard to the admissibility of the question referred for a preliminary ruling are unconvincing. The Court has consistently held that 'it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court'. [2]

25. From this the Court derives the principle that where 'the questions submitted by the national courts concern the interpretation of a provision of Community law, the Court is, in principle, obliged to give a ruling'. [3] Consequently 'a request from a national court may be rejected only if it is quite obvious that the interpretation of Commu-

2 — Case C-134/94 *Esso Española* [1995] ECR I-4223, paragraph 9. See also Case 180/83 *Moser* [1984] ECR 2539, paragraph 6; Case 247/86 *Alsatel* [1988] ECR 5987, paragraph 8; Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 10; Case C-30/93 *AC-ATEL Electronics* [1994] ECR I-2305, paragraph 19; and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59. See also Case C-7/97 *Bronner* [1998] ECR I-7791, paragraph 16, and Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 25.

3 — See, amongst other authorities, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraphs 34 and 35; Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraphs 19 and 20; and *Bronner* (cited in footnote 2), paragraph 16.

nity law or review of the validity of a rule of Community law sought by that court bears no relation to the actual facts of the case or to the subject-matter of the main action'. [4]

26. The Court has ruled in this connection that 'it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver'. [5]

27. Therefore, with regard to the argument put forward by the public order authority, it cannot be for the Court of Justice to ascertain the content of the contracts between Omega and Pulsar or to compare the date on which those contractual relations arose with the date of the public order notice. It should also be noted that the threat of a fine is generally accompanied by a period of time for it to take effect, so that, even if contractual relations did not arise until after the issuing of the public order notice, Community law implications cannot be excluded.

4 — Case C-446/93 *SEIM* [1996] ECR I-73, paragraph 28, and *Bronner* (cited in footnote 2), paragraph 17.

5 — Case 17/81 *Pabst & Richarz* [1982] ECR 1331, paragraph 12; *AC-ATEL Electronics* (cited in footnote 2), paragraph 17; Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 26; and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 32.

28. It is therefore necessary to examine the substance of the question referred for a preliminary ruling.

B — *Assessment*

1. The fundamental freedom concerned

(a) Arguments of the parties

29. Both the *public order authority* and the *Commission* take the view that freedom of movement of goods and freedom to provide services are affected by the national measure at issue in different ways, if at all.

30. In line with their arguments on admissibility, the *public order authority* — and the *Federal German Government* in the oral procedure — question whether freedom of movement of goods and freedom to provide services have been affected at all and argue in this connection that, even if it were to be assumed that such fundamental freedoms were affected, that effect on the two fundamental freedoms should in any event be assessed differently in each case. With regard to freedom of movement of goods, the public

order notice at issue prohibits the importation of goods only in so far as it bans their use within the 'laserdrome'. It could be maintained in this case, as in the judgment in *Schindler*,[6] that the 'importation and distribution of objects are not ends in themselves' but are only intended to facilitate participation in the game, so that the restriction resulting from the contested public order notice should primarily be examined, if at all, in the context of freedom to provide services.

31. The *Commission* also takes the view that the services rendered under the franchise agreement are of prime importance to the main proceedings as the importation of goods from Great Britain ultimately only facilitates the ability of that leisure business to operate.

(b) Assessment

32. In the light of settled case-law of the Court of Justice, according to which examination on the basis of one fundamental freedom can be omitted if the restrictive effect on that fundamental freedom is the unavoidable consequence of the legal position with regard to another fundamental freedom of prime importance,[7] there is no need for a separate review of Article 28 et seq. EC in the present case. The Commission and the public order authority rightly point out that the contested public order notice restricts the importation of goods only in so far as they facilitate participation in the game in question, so that the free movement of goods is of only secondary importance in this case.

33. It is easy to see that the freedom to provide services has been restricted in this case. As a result of the public order notice at issue, there is a ban on the variant of the game that forms an essential part of the contractual arrangements between Omega, the operator of the game situated in Germany, and Pulsar, the intellectual property owner located in Great Britain. The public order authority rightly states in this connection that the contested public order notice does not prohibit laserdromes in principle; the adverse effect on Pulsar's freedom to provide services arises from the fact that it can offer its services in the Federal Republic of Germany only under harsher conditions — that is to say, by forgoing certain material parts thereof — which in turn adversely affects the right of the customer to use the services of a foreign provider.

34. Nevertheless, in the opinion of the public order authority, there is no violation of the principle of freedom to provide

6 — Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22.

7 — In addition to the *Schindler* judgment (cited in footnote 6), the Commission refers in this connection to the judgment in Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, paragraph 21.

services. The case-law established in *Keck and Mithouard* [8] could be applied mutatis mutandis to the present case inasmuch as the prohibition does not extend to the operation of a laserdrome per se or to the use of Pulsar's services as a whole, but just to one type of use in the form of a variant of the game. It must therefore be assumed, it argues, that the measure in question constitutes a rule on the provision of a service that falls outside the scope of Article 49 EC.

35. It must be noted in this context that the Court of Justice has already had occasion to deal with a similar argument in its judgment in *Alpine Investments.* [9] The Court of Justice found in that case that a provision on selling arrangements in the Member State in which the provider of services is established directly affects access to the market in services since it affects not only offers of services in that Member State but also those made in other States whereas the reason for excluding selling arrangements from the scope of application of Article 28 EC was that the application of such provisions on selling arrangements is not such as to prevent access by those products to the market of the Member State of importation or to impede such access more than it impedes access by domestic products.

36. However, the public order authority asks it to be borne in mind in this connection that in its *Alpine Investments* judgment the Court of Justice was dealing with a rule in a Member State in which the provider of services was established whereas the main proceedings here are concerned with a rule in a Member State in which the recipient of services is established, so that the Court's argument is not applicable. Although this objection is correct in itself, it does not take account of the fact that transposition of the distinction made in the *Keck and Mithouard* case to freedom to provide services is unpersuasive because, where there are sufficient international implications, a rule on arrangements for the provision of any service — irrespective of location — must constitute a restriction of relevance to Community law simply because of the incorporeal nature of services, without any distinction at all being permissible in this respect between rules relating to arrangements for the provision of services and rules that relate directly to the services themselves.

