
ANNEX A1



ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
OPĆI SUD EUROPSKE UNIJE
TRIBUNALE DELL'UNIONE EUROPEA

EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
EUROPOS SĄJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI ĠENERALI TAL-UNJONI EWROPEA
GERECHT VAN DE EUROPESE UNIE
SĄD UNII EUROPEJSKIEJ
TRIBUNAL GERAL DA UNIÃO EUROPEIA
TRIBUNALUL UNIUNII EUROPENE
VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
SPLOŠNO SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

JUDGMENT OF THE GENERAL COURT (Fifth Chamber, Extended
Composition)

14 July 2021 *

(Access to documents – Regulation (EC) No 1049/2001 – Harmonised standards –
Documents concerning four harmonised standards approved by CEN – Refusal to
grant access – Exception relating to the protection of the commercial interests of a
third party – Protection deriving from copyright)

- 1013322 -

In Case T-185/19,

Public.Resource.Org, Inc., established in Sebastopol, California (United States),

Right to Know CLG, established in Dublin (Ireland),

represented by F. Logue, Solicitor, A. Grünwald, J. Hackl and C. Nüßing,
lawyers,

applicants,

v

European Commission, represented by G. Gattinara, F. Thiran and S. Delaude,
acting as Agents,

defendant,

supported by

European Committee for Standardisation (CEN), and the other interveners,
whose names are listed in the annex,¹ represented by U. Karpenstein,
K. Dingemann and M. Kottmann, lawyers,

* Language of the case: English.

¹ The list of the other interveners is annexed only to the version sent to the parties.

interveners,

APPLICATION on the basis of Article 263 TFEU for annulment of Commission Decision C(2019) 639 final of 22 January 2019 refusing to grant a request for access to four harmonised standards adopted by CEN,

THE GENERAL COURT (Fifth Chamber, Extended Composition),

composed of S. Papasavvas, President, D. Spielmann, U. Öberg, O. Spineanu-Matei (Rapporteur) and R. Norkus, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 10 November 2020,

gives the following

Judgment

I. Background to the dispute

- 1 On 25 September 2018, the applicants, Public.Resource.Org, Inc. and Right to Know CLG, non-profit organisations whose main focus is to make the law freely accessible to all citizens, made a request to the European Commission Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) and Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13), for access to documents held by the Commission ('the request for access').
- 2 The request for access concerned four harmonised standards adopted by the European Committee for Standardisation (CEN), in accordance with Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ 2012 L 316, p. 12), namely standard EN 71-5:2015, entitled 'Safety of toys – Part 5: Chemical toys (sets) other than experimental sets'; standard EN 71-4:2013, entitled 'Safety of toys – Part 4: Experimental sets for chemistry and related

activities'; standard EN 71-12:2013, entitled 'Safety of toys – Part 12: N-Nitrosamines and N-nitrosatable substances'; and standard EN 12472:2005+A 1:2009, entitled 'Method for the simulation of wear and corrosion for the detection of nickel released from coated items' ('the requested harmonised standards').

- 3 By letter of 15 November 2018, the Commission, on the basis of the first indent of Article 4(2) of Regulation No 1049/2001, refused to grant the request for access ('the initial refusal decision').
- 4 On 30 November 2018, the applicants, pursuant to Article 7(2) of Regulation No 1049/2001, submitted a confirmatory application to the Commission. By decision of 22 January 2019, the Commission confirmed the refusal to grant access to the requested harmonised standards ('the confirmatory decision').

II. Procedure and forms of order sought

- 5 By application lodged at the Court Registry on 28 March 2019, the applicants brought the present action.
- 6 By document lodged at the Court Registry on 10 July 2019, CEN and 14 national standardisation bodies, namely the Asociación Española de Normalización (UNE), the Asociația de Standardizare din România (ASRO), the Association française de normalisation (AFNOR), Austrian Standards International (ASI), the British Standards Institution (BSI), the Bureau de normalisation/Bureau voor Normalisatie (NBN), Dansk Standard (DS), the Deutsches Institut für Normung eV (DIN), the Koninklijk Nederlands Normalisatie Instituut (NEN), the Schweizerische Normen-Vereinigung (SNV), Standard Norge (SN), the Suomen Standardisoimisliitto ry (SFS), the Svenska institutet för standarder (SIS) and the Institut za standardizaciju Srbije (ISS) applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission.
- 7 By order of 20 November 2019, *Public.Resource.Org and Right to Know v Commission* (T-185/19, not published, EU:T:2019:828), the President of the Fifth Chamber of the General Court granted the application for leave to intervene. The interveners lodged the statement in intervention and the main parties lodged their observations on that statement within the prescribed periods.
- 8 On a proposal from the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral part of the procedure.
- 9 By order of 17 June 2020, the Court (Fifth Chamber), pursuant to Article 91(c), Article 92(1), and Article 104 of the Rules of Procedure, ordered the Commission to produce the requested harmonised standards and decided that they would not be communicated to the applicants. The Commission complied with that measure of inquiry within the prescribed period.