37. Nor does the analogous application of the *Keck* case-law to rules in the State in which the recipient of services is established constitute a persuasive argument in view of the country of origin principle inherent in Article 49 EC. This also explains why the Court of Justice has consistently assumed in its case-law — without drawing any such distinction as in the *Keck and Mithouard*

8 — Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097.

9 — Case C-384/93 [1995] ECR I-1141, paragraph 36 et seq. Compare the judgment in Case C-6/98 *ARD* [1999] ECR I-7599, in which the Court of Justice categorises a restriction on advertising as a selling arrangement within the meaning of the *Keck and Mithouard* case-law on Article 30 EC and as a restriction for the purposes of Article 49 EC.

case — that Article 49 EC also encompasses such rules. [10] As the Court has consistently held 'observance of the principle laid down in Article 49 EC requires not only the elimination of all discrimination on grounds of nationality but also the abolition of *any* restriction liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services' [11] (emphasis added).

38. It must therefore be held that the public order notice in question does result in a restriction on the freedom to provide services guaranteed by Article 49 EC.

2. Justification for the restriction

a) Arguments of the parties

39. The *public order authority*, the *Commission* and the *Federal German Government* all consider that there is possible justification for this particular restriction on freedom to provide services caused by the public order notice contested in the main proceedings. Reference is made in this context to the grounds contained in Article 46 EC in conjunction with Article 55 EC as well as to the overriding reasons relating to the public interest recognised by the Court of Justice.

40. *Omega* contends, as it has already done in the proceedings before the national courts, that the national measure in question is dubious on two counts. Firstly, it is without any sufficiently concrete and precise basis in national law, which constitutes a breach of the principle of protection of legitimate expectations protected under Community law; secondly, the restriction on Community fundamental freedoms resulting from the disputed public order notice cannot be justified on grounds of public policy, health or safety. Omega argues that the simulation of killing and violence in films as well as in the visual arts and in contact sports and children's games is widespread and accepted in society; 'Lasersport' is no different from those activities. Omega also argues that 'Lasersport' does not involve simulated killing in any event.

10 — Case C-58/98 *Corsten* [2000] ECR I-7919. See too the observations by Advocate General Cosmas in his Opinion of 30 November 1999 (footnote 22). See also most recently on the same problem Case C-215/01 *Schnitzer* [2003] ECR I-14847.

11 — Case C-478/01 *Commission* v *Luxembourg* [2003] ECR I-2351, paragraph 19. See too Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 14; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 10; *Corsten* (cited in footnote 10), paragraph 33; Case C-294/00 *Deutsche Paracelsus Schulen* [2002] ECR I-6515, paragraph 38; and Case C-131/01 *Commission* v *Italy* [2003] ECR I-1659, paragraph 26.

(b) Assessment

(i) Introductory remarks

41. In its question referred for a preliminary ruling, the national court is essentially asking whether the power of Member States to restrict fundamental freedoms guaranteed by the EC Treaty for overriding reasons relating to the public interest — particularly, in this case, for reasons relating to the protection of public order and safety — is dependent on such a restriction being based on a general legal opinion held in all the Member States.

42. The national court states in this context that the assumption of a threat to public order in the main proceedings was derived from the principle of protection for human dignity enshrined in its national Constitution. This means that the public order notice in question is ultimately based on protection under (national) fundamental law. However, if one considers that protection under fundamental law at Community-law level derives from the recognition of general legal tenets which result — in particular — from the constitutional traditions common to the Member States, [12] it must be concluded with regard to the question referred for a preliminary ruling that an assumption that the general legal opinion of all of the Member States is essential to the particular evaluation of fundamental law in this case implies that — at Community-law level — there is a direct conflict between fundamental freedoms, such as (in this case) freedom to provide services, and the fundamental laws acknowledged by Community law. The existence of such a conflict raises important issues in relation to the whole system of fundamental freedoms.

43. In the light of these considerations, it would therefore seem appropriate for reflections on the relationship between Community fundamental freedoms [13] and protection under fundamental law within the Community to precede an answer to the question referred for a preliminary ruling.

44. I should also start by saying that the Court of Justice is increasingly being confronted with cases that raise the issue of a conflict between fundamental freedoms and the fundamental laws acknowledged by Community law. [14] The present case can be compared in that respect with *Schmidberger*. [15] In that case also, the Member State was implying the need to protect fundamental constitutional rights in order to justify a restriction on one of the fundamental freedoms in the Treaty. On the basis that the Community was also obliged to protect fundamental rights and that the fundamental rights involved also demanded

12 — See Article 6 EU.

13 — We are only concerned here with fundamental freedoms under the Treaty; these are not to be confused with those under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

14 — See also in this context the Opinion of Advocate General Jacobs in Case C-112/00 *Schmidberger* [2003] ECR I-5659, point 89.

15 — Cited in footnote 14.

recognition under Community law, the Court of Justice in that case considered 'the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty'. [16]

45. An investigation of the relationship between fundamental freedoms and Community protection of fundamental rights in connection with the present case requires, first of all, a general review of Community protection of fundamental rights (ii) and the safeguarding of human dignity in particular (iii). Only then should consideration be given to the question of whether any direct conflict between freedom to provide services and the safeguarding of human dignity is to be assumed in the present case or whether the safeguarding of human dignity is to be considered in the context of justification for the established restriction on freedom to provide services (iv).

(ii) Protection of fundamental rights under Community law

46. The Community's commitment to fundamental rights undoubtedly forms one of the cornerstones of the Community legal order. According to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in this respect. [17]

47. The principles established by that case-law were reaffirmed in the preamble to the Single European Act and subsequently in Article F.2 of the Treaty on European Union (now Article 6(2) EU). [18]

— The status of fundamental rights as general principles of Community law

48. Clarification would appear to be required with regard to the order of pre-

16 — Loc. cit., paragraph 77.

17 — See, in particular, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37; and Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25.

18 — Under Article 6(2) EU '[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

cedence that is to be afforded to fundamental rights as general principles of Community law. It is particularly questionable whether there is in fact any order of rank between the fundamental rights applicable as general legal principles and the fundamental freedoms enshrined in the Treaty.

49. It is significant in this context that the Court of Justice should defend fundamental rights as general legal principles of the Community on the basis of Article 220 EC and Article 6(2) EU. They are to be considered part of its primary legislation and therefore rank in hierarchy at the same level as other primary legislation, particularly fundamental freedoms. [19]

50. It would nevertheless be appropriate to discuss in general the question of whether, in view of the fundamental rights safeguarded in general by fundamental law and human rights, in the light of the Community's conception of itself as a community founded on the observance of such rights and, above all, having regard to the need in today's world to have recourse to commitment to the protection of human rights as a prerequisite for the legitimacy of all State orders, fundamental and human rights could in general be afforded a certain precedence over 'general' primary legislation. However, fundamental freedoms themselves can also perfectly well be materially categorised as fundamental rights — at least in certain respects: in so far as they lay down prohibitions on discrimination, for example, they are to be considered a specific means of expression of the general principle of equality before the law. [20] In this respect, a conflict between fundamental freedoms enshrined in the Treaty and fundamental and human rights can also, at least in many cases, represent a conflict between fundamental rights.

51. In practice, however, the conflict is hardly ever as serious as this, since fundamental freedoms and (most) fundamental rights both allow of certain restrictions.

52. In the *Schmidberger* case, the national court had raised the question of whether the principle of free movement of goods enshrined in the EC Treaty prevailed over certain national guarantees of fundamental rights. [21] In its examination of 'the need to reconcile the requirements of the protection

19 — This is also apparently assumed in the *Schmidberger* case (cited in footnote 14), paragraph 77 of which refers to the 'need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty'. If any order of rank were to exist between Community protection of fundamental rights and fundamental freedoms, there would be no need to 'reconcile' those requirements.

20 — Fundamental freedoms preclude, in particular, any discrimination based on nationality. See in this respect Schwarze, *EU-Kommentar*, First edition 2000, Article 12 of the EC Treaty, paragraph 9.

21 — Judgment cited in footnote 14 (paragraph 70).

of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty', [22] the Court of Justice compared the reasons given as justification in Article 36 EC or recognised as overriding requirements relating to the public interest, where it is permissible for the free movement of goods to be subject to restrictions, with the justified restrictions to which freedom of expression and freedom of assembly may be subject according to Articles 10(2) and 11(2) of the ECHR. [23] No further reasoning was given as to how far a restriction on the scope of protection of a national fundamental right entails a restriction on the scope of protection of the corresponding Community guarantee.

53. Even though the Court of Justice interprets the aforementioned restrictions on fundamental rights, in substance, in a particular manner tailored to the needs of the Community, [24] it appears to me to be significant that in cases such as this the necessary weighing-up of the interests involved ultimately takes place in the context of the actual circumstances in which the particular fundamental rights are restricted. The need 'to reconcile' the requirements of the protection of fundamental rights cannot therefore mean weighing up fundamental freedoms against fundamental rights per se, which would imply that the protection of fundamental rights is negotiable. It is also necessary to examine the extent to which the fundamental rights concerned admit of restrictions. The provisions on the fundamental freedom concerned, and particularly the circumstances in which exceptions are permissible, must then be construed as far as possible in such a way as to preclude measures that exceed allowable impingement on the fundamental rights concerned and hence to preclude those measures that are not reconcilable with fundamental rights.

— The role of fundamental rights within the Community legal order

54. It follows from the protection of fundamental rights guaranteed by the Community legal order, firstly, that respect for fundamental rights is a condition of the legality of Community acts [25] and, secondly, that when implementing Community rules — in the widest sense — Member States must observe the requirements flowing from the protection of fundamental rights in the Community legal order. [26]

55. Therefore, inasmuch as the Community as a unity of interests considers itself to be a Community founded on respect for funda-

22 — Loc. cit., paragraph 77.

23 — Loc. cit., paragraphs 78 and 79.

24 — Loc. cit., paragraph 80.

25 — See, inter alia, Opinion 2/94 [1996] ECR I-1759, paragraph 34; Case C-249/96 *Grant* [1998] ECR I-621, paragraph 45; and Case C-25/02 *Rinke* [2003] ECR I-8349, paragraph 26.

26 — Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16; Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 37; Case C-442/00 *Caballero* [2002] ECR I-11915, paragraph 30; and *ERT* (cited in footnote 17), paragraph 41 et seq.

mental and human rights, [27] it cannot accept measures by Community institutions or Member States 'which are incompatible with observance of the human rights thus recognised'. [28] Article 51(1) of the Charter of Fundamental Rights of the European Union reflects that observation. [29]

56. From the point of view of legal method, the requirement in the European Communities and the European Union that fundamental rights be respected has been fulfilled in the case-law of the Court of Justice in a variety of ways.

57. The most important principle is that interpretation should be in conformity with fundamental rights, which can also be understood to mean a form of interpretation in conformity with primary legislation [30] or interpretation in accordance with constitutional principles. As far as possible, therefore, provisions of Community law are to be interpreted in such a way as to be reconcilable with relevant fundamental rights.

58. In its *Johnston* judgment, for example, the Court of Justice found that the requirement of judicial control stipulated in Article 6 of Directive 76/207/EEC 'reflect[ed]' the general principle of a right to an effective remedy enshrined in the constitutional traditions common to the Member States and in Articles 6 and 13 of the ECHR so that it then interpreted the provision of the directive 'in the light of' that general principle. [31] Hence, Article 11 of Directive 89/552/EEC, which regulates the frequency of advertising breaks, must also be interpreted in the light of Article 10(1) of the ECHR to which the eighth recital in the preamble to that directive makes express reference. [32] According to case-law, the provisions of the Treaty and of regulations and directives on the freedom of movement of employed and self-employed workers, for example, including Regulation (EEC) No 1612/68, must also be interpreted in the light of the right to respect for family life laid down in Article 8 of the ECHR. [33]

27 — See Article 6(1) EU.