- 10 On a proposal from the Fifth Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to assign the case to the Fifth Chamber sitting in extended composition.
- 11 On a proposal from the Judge-Rapporteur, the Court (Fifth Chamber, extended composition), by way of measures of organisation of procedure as provided for in Article 89 of the Rules of Procedure, put written questions to the parties, asking them to reply both before the hearing and at it. The parties replied in writing to certain questions within the prescribed period and presented oral argument and answered the other questions put by the Court at the hearing on 10 November 2020. At the hearing, the applicants stated to the Court that by the action they sought only the annulment of the confirmatory decision, which was noted in the minutes of the hearing.
- 12 The applicants claim, further to the clarification referred to in paragraph 11 above, that the Court should:
 - annul the confirmatory decision;
 - order the Commission to pay the costs.
- 13 The Commission contends that the Court should:
 - dismiss the action;
 - order the applicants to pay the costs.
- 14 The interveners contend that the Court should:
 - dismiss the action;
 - order the applicants to pay the costs.

III. Law

A. Admissibility

- 15 The interveners argue that the action is inadmissible since the applicants have no legal interest in bringing proceedings. In the interveners' view, inasmuch as the applicants, first, could access the requested harmonised standards free of charge for non-commercial purposes through libraries, secondly, could access those standards and use them for any purpose in return for the payment of a 'reasonable' fee, and, thirdly, have in fact owned since 2015 (that is, well before their request for access to the documents in 2019) a copy of at least three of the four requested harmonised standards, they have no interest in bringing the present proceedings.

- 16 It follows from the Court's case-law that any action for annulment brought by a natural or legal person must be based on an interest on the part of the applicant in bringing proceedings (see, to that effect, order of 24 September 1987, *Vlachou v Court of Auditors*, 134/87, EU:C:1987:388, paragraph 8) and that non-compliance with that essential prerequisite, which it is for that natural or legal person to prove, constitutes an absolute bar to proceeding with a case, which the EU Courts may raise of their own motion at any time (see, to that effect, orders of 7 October 1987, *G. d. M. v Council and ESC*, 108/86, EU:C:1987:426, paragraph 10, and of 21 July 2020, *Abaco Energy and Others v Commission*, C-436/19 P, not published, EU:C:2020:606, paragraph 80).
- 17 In that regard, it should be noted that it is settled case-law that an action for annulment brought by a natural or legal person is admissible only in so far as the applicant has an interest in the annulment of the contested measure. Such an interest presupposes that the annulment of the contested measure must of itself be capable of having legal consequences and that the action must be likely, if successful, to procure an advantage for the party who brought it. That interest must be vested and present and is evaluated as at the date on which the action is brought. The interest must continue until the final decision, failing which there will be no need to adjudicate (see judgment of 19 December 2019, *XG v Commission*, T-504/18, EU:T:2019:883, paragraphs 30 and 31 and the case-law cited).
- 18 In the specific context of disputes concerning access to documents on the basis of Regulation No 1049/2001, a person who is refused access to a document or to part of a document has, by virtue of that very fact, established an interest in the annulment of the decision refusing access (see judgment of 5 December 2018, *Falcon Technologies International v Commission*, T-875/16, not published, EU:T:2018:877, paragraph 29 and the case-law cited).
- 19 In the present case, the parties agree that the Commission did not grant the applicants access to the requested harmonised standards.
- 20 In those circumstances, having regard to the case-law referred to in paragraph 18 above, the applicants have an interest in obtaining the disclosure of the requested harmonised standards under Regulation No 1049/2001 and, accordingly, in seeking annulment of the confirmatory decision. In the present case, the applicants, despite the possibility to consult copies of the requested harmonised standards in public libraries, may invoke an interest in bringing proceedings since, by that consultation, they do not achieve full satisfaction in the light of the objectives they pursued by their request for access (see, to that effect, judgment of 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, paragraph 47) and therefore retain a genuine interest in gaining access to those harmonised standards on the basis of Regulation No 1049/2001.
- 21 That is all the more the case since, as the applicants maintain without being contradicted on that point by the Commission or the interveners, the requested

harmonised standards are available only in a very limited number of libraries, sometimes only in one library in a Member State or in libraries which are not open to the public, and their accessibility is excessively difficult in practice.