28 — *Schmidberger* (cited in footnote 14), paragraph 73; Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14; and *ERT* (cited in footnote 17), paragraph 41.

29 — 'The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.' The comments on this article show that the scope of application of the protection of fundamental rights under Community law is established in accordance with the aforementioned case-law of the Court of Justice.

30 — In so far as fundamental rights form part of primary legislation; see above, point 49.

31 — Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18 et seq. See also Case 36/75 *Rutili* [1975] ECR 1219, paragraph 32.

32 — Case C-245/01 *RTL Television* [2003] ECR I-12489, paragraph 41.

33 — See, amongst other authorities, Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 38, and Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 72.

59. The starting point for the Court's analysis in this respect will often be an inherent connection of the Community legislation to be interpreted with a particular fundamental right, but the connection can also arise from the general context of the facts in the case. [34]

60. A more far-reaching expression of that interpretative function in the context of the interpretation of Community law can be found in the *ERT* [35] judgment, according to which the Member States are also governed by the requirements of Community protection of fundamental rights where, as in the present case, they rely on exceptions to fundamental freedoms. According to that judgment, where a Member State relies on an overriding requirement relating to the public interest or on grounds for justification that are stipulated in the Treaty in order to justify a national rule which is likely to obstruct the exercise of a fundamental freedom arising from the Treaty, such justification 'must be interpreted in the light of the general principles of law and in particular of fundamental rights'. [36]

61. In general, however, fundamental and human rights in the context of the protection of fundamental laws within the Community figure not merely as interpretative criteria, but also in much more immediate fashion as a direct yardstick by which to gauge the legality of Community acts [37] or as an enforceable claim to a particular legal remedy in Community law. [38] [39]

62. From the methodology point of view, it should be noted that a provision of (secondary) Community legislation will only be contrary to fundamental law — and therefore unlawful — if it is not possible for that provision to be interpreted in a manner that conforms with fundamental law. If it is therefore claimed that a provision of Community law conflicts with a fundamental right afforded protection under Community law, the Court of Justice will first of all examine whether that provision can be interpreted in conformity with that fundamental right. If that should not be possible, the provision must be annulled. However, if it should be found that the provision, when thus interpreted, does not as such infringe

34 — See, for example, on the compatibility of a rule or measures to combat epidemics amongst fish stocks with the fundamental right to property, Joined Cases C-20/00 and C-64/00 *Booker Aquacultur and Hydro Seafood* [2003] ECR I-7411, paragraph 64 et seq.

35 — Cited in footnote 17.

36 — Loc. cit. (cited in footnote 17), paragraph 42 et seq. See also Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 24.

37 — See, for example, Case C-404/92 P *X* v *Commission* [1994] ECR I-4737, paragraph 8 et seq., relating to the right to respect for private life under Article 8 of the ECHR in connection with consideration of the results of an AIDS test as part of a pre-recruitment procedure even though the party concerned had, according to his own statement, not given his consent to the test being carried out. The Court of Justice annulled the Commission's decision — and the judgment of the Court of First Instance which had upheld that decision — on account of a violation of Article 8 of the ECHR.

38 — Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417: in that case, the Court of Justice allowed the plea of infringement of the right to legal process within a reasonable period provided for in Article 6(1) of the ECHR as a ground of appeal relating to the proceedings before the Court of First Instance and granted a reduction in the fine as a specific legal consequence of the infringement of that right.

39 — See J.H.H. Weiler/Nicolas J.S. Lockhart, 'Taking Rights Seriously: The European Court and its Fundamental Rights Jurisprudence — Part II', CML Rev. 32/1995, 579 (589).

the fundamental rights safeguarded by the Community legal order, it will be valid and it will then be for the authorities and courts at national level, where appropriate, to ensure that this rule is applied in accordance with the principle of the protection of fundamental rights. [40]

63. It should be noted with regard to that national level of — Community — protection of fundamental rights that even national provisions or measures implementing Community law have to be evaluated in the light of Community fundamental rights. The Court of Justice has consistently held in this context that such provisions and measures are to be interpreted by the national courts as far as possible in accordance with that Community rule, interpreted in conformity with fundamental rights. [41] Otherwise, because of the priority accorded to the application of Community law, the national courts will be obliged to annul those national provisions or measures or ensure that they are not applied.

64. Where a Community provision affords the Member States a degree of discretion or a choice between various modes of implementation, they must exercise their discretion with respect for Community fundamental rights so that the national rule in question is therefore applied in a manner reconcilable with Community protection of fundamental rights. Fundamental rights are also binding on the authorities and courts in the Member States in the context of the so-called 'procedural autonomy' of Member States or constitute standards which restrain them. [42]

65. Admittedly, in all those cases — whether the Member State was relying on a particular provision in a directive or invoking circumstances by way of justification in the context of a fundamental freedom — the substance of the Community provision to be implemented is often not so much given actual concrete form or substantive effect as supplemented by other elements. Fundamental rights form such additional elements. However, they are inherent in the Community provisions concerned.

66. It should finally be noted that there is a close connection between the function of fundamental rights as a criterion of interpretation and their function as a direct yardstick by which to gauge the legality of a

40 — *Rinke* (cited in footnote 25), paragraphs 28 and 42, and Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 90.

41 — See Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 93.

42 — Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 60 and paragraph 96 et seq.

Community provision [43] or a national measure of implementation.

— Conclusions with regard to the relationship between national protection of fundamental rights and Community protection of fundamental rights

67. It is now necessary to examine, on the basis of the principles outlined above, what significance is to be attached under Community law to a national evaluation of fundamental rights in the context of the resolution of this case.

68. It should first of all be generally stated in this connection that, from its very earliest case-law, the Court of Justice has refused to allow objections to the validity of Community law to stand where they are based on systems of constitutional law applicable within the Member States. [44]

69. The reasons that are still persuasive today in terms of principle were laid down by the Court of Justice in its policy-making judgment in *Internationale Handelsgesellschaft* as follows: 'Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that State or the principles of a national constitutional structure.' [45]

70. The refusal to gauge Community law according to individual State precepts of fundamental law must immediately be put into perspective, however, inasmuch as, firstly, the fundamental and human rights accepted as general legal tenets of Community law are drawn, in turn, with regard to substance — as established in the settled

43 — *Connolly* v *Commission* (cited in footnote 17), paragraphs 37 to 64, which concerned the question inter alia of whether Mr Connolly's right to freedom of expression had been infringed by the application of Article 17(2) of the Staff Regulations in a decision by the Commission, in which the Court of Justice first of all discussed the substance of the fundamental right to freedom of expression as laid down in Article 10 of the ECHR and then examined whether the contested decision was reconcilable with Article 17(2) of the Staff Regulations when interpreted and applied in the light of that fundamental right.

44 — See, inter alia, Case 1/58 *Stork* v *High Authority* OJ, English Special Edition, 1959, p. 17, and Case 40/64 *Sgarlata and Others* v *Commission* OJ, English Special Edition, 1965, p. 215.

45 — Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3. These reflections were the stimulus for development of the autonomous protection of fundamental rights under Community law; alternatively, formulation of the Community's own reasonable principle of protection of fundamental rights formed the real basis of acceptance of the unqualified primacy of Community law apparent, for example, in the two '*Solange*' judgments of the German Bundesverfassungsgericht (Federal Constitutional Court).

case-law outlined above — from sources such as the constitutional traditions common to the Member States and from the ECHR in particular; secondly, the Treaty makes provision for reasons to justify restrictions on the fundamental freedoms guaranteed by it so that considerations stemming from the national systems of fundamental law are also ultimately incorporated, as is also clear from this case.

71. All this means, with regard to the question referred here for a preliminary ruling, that an established restriction on freedom to provide services cannot immediately be justified by the protection of specific fundamental rights guaranteed by the Constitution of a Member State. It is also necessary to examine the extent to which the restriction can be justified on grounds acknowledged in Community law, such as the safeguarding of public policy. A common conception among the Member States on the matter of protecting public order is not a precondition for such a justification.

72. However, if such an examination should show that the restrictive national measure concerned is based on an evaluation of national protection of fundamental rights that reflects general legal opinion in the Member States, a corresponding requirement of protection could (also) be inferred from Community protection of fundamental rights — which would mean, methodologically speaking, that it would no longer be necessary to examine whether the national measure is to be considered a justified, because permissible, exception to the fundamental freedoms enshrined in the Treaty, but, according to the formula in the *Schmidberger* judgment, 'how the requirements of the protection of fundamental rights in the Community can be reconciled with those arising from a fundamental freedom enshrined in the Treaty'.

73. In the present case, therefore, it remains to be established whether the protection of human dignity required under the German Basic Law should be considered in the context of justification for the public order notice in question or whether the existence of a corresponding guarantee of a fundamental right in Community law makes a decision necessary at Community law level. This in turn requires an analysis of the concept of human dignity.

(iii) Human dignity under Community law

— Features of human dignity as a legal concept

74. There is hardly any legal principle more difficult to fathom in law than that of human dignity. An attempt will be made below at least to give an outline of this concept. [46]

46 — See in general, amongst other authorities, Enders, *Die Menschenwürde in der Verfassungsordnung*, 1997, p. 5 et seq.; Maurer *Le principe de la dignité humaine et la Convention européenne des droits de l'homme*, 1999, pp. 30-40; Brugger *Menschenwürde, Menschenrechte, Grundrechte*, 1997, p. 29 et seq.; Brieskorn, *Rechtsphilosophie*, 1990, p. 150 et seq.

75. 'Human dignity' is an expression of the respect and value to be attributed to each human being on account of his or her humanity. It concerns the protection of and respect for the essence or nature of the human being per se — that is to say, the 'substance' of mankind. Mankind itself is therefore reflected in the concept of human dignity; it is what distinguishes him from other creatures. However, the question of what distinguishes mankind inevitably prevails over the law; that is to say, the substance of human dignity is ultimately determined by a particular 'conception of man'. [47]

76. Human dignity, as a fundamental expression of an element of mankind founded simply on humanity, forms the underlying basis and starting point for all human rights distinguishable from it; at the same time, it is the point of convergence of individual human rights in the light of which they are to be understood and interpreted. Mention is therefore made by German theorists, for instance, of human dignity as the 'fundamental constitutional principle' of human rights. [48]

77. It has as its source the same conceptual background and formation process as have human rights in general. The right to respect for human rights runs counter in this respect to the idea that human regard is negotiable by the State, the people and the majority — and therefore counter to the idea that the individual is identified according to the community and considered to be a function thereof. [49] It reflects the idea that every individual human being is considered to be endowed with inherent and inalienable rights.

78. A variety of religious, philosophical and ideological reasoning could be given as the basis for this analysis. [50] All in all, human dignity has its roots deep in the origins of a conception of mankind in European culture that regards man as an entity capable of spontaneity and self-determination. Because of his ability to forge his own free will, he is a person (subject) and must not be downgraded to a thing or object. [51]

79. That link between the concept of dignity and those of the self-determination and freedom of mankind clearly shows why the idea of the dignity of man also often finds

47 — Enders (cited in footnote 46), p. 17 et seq.

48 — Jarass/Pieroth, *Grundgesetz für die Bundesrepublik Deutschland: Kommentar*, 2000, p. 41.

49 — Historically, the concept of human dignity was especially formulated as a counterpart to the wielding of unbridled State authority, initially under absolutism and then under national socialism and totalitarianism.