- 22 As regards paid access to the requested harmonised standards via points of sale managed by the national standardisation bodies, it must be noted that that does not in any way correspond to the objective pursued by the applicants to obtain freely available access to those standards which is without charge and does not reveal an absence or even a loss of interest in bringing proceedings (see, to that effect and by analogy, judgment of 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, paragraph 47).
- 23 In the light of the above, the interveners' arguments relating to a lack of interest in bringing proceedings on the part of the applicants must be rejected, without it being necessary to examine the admissibility of those arguments.

B. Substance

- 24 In support of the action, the applicants rely on two pleas in law, alleging, first, errors of law and of assessment in the application of the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001, aimed at protecting commercial interests, and, secondly, errors in law as regards the existence of an overriding public interest, within the meaning of the last clause of Article 4(2) of that regulation, and infringement of the obligation to state reasons.

1. First plea in law: errors of law and of assessment in the application of the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001, aimed at protecting commercial interests

- 25 The applicants dispute, in essence, the application in the present case of the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001 on the grounds that, first, copyright protection cannot be applicable to the requested harmonised standards and, secondly, no harm to the commercial interests of CEN and its national members has been established.
- 26 The applicants divide the first plea into three parts. The first and second parts allege errors of law related to the application of the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001. The third part alleges an error of assessment as to the effect on commercial interests.

(a) The first part: errors of law consisting of the wrongful application of the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001

- 27 The applicants submit that since the requested harmonised standards form part of 'EU law', they should be accessible freely and without charge, with the result that no exception to the right of access can apply to them. According to the applicants,

private rights cannot be granted with respect to a ‘text of the law’, which must be freely accessible to all and, accordingly, those standards cannot be protected by copyright. In support of their line of argument they rely on the judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821).

- 28 The Commission, supported by the interveners, disputes the applicants’ arguments.
- 29 In that regard, it is important to reiterate that, having been adopted on the basis of Article 255(2) EC (now Article 15(3) TFEU), the purpose of Regulation No 1049/2001, as stated in recital 4 and Article 1 thereof, is to give the public the widest possible right of access to EU institutions’ documents. In accordance with Article 2(3) of that regulation, that right covers both documents drawn up by those institutions and documents received from third parties, which includes any legal person, as expressly stated in Article 3(b) of that regulation.
- 30 The right of access to documents held by the EU institutions is, however, subject to certain limits, based on public or private interest grounds. More specifically, and in reflection of recital 11 of that regulation, Article 4 of Regulation No 1049/2001 lays down a system of exceptions authorising the institutions to refuse access to a document where its disclosure would undermine one of the interests protected by that provision.
- 31 Among the exceptions to the right of access is that set out in the first indent of Article 4(2) of Regulation No 1049/2001, which states that ‘the [EU] institutions shall refuse access to a document where disclosure would undermine the protection of ... commercial interests of a natural or legal person, including intellectual property, ... unless there is an overriding public interest in disclosure’.
- 32 In the case of documents emanating from third parties, Article 4(4) of Regulation No 1049/2001 states that the EU institution is to consult the third party with a view to assessing whether the exceptions laid down in Article 4(1) or (2) of the regulation may be applied, unless it is clear that the document should or should not be disclosed. If the institution concerned considers that it is clear that access to a document emanating from a third party must be refused on the basis of the exceptions laid down in Article 4(1) or (2), it is to refuse access to the applicant without even having to consult the third party from which the document originates, whether or not that third party has previously refused a request for access to those same documents made on the basis of that regulation.
- 33 Lastly, as regards the discretion enjoyed by EU institutions when dealing with requests for access to documents from third parties, it should be pointed out that the provisions of Regulation No 1049/2001, establishing, subject to the exceptions which it lists, a right of access to all the documents held by an institution must be implemented effectively by the institution to which the request for access is addressed.