50 — From a religious perspective, the dignity of man is based on his creation in the image of God and the universal promise of salvation for all mankind. It was political thinking during the 18th century that recognition that all mankind has its nature and reason in common was the cornerstone from which stemmed the demand that human dignity and human rights should be recognised. See in this connection, in particular, Brieskorn (cited in footnote 46), p. 139 et seq.

51 — For this 'object formula' incorporated in Kant's teachings on German fundamental rights, see Enders (cited in footnote 46), paragraph 20.

expression in other concepts and principles that have to be safeguarded, such as personality and identity. [52]

80. Furthermore, the concept of the legal equality of all is also inherent in the idea of human rights in general and human dignity in particular, so that reference is also often made of the phrase 'égale dignité' which embraces both concepts. [53]

81. As an emanation and as specific expressions of human dignity, however, all (particular) human rights ultimately serve to achieve and safeguard human dignity — which leads me on to the question of the relationship between human dignity and specific human rights and whether human dignity constitutes a general principle, an evaluation principle or even an independent judiciable fundamental right.

— Human dignity as a rule of law and its protection under Community law

82. The concept of safeguarding human dignity chiefly made its appearance in positive law (both national and international) during the course of the human rights movement that emerged during the second half of the 20th century, although it evolved in very different ways. For instance, the preambles to both the Universal Declaration of Human Rights of 10 December 1948 and to the two UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights recognise the inherent dignity of all members of the human family as forming the basis of human rights, although without human dignity itself being made a separate human right. Human dignity is not given any express mention at all in the ECHR — although its preamble does refer to the Universal Declaration of Human Rights. However, according to the case-law of the European Court of Human Rights (ECHR) respect for human dignity and human freedom is 'the very essence of the Convention'. [54]

83. As far as the constitutional systems of the Member States are concerned, therefore, the concept of human dignity enjoys full recognition in one form or another, espe-

52 — See, for instance, as an example of a concept of dignity based on the idea of personality, Paragraph 16 of the Austrian Allgemeines Bürgerliches Gesetzbuch (Civil Code, 'ABGB'): 'Everybody has innate rights evident just by virtue of reason and must therefore be deemed to have personal identity. Slavery and serfdom and the assertion of might based thereon is not permitted in these lands.' Accordingly, mankind as the bearer of natural inherent rights — and therefore as a legal subject — must not be downgraded to a legal object.

53 — Meyer, *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2003, p. 55.

54 — ECHR, *Pretty v. United Kingdom*, judgment of 29 April 2002, *Reports of Judgments and Decisions*, § 65.

cially when one considers (as stated above) that this concept can be expressed in different ways. [55]

84. As in the aforementioned instruments of international law, however, human dignity seems to appear in the national legal systems of the Member States primarily as a general article of faith or — often in the case-law — as a fundamental, evaluation or constitutional principle, rather than as an independent justiciable rule of law. [56] A rule such as that contained in the German Constitution whereby — at least according to the majority viewpoint — respect for and protection of human dignity as embodied in Article 1 of the German Basic Law constitutes not just a 'fundamental constitutional principle' but also a separate fundamental right, must therefore be considered the exception.

85. One principal reason for this must be that it is not until human dignity is shaped and formulated in each individual fundamental right that it acquires more concrete substantive form and functions as a criterion of evaluation and interpretation in relation thereto. The concept of human dignity itself — like the concept of mankind to which it directly relates — is in fact a generic concept for which there is not, as such, any traditional legal definition or interpretation in the true sense; it is rather the case that its substance has to be set out in more concrete form in each individual case, especially by way of judicial findings.

86. Instead of direct recourse to human dignity, therefore, the codification and application of individual concrete guarantees of fundamental rights would therefore seem appropriate from the point of view of justiciability and judicial methods in general.

87. As far as human dignity in Community law is concerned, therefore, it is clear that it has not found any express (written) mention in valid primary legislation. However, reference to human dignity is at least made in a few legal instruments of secondary legislation — for example, in the recitals to the preamble to Regulation No 1612/68 [57] and in Article 12 of Directive 89/552 [58] — and it has also been incorporated into case-law in this connection. [59]

55 — For an examination of the role of human dignity in the national constitutional systems of the Member States see Meyer (cited in footnote 53), paragraph 48 et seq. For references to constitutional systems, see also Rau/Schorkopf, 'Der EuGH und die Menschenwürde', NJW, 2002, 2448 (2449).

56 — See, inter alia, Brugger (cited in footnote 46), paragraph 9 et seq.

57 — 'Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity ... .'

58 — 'Television advertising shall not prejudice respect for human dignity.'

59 — See, inter alia, Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini and Others* [1997] ECR I-3843, paragraph 31, and *Baumbast and R* (cited in footnote 33), paragraph 59.

88. In a few cases, the Court of Justice and its Advocates General have also independently made reference to human dignity in connection with the principle of equality or non-discrimination, that is to say, in the context of 'égale dignité'. [60]

89. In its judgment in *Netherlands* v *Parliament and Council*, [61] the Court of Justice took the opportunity of describing in detail the status of human dignity and the protection thereof under Community law. That case concerned an action for annulment of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions. [62] The applicant was claiming inter alia — in the sense of the aforementioned 'object formula' of human dignity — that the patentability of isolated parts of the human body provided for by Article 5(2) of the directive reduced living human matter to a means to an end, undermining human dignity. The Court of Justice stated in this respect: 'It is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed.' The Court of Justice then went on to find that there had been no illegality based on violation of human dignity. [63]

90. In this way, the Court of Justice has acknowledged that respect for human dignity does, in any event, constitute an integral part of the general legal tenets of Community law and a criterion and requirement of the legality of acts under Community law. It is, however, questionable whether, in this case also, it can be argued that one is dealing with a form of interpretation of provisions of Community law that conforms to fundamental law and that the protection of human dignity simply figures here as a principle of interpretation. The assumption that human dignity — as a general legal principle in the sense of a principle of evaluation — is not recognised by the Court of Justice as a separate fundamental right or an independent head of claim initially seems to stem from the distinction made in the German