- 34 Consequently, in accordance with Article 8 of Regulation No 1049/2001, ultimate responsibility for the proper application of that regulation lies with the EU institution and it is also for the latter to defend the validity of a decision refusing access to documents emanating from a third party before the Courts of the European Union or the Ombudsman. If, in a situation involving documents from third parties, the institution were required to accept automatically the reasons given by the third party concerned, it would be forced to defend – vis-à-vis the person making the request for access and, in some cases, before those review bodies – positions which it does not itself consider to be defensible (see, to that effect and by analogy, judgment of 14 February 2012, *Germany v Commission*, T-59/09, EU:T:2012:75, paragraph 47).
- 35 In the present case, it is apparent from the arguments put forward by the parties that they do not agree, in the first place, as to the scope and intensity of the review which the EU institution concerned, in the present case, the Commission, must carry out in the procedure referred to in Article 4(4) of Regulation No 1049/2001 relating to the existence and consequences of purported copyright protection for requested documents originating from a third party, for the purposes of applying the exception laid down in the first indent of Article 4(2) of that regulation.
- 36 The Commission, supported by the interveners, maintains that it is not entitled, when examining an application made under Regulation No 1049/2001 for access to documents, to call into question the existence of copyright protection for the requested documents that has been accorded to a third party by the ‘applicable national law’.
- 37 The applicants, in turn, criticise the Commission for not verifying that the conditions for the existence of copyright over the requested harmonised standards in favour of CEN were satisfied. In so doing, they implicitly but necessarily recognise the Commission’s power to carry out an exhaustive review of the existence and consequences of alleged copyright protection for requested third party documents.
- 38 In the second place, the parties disagree on the eligibility of the requested harmonised standards to be subject to copyright protection inasmuch as they form part of EU law and, consequently, to come under the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001.
- 39 Therefore, it is necessary to examine the applicants’ arguments concerning, first of all, an error of law in the application of the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001 in that the Commission found that there was an effect on commercial interests stemming from copyright protection for the requested harmonised standards (see paragraph 35 above), and, secondly, an error of law connected with the eligibility of those harmonised standards to be subject to copyright protection inasmuch as they are part of EU law (see paragraph 38 above).

- 40 In the first place, it must be pointed out that copyright is an intellectual property right which guarantees legal protection for the creator of an original work, which remains, notwithstanding progressively closer harmonisation, largely governed by national law. Its existence and the scope of its protection, and more particularly exceptions to that protection, which are not the subject of either EU harmonising provisions or international provisions to which the European Union or its Member States are bound, continue to be defined by the laws of the Member States (see, to that effect, Opinion of Advocate General Jääskinen in *Donner*, C-5/11, EU:C:2012:195, points 24 and 27).
- 41 Furthermore, under Article 5(2) of the Berne Convention for the Protection of Literary and Artistic Works, signed in Berne on 9 September 1886 (Paris Act of 24 July 1971), in the amended version of 28 September 1979 ('the Berne Convention'), the enjoyment and the exercise of copyright are not to be subject to any formality (principle of 'automatic protection').
- 42 Moreover, the scope of copyright protection for the same work may differ according to the place where that protection is sought. Accordingly, under Article 5(3) of the Berne Convention, protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he or she is protected under that convention, that person is to enjoy in that country the same rights as national authors. By contrast, in accordance with paragraph 2 of that article, the extent of protection, as well as the means of redress afforded to the author to protect his or her rights, is to be governed exclusively by the laws of the country where protection is claimed (the principle of the 'independence' of protection).
- 43 In those circumstances, it must be held that it is for the authority which has received a request for access to third-party documents, where there is a claim for copyright protection for those documents, inter alia, to identify objective and consistent evidence such as to confirm the existence of the copyright claimed by the third party concerned. Such a review corresponds in fact to the requirements inherent in the division of competences between the European Union and the Member States in the field of copyright.
- 44 It is in the light of those considerations that the General Court must examine whether the Commission complied with the scope of the review which it was required to carry out when applying the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001 (see paragraph 35 above).
- 45 In that regard, it should be noted that, first, in the initial refusal decision, the Commission, in order to justify the applicability of the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001, refers to the copyright over the requested harmonised standards belonging to CEN as a European organisation governed by private law which holds a right of ownership over all its publications, including European standards. Consequently, the Commission found that disclosure of those harmonised standards, 'could undermine the protection of

commercial interests of a legal person, including intellectual property ... as CEN [was] the copyright owner of all deliverables produced by their respective technical committees' and that, 'consequently, the copyright and exploitation rights (distribution and sales) on any CEN publication (including draft European standards) belong exclusively to CEN and its national members from whom the (draft) standards [could] be obtained'.