60 — In Case C-13/94 *P* v *S* [1996] ECR I-2143, paragraph 22, the Court of Justice stated in relation to discrimination against a transsexual person (based on sex): 'to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.' See also the statements made with reference to that case by Advocate General Ruiz-Jarabo Colomer in his Opinion in Case C-117/01 *K.B.* [2004] ECR I-541, paragraph 77. Advocate General Cosmas stated, with regard to entitlement to equal pay for men and women, in his Joined Opinion in Case C-50/96 *Lilli Schröder and Others* [2000] ECR I-743, at paragraph 80: 'In a community governed by the rule of law, which respects and safeguards human rights, the requirement of equal pay for men and women is founded mainly on the principles of human dignity and equality between men and women and on the precept of improving working conditions, not on objectives which are economic in the narrow sense ... .'

61 — Case C-377/98 [2001] ECR I-7079.

62 — OJ 1998 L 213, p. 13.

63 — Loc. cit., paragraph 69 et seq.

version of the judgment between 'respect' (for human dignity) and the 'fundamental right' (to integrity) [64] although such an interpretation does not find any support in the other language versions, including the language of the proceedings (Dutch) in which mention is consistently made of the 'fundamental right' to respect for human dignity without any such distinction being drawn.

91. The Court of Justice therefore appears to base the concept of human dignity on a comparatively wide understanding, [65] as expressed in Article 1 of the Charter of Fundamental Rights of the European Union. [66] This article reads as follows: 'Human dignity is inviolable. It must be respected and protected.'

— Conclusions in relation to the present case

92. Because of the inchoate nature of the concept of human dignity, however, it is almost impossible for the Court in this case — unlike in the *Schmidberger* judgment — immediately to equate the substance of the guarantee of human dignity under the German Basic Law with that of the guarantee of human dignity as recognised in Community law.

93. It is therefore advisable to evaluate the national measure in question in the light of Community law. Such an examination requires an interpretation of the circumstances of public policy invoked by the Member State by way of justification according to the importance and scope of human dignity in the Community legal order. An important point in this connection is that protection of human dignity is afforded recognition as a general legal principle — and therefore forms part of primary legislation. It would therefore follow that, as far as possible, the Court should not allow any interpretation of fundamental freedoms that compels a Member State to permit acts or activities that are an affront to human dignity; in other words, it must be possible to admit under the public policy exception those considerations that relate to a right the protection and observance of which Community law itself demands.

94. Mention should also finally be made of a comparable case that had to be decided by the Human Rights Committee under the UN Covenant on Civil and Political Rights. In those proceedings, it was necessary to decide on the legality of a ban pronounced by the French authorities based principally on the protection of human dignity in relation to an activity known as 'dwarf-tossing', by which

64 — See Rau/Schorkopf (cited in footnote 55), 2449, and Jones, 'Common Constitutional Traditions: Can the Meaning of Human Dignity under German Law guide the European Court of Justice?', *Public Law*, spring 2004, p. 167 et seq.

65 — According to the German model, therefore, as both a constitutional principle of the Union and a fundamental right per se.

66 — See Bernsdorff/Borowsky, *Die Charta der Grundrechte der Europaischen Union: Handreichungen und Sitzungsprotokolle*, 2002, p. 142 et seq., p. 169 et seq. and p. 260 et seq; Meyer (cited in footnote 53), paragraph 55 et seq.

the diminutive complainant earned his living. The committee found, with regard to the question of whether that ban constituted prohibited discrimination within the meaning of Article 26 of the covenant, that the distinction drawn — between dwarves and persons who were not dwarves — was based on objective reasons and was not discriminatory in its purpose. It stated in its reasoning in this context that 'the State party has demonstrated, in the present case, that the ban on dwarf-tossing as practised by the author did not constitute an abusive measure but was necessary in order to protect public order, which brings into play considerations of human dignity that are compatible with the objectives of the Covenant.' [67]

(iv) Interpretation of the concept of public policy in the light of the importance and scope of human dignity

95. It is now necessary, following my introductory remarks on the concept of public policy and having regard to the principles set out above, to examine the extent to which the contested public order notice pursues a recognised aim relating to the public interest and, if so, whether it is reasonably proportionate to the aim pursued.

— Concept of public policy

96. The case-law of the Court of Justice on the concept of public policy — as a concept of Community law — attempts to strike a balance between, on the one hand, the necessary stemming of exceptions to the fundamental freedoms assured under primary legislation and the associated possibilities of justification, and, on the other, the scope of discretion afforded to Member States.

97. The Court of Justice has therefore observed that 'Member States are still, in principle, free to determine the requirements of public policy and public security in the light of their national needs'. [68] The Court has also ruled that the particular circumstances that might justify recourse to the concepts of public policy and public security 'may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty'. [69]

98. The Court has consistently stated, however, that the grounds covered by the

67 — Communication No 854/1999: France. 26/7/2002. CCPR/C/75/D/854/1999, particularly paragraph 7.4.

68 — Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 17.

69 — Case 41/74 *Van Duyn* [1974] ECR 1337, paragraphs 18 and 19.

concept of public policy have to be strictly interpreted in Community law so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions. [70] It therefore follows from this case-law, in relation to the question referred for a preliminary ruling, that, whilst it is possible for assessments to vary from one Member State to another, Community law does nevertheless set strict limits on such assessments by the individual States.

99. This review by the Court leads particularly to the conclusion that not every infringement of national law can be considered a violation of public policy. The Court also requires the existence of a 'genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'. [71] The existence of such a threat is precluded, in particular, if those derogations are misapplied so as, in fact, to serve purely economic ends. [72] Nor can a Member State adopt measures against a national of another Member State 'by reason of conduct which, when engaged in by nationals of the first Member State, does not give rise to punitive measures or other genuine and effective measures intended to combat that conduct'. [73]

— The existence of a sufficiently serious threat in the present case

100. The case-law cited above demonstrates with regard to the present case that justification for this restriction on freedom to provide services on grounds of public policy can be considered to exist only if the variant of the game prohibited by the public order notice constitutes a genuine and sufficiently serious threat to a fundamental interest of society.