- 46 In the confirmatory decision, the Commission rejects the applicants' allegations related to the lack of copyright protection for the requested harmonised standards, stating that, 'contrary to what [they] allege[d], the [harmonised standards were] protected by copyright [despite the fact that they did] contain data which [could] be considered as factual or relating to procedures'. In addition, in response to the applicants' criticisms that the originator of those harmonised standards was not consulted, it referred to the position paper of CEN and CENELEC of 17 May 2017 on the consequences of the judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821), in which those organisations had 'as copyright holders for European standards, explicitly considered that, on the basis of [that judgment] there were no grounds to challenge their copyright and distribution policies of harmonised standards'. The Commission 'consequently ... considered that the consultation under Article 4(4) of Regulation ... No 1049/2001 was not necessary as the position of the originator of the documents, the copyright holder in question, was already made publicly known by the abovementioned position paper'.
- 47 It follows that the Commission based its finding on the existence of copyright protection for the requested harmonised standards on objective and consistent evidence such as to support the existence of the copyright claimed by CEN for those standards.
- 48 Secondly, in the confirmatory decision, the Commission states that, 'the texts of the [requested harmonised] standards, while taking into account the specific requirements provided for in the legislation they support, were drafted by [their] authors in a way that is sufficiently creative to deserve copyright protection', that 'the length of the texts implies that the authors had to make a number of choices (including in the structuring of the document), which results in the document being protected by copyright' and that, 'consequently, [those harmonised standards] as a whole [make them] an original work of authorship, deserving protection under the copyright rules'. In carrying out such an analysis, it thus assessed, from the perspective of the threshold of originality which a product must attain in order to constitute a 'work' in terms of the case-law, whether those harmonised standards were capable of being protected by copyright. Although the condition of originality required for a product to be eligible for that protection remains governed by the laws of the Member States, it follows from the Court's settled case-law on the interpretation of the autonomous concept of 'work' that, if a subject matter is to be capable of being regarded as original, it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his or her free and creative choices (see judgment of 11 June 2020,

Brompton Bicycle, C-833/18, EU:C:2020:461, paragraph 23 and the case-law cited). In the light of that case-law, the Commission was entitled, without committing any error, to find that the necessary threshold of originality for the harmonised standards in question had been met in the present case.

- 49 It follows from all of the foregoing that the Commission cannot be accused of any error of law connected with the scope of the review required of it when applying the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001 in order to find that there was an effect on commercial interests stemming from copyright protection for the requested harmonised standards.
- 50 In the second place, the applicants, in support of their line of argument concerning an error of law related to the eligibility of the requested harmonised standards to be subject to copyright protection, in so far as they form part of EU law, invoke the fact that they are ‘texts of law’ and the judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821).
- 51 In that regard, it must be borne in mind that a harmonised standard is defined in Article 2(c) of Regulation No 1025/2012 as a technical specification adopted by a European standardisation organisation on the basis of a request made by the Commission for the application of EU harmonisation legislation, with which compliance is not compulsory.
- 52 In the judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821), the Court of Justice held in particular that a harmonised standard such as that at issue in the main proceedings, adopted on the basis of [secondary legislation] and the references to which have been published in the *Official Journal of the European Union*, forms part of EU law (paragraph 40).
- 53 It should be noted, as has the Commission, that it is in no way apparent from the judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821), that the Court of Justice declared invalid the system of publication of harmonised standards laid down in Article 10(6) of Regulation No 1025/2012, by which only the references of those standards are to be published. On the contrary, the Court pointed to the choice of the EU legislature to make the legal effects attached to a harmonised standard subject solely to the prior publication of its references in the C Series of the Official Journal (judgment of 27 October 2016, *James Elliott Construction*, C-613/14, EU:C:2016:821, paragraphs 37, 40 and 43).
- 54 In those circumstances, the applicants are wrong to claim that, since the Court of Justice held in the judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821) that the requested harmonised standards formed part of ‘EU law’, those harmonised standards should be freely accessible without charge with the result that no exception to the right of access can be applied to them.

55 In the light of all of the foregoing considerations, the first part of the first plea must be rejected.

(b) *The second part: errors of law relating to the application of the exception laid down by the first indent of Article 4(2) of Regulation No 1049/2001*

56 According to the applicants, even if copyright protection for the requested harmonised standards was theoretically possible, it was not applicable to the harmonised standards in question because they do not constitute a ‘personal intellectual creation’ for the purposes of the case-law of the Court of Justice, which is necessary in order to be able to benefit from such protection.

57 In that regard, as noted in paragraph 40 above, since the conditions for the enjoyment of copyright protection, the extent of the protection for that right, and more particularly exceptions to that protection, remain governed by the laws of the Member States, which are free to determine the protection to be given to official texts of a legislative, administrative or judicial nature, and, as is apparent from the case-law, those conditions may be contested solely before the courts of the Member States (see, to that effect and by analogy, Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011, EU:C:2011:123, paragraph 80, and order of 5 September 2007, *Document Security Systems v ECB*, T-295/05, EU:T:2007:243, paragraph 56), the Commission was not authorised, contrary to the applicants’ arguments, to examine the conditions required by the applicable national law for the purpose of checking the veracity of copyright protection for the requested harmonised standards as such an examination goes beyond the scope of the review which it was empowered to carry out in the procedure for access to documents.

58 Furthermore, there is no support at all for the applicants’ argument that CEN, when drafting the requested harmonised standards, does not exercise free and creative choices.

59 The applicants argue, first, that the requested standards ‘merely consist of lists of technical characteristics and/or test methods and therefore there is no genuine creative choice available to the drafter which could be considered to be the expression of the author’s personality or his or her own intellectual creation’ and, secondly, that ‘there is also no room for any free or creative choices with respect to the design of [those harmonised standards], for example, regarding layout, structure, language, or any other of their key features [because] these aspects of standard-setting are governed by [their] own sets of standards which heavily restrict any potential room for creativity [by] standard-setting bodies’. However, they merely make assertions, without substantiating their claims with any analysis or refuting the Commission’s arguments set out in the confirmatory decision (see paragraph 48 above) as to the degree of originality of those harmonised standards, which is apparent from the length of the texts at issue, which implies choices by the authors, including in the structuring of the documents. Moreover, they do not specify how the restrictions on creativity which are imposed by the

standardisation legislation are such that those harmonised standards are not capable of reaching the threshold of originality required at EU level.

60 Consequently, the second part of the first plea must be rejected.

(c) The third part: error of assessment of the effect on commercial interests

61 The applicants argue that the Commission has not established how disclosure of the requested harmonised standards would undermine the commercial interests of CEN and its national members. They submit that, even if copyright protection for those harmonised standards was theoretically possible and even if the harmonised standards in question were regarded as a personal intellectual creation, the confirmatory decision should still be annulled given that the Commission has not proved the alleged infringement of the commercial interests of CEN as the author of those same harmonised standards.

62 The Commission, supported by the interveners, disputes the applicants' arguments.

63 In that regard, it should be observed that in order to justify refusal of access to a document, it is not sufficient, in principle, for that document to fall within an activity or an interest mentioned in Article 4 of Regulation No 1049/2001. The institution concerned must also show how access to that document could specifically and actually undermine the interest protected by an exception laid down in that article and that the risk of that interest being undermined is reasonably foreseeable and not purely hypothetical. The same applies in respect of a third party where he or she is consulted in the context of the consultation procedure provided for in Article 4(4) of Regulation No 1049/2001, since the purpose of that article is to enable the institution to assess whether an exception laid down in paragraph 1 or 2 of that article should apply (see judgment of 5 February 2018, *Pari Pharma v EMA*, T-235/15, EU:T:2018:65, paragraph 69).

64 In the present case, it is clear from the confirmatory decision that the Commission based its refusal to disclose the requested harmonised standards on two connected but different infringements of the commercial interests of CEN and its national members, namely, first, the protection of those harmonised standards by copyright and, secondly, the risk of a very large fall in the fees collected by CEN and its national members in return for access to those harmonised standards, if access to them could be obtained free of charge from the Commission.