101. The national authorities have a discretion in making that assessment. The Court has given expression to that principle by holding that 'Community law does not impose upon the Member States a uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy'. [74]

70 — *Rutili* (cited in footnote 31), paragraphs 26 to 28, and *Van Duyn* (cited in footnote 69), paragraphs 18 and 19.

71 — Case 30/77 *Bouchereau* [1977] ECR 1999, paragraphs 33 to 35. See also Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 21.

72 — *Rutili* (cited in footnote 31), paragraph 30, and *Église de scientologie* (cited in footnote 68), paragraph 17.

73 — *Oteiza Olazabal* (cited in footnote 40), paragraph 42. See also Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, paragraph 9, and Case C-243/01 *Gambelli and Others* [2003] ECR I-1665, paragraph 69. See also my Opinion in Case C-42/02 *Lindman* [2003] ECR I-1303, paragraph 114.

74 — *Adoui and Cornuaille* (cited in footnote 73), paragraph 8.

102. It is clear from the case-law that the Court of Justice affords the Member States scope for discretion, in particular, in areas that are especially sensitive ideologically or associated with particular social risks. Because of the particular social implications and risks involved in gambling, therefore, it has left it to the discretion of the individual Member State concerned to determine the scope of the protection which it 'intends providing in its territory in relation to lotteries and other forms of gambling'.[75] As the Commission rightly states, this upholds the view that the reasons invoked by way of justification fall within the margin of assessment and discretion enjoyed by the Member States.

103. However, as recent case-law has made clear, national restrictive measures, such as those imposed on gambling, have to fulfil such requirements as appropriateness and proportionality.[76]

104. In so far as respect for human dignity is mentioned by the Member State in order to demonstrate the particular threat, this undoubtedly forms one of the fundamental interests of any society committed to protecting and respecting fundamental rights.

105. Methodologically speaking, it should be noted that the finding that a fundamental interest of society has been affected is determined in the light of national value judgments. There is no question here of any general opinion in the Member States.[77]

106. Nor does the *Schindler* judgment[78] cited by the court making the reference conflict with this view. The Court of Justice said there that 'it is not possible to disregard the moral, religious or cultural aspects ... in all the Member States'. In that statement, it gives expression to the viewpoint that the existence of such general opinion on the need to restrict a fundamental freedom is an indication of its legitimacy and not that this general opinion is a requirement for the recognition of such legitimacy.[79]

75 — Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraph 14, and Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 33, which both make reference to the judgment in *Schindler* (cited in footnote 6).

76 — See, amongst other authorities, *Lindman* (cited in footnote 73), paragraph 25. It should be noted that the examination of proportionality undertaken below (particularly in paragraph 111 et seq.) does not relate to human dignity since it cannot as such be subject to any restriction; the review rather relates to the question whether, in the light of the aim of protecting public order — having regard to the arguments concerning human dignity — the ban at issue in the main proceedings constitutes an appropriate, necessary and proportionate restriction on freedom to provide services.

77 — See above, point 71.

78 — Cited in footnote 6, paragraph 60.

79 — The Commission rightly argues in this connection that the Court made that statement in the context of the validity of the reason invoked by the Member State by way of justification.

107. In the present case, the general opinion in the Member States is not to be viewed in the specific way in which human dignity is protected in national law — leading here to the contested public order notice — but in the context of the fundamental concordance of values in relation to the status of human dignity under relevant national law and in Community law.

108. The circumstances invoked by the referring court, having regard to the fundamental importance of human dignity in the Community legal order, support the finding of a serious threat to fundamental interests of society, as claimed here. The findings of fact contained in the order for reference include, in particular, the fact that Omega's leisure operation aroused public displeasure. From the legal point of view, mention should be made of the rejection of conduct or services glorifying or promoting violence, such rejection being based on the protection and observance of human dignity.[80]

109. The public order notice in question undoubtedly constitutes a uniformly applicable measure.

80 — When examining whether the national authorities have exercised their discretion in a manner that is lawful in Community law the special circumstances applicable in a Member State cannot be ignored. Mention is made in this context of the sensitivity of national public opinion following the massacre at the school in Erfurt on 26 April 2002.

110. Suffice it to say, with regard to the reservations expressed as to its national legal basis, that the concept of statutory limitation restricting fundamental freedoms enshrined in the Treaty is not known to Community law. The question whether the legal basis of the public order notice in question is sufficiently precise is therefore governed by national law.

111. The appropriateness of the public order notice in question in countering the threat to important interests of society was not doubted in the written or oral procedure.

112. Nor can there be any doubt as to the necessity for the ban in countering threats to public order, particularly having regard to the principle of human dignity. The public order authority argues, correctly, that the contested public order notice banned only a variant of the game so that the possibility of a milder remedy is not apparent.

113. Nor does the public order notice in question constitute a disproportionate impingement on Omega's rights. Since the restriction on the fundamental freedom concerned is imposed by an individual measure, the extent to which measures in other cases are taken or not taken cannot be relevant to an examination of the proportionality of that measure under Community law, since assessment under Community law depends upon all the circumstances of the individual case, as established by the court of reference. In any event, the Court files do not show that the German authorities displayed inconsistency with regard to lasersport games.

V — Conclusion

114. In the light of the foregoing considerations, I propose that the question referred to the Court by the Bundesverwaltungsgericht should be answered as follows:

An individual national public order notice banning a commercial activity found by the national courts to be incompatible with basic principles of constitutional law is compatible with the provisions of the Treaty establishing the European Community relating to freedom to provide services if that order is genuinely justified for public policy purposes relating to the public interest and it is ensured that that purpose cannot be achieved by measures that are less restrictive of the freedom to provide services.