65 In that regard, it should be borne in mind, as the Commission submits, that the sale of standards is a vital part of the standardisation bodies' business model. Freely available access to those standards without charge would call that model into question and would oblige those bodies to reconsider entirely the way in which they are organised, thus creating significant risks for the production of further standards and the possibility of having a method which shows that a

product is deemed to comply with the requirements established by EU legislation by using a uniform method.

- 66 Thus, to the extent that, as was observed in connection with the first and second parts of the first plea (see paragraph 47 above), the Commission was justified in finding that the requested harmonised standards were covered by copyright protection, under which they were accessible to interested parties solely after the payment of certain fees (see paragraph 19 above), their disclosure for free on the basis of Regulation No 1049/2001 could specifically and actually affect the commercial interests of CEN and its national members, in terms of the case-law cited in paragraph 63 above.
- 67 In any event, as the Commission rightly argues, supported by the interveners, in the context of the first indent of Article 4(2) of Regulation No 1049/2001, freely available public access to the standards would undeniably undermine the protection of CEN's intellectual property since those standards are subject to licensing conditions imposed on buyers. The absence of any kind of control over the disclosure of the standards would evidently have an impact on CEN's commercial interests.
- 68 That conclusion is not called into question by the applicants' argument that, in the process of drawing up the requested harmonised standards, CEN acts as a public authority by performing public functions which are not subject to any commercial interest.
- 69 In that regard, in accordance with Article 10 of Regulation No 1025/2012, harmonised standards are to be drafted or, as necessary, revised by one of the three European standardisation organisations, at the initiative and under the direction and supervision of the Commission. To that end, that regulation recognises three European standardisation organisations, namely CEN, the European Committee for Electrotechnical Standardisation (Cenelec) and the European Telecommunications Standards Institute (ETSI). Those organisations are non-profit associations; CEN and Cenelec are governed by Belgian private law and ETSI by French law.
- 70 Contrary to the applicants' submission, it is in no way apparent from the provisions governing the European standardisation system that, in the standards development process, CEN acts as a public authority by performing public functions which are not subject to any commercial interests.
- 71 The fact that the European standardisation organisations, including CEN, contribute to the performance of tasks in the public interest by providing certification services relating to compliance with the applicable legislation does not in any way alter their status as private entities engaged in an economic activity (see, to that effect and by analogy, judgment of 5 December 2018, *Falcon Technologies International v Commission*, T-875/16, not published, EU:T:2018:877, paragraph 47).

- 72 In that regard, it should be noted, as did the Commission, that if a publicly owned undertaking may hold commercial interests, the same must apply a fortiori to a private entity, even if it contributes to the performance of tasks in the public interest (see, to that effect and by analogy, judgment of 5 December 2018, *Falcon Technologies International v Commission*, T-875/16, not published, EU:T:2018:877, paragraph 49).
- 73 It follows from all of the foregoing that, in accordance with the first indent of Article 4(2) of Regulation No 1049/2001, the Commission demonstrated that disclosure of the requested harmonised standards could specifically and actually undermine the commercial interests of CEN or its national members and that the risk of those interests being undermined was reasonably foreseeable and not purely hypothetical, in terms of the case-law cited in paragraph 63 above.
- 74 Consequently, the third part of the first plea and that plea in its entirety must be dismissed.

2. *Second plea in law: errors of law as regards the existence of an overriding public interest within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001 and breach of the obligation to state reasons*

- 75 The applicants complain that the Commission erred in law in considering that no overriding public interest, within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001, justified disclosure of the requested harmonised standards and that it failed to give sufficient reasons for its refusal to recognise the existence of an overriding public interest.
- 76 This plea is divided into three parts. The first alleges an error of law as regards the existence of an overriding public interest requiring free access to the law. The second concerns an error of law relating to the existence of an overriding public interest owing to the obligation of transparency in environmental matters. The third part alleges an inadequate statement of reasons for the Commission's refusal to recognise the existence of an overriding public interest.
- 77 It is appropriate to examine the third part of the second plea first of all.

(a) *The third part: inadequate statement of reasons for the Commission's refusal to recognise the existence of an overriding public interest*

- 78 First, the applicants submit that the Commission did not give sufficient reasons in the confirmatory decision for its rejection of the arguments put forward in the confirmatory application regarding the existence of an overriding public interest justifying access to the requested harmonised standards.
- 79 In that regard, the applicants submit that the Commission remained silent in relation to the most important arguments which they had put forward in their confirmatory application relating to the implications of the requested harmonised

standards being classified as ‘EU law’ by the judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821). More specifically, they submit that the Commission does not explain, in particular, why their argument on the need to have access to the law in a state governed by the rule of law should not be regarded as constituting an overriding public interest.

- 80 Secondly, according to the applicants, the Commission did not explain its reasoning with regard to the balancing of the conflicting interests in the present case, in terms of the case-law arising from the judgment of 1 July 2008, *Sweden and Turco v Council* (C-39/05 P and C-52/05 P, EU:C:2008:374), and, in so doing, has led them to believe that such a balancing exercise was not carried out.
- 81 The Commission disputes the applicants’ arguments and submits that it stated to the requisite legal standard the reasons for its refusal to recognise the existence of an overriding public interest.
- 82 As a preliminary point, it must be observed that the obligation to state reasons is a general principle of EU law, enshrined in the second paragraph of Article 296 TFEU and in Article 41(1) of the Charter of Fundamental Rights of the European Union (‘the Charter’), under which any legal act adopted by the EU institutions must state the reasons on which it is based (see judgment of 6 February 2020, *Compañía de Tranvías de la Coruña v Commission*, T-485/18, EU:T:2020:35, paragraph 19 and the case-law cited). That obligation on the part of EU institutions to state the reasons on which a decision is based is not merely taking formal considerations into account, but is intended to enable the EU judiciary to exercise its power to review the lawfulness of the decision and the persons concerned to know the reasons for the measure adopted so that they can defend their rights and ascertain whether or not the decision is well founded. Thus, the parties concerned can make genuine use of their right to a judicial remedy only if they have precise knowledge of the content of and the reasons for the act in question (see judgment of 28 November 2019, *Mélin v Parliament*, T-726/18, not published, EU:T:2019:816, paragraph 40 and the case-law cited).
- 83 In the context of applying the provisions of Regulation No 1049/2001, it has been held that the purpose of the obligation for the institution to state the reasons for its decision refusing to grant access to a document is, first, to provide the person concerned with sufficient information to make it possible to determine whether the decision is well founded or whether it is vitiated by an error which may permit its validity to be contested and, secondly, to enable the Courts of the European Union to review the lawfulness of the decision. The extent of that obligation depends on the nature of the measure at issue and the context in which it was adopted (see judgment of 6 February 2020, *Compañía de Tranvías de la Coruña v Commission*, T-485/18, EU:T:2020:35, paragraph 20 and the case-law cited).
- 84 According to the case-law, the obligation to state reasons does not however require the institution concerned to respond to each of the arguments put forward during the procedure preceding the adoption of the contested decision (see

judgment of 25 September 2018, *Psara and Others v Parliament*, T-639/15 to T-666/15 and T-94/16, EU:T:2018:602, paragraph 134 and the case-law cited).

- 85 In the present case, it should be noted that in part 4 of the confirmatory decision, headed ‘No overriding public interest in disclosure’, the Commission responded to the applicants’ arguments in the confirmatory application related to the purported existence of overriding public interests stemming, first, from the interpretation given by the Court of Justice in the judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821), and, secondly, from alleged obligations of transparency in environmental matters.
- 86 In that regard, first, the Commission stated that, as it had explained in part 2.1 of the confirmatory decision, which concerned conditions for the protection of the commercial interests of a natural or legal person, the effects of the judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821), had to be considered in the context in which that judgment was delivered. Consequently, according to the Commission, that judgment ‘[did] not create the obligation of proactive publication of the harmonised standards in the Official Journal, nor [did] it establish an automatic overriding public interest in their disclosure’.
- 87 Secondly, the Commission rebutted the applicants’ claims related to the obligations of transparency in environmental matters, deemed to be in the overriding public interest, compared with the interest in protecting the commercial interests of a natural or legal person, arguing, in essence, that they do not apply in the present case.
- 88 Thirdly, the Commission added that it had not, moreover, been able to identify any overriding public interest justifying such disclosure.
- 89 It follows that the confirmatory decision does indeed state, succinctly but clearly, that the applicants had not put forward any argument capable of demonstrating the existence of an overriding public interest in disclosure of the requested harmonised standards. The Commission furthermore added that it had not been able to identify any overriding public interest justifying such disclosure.
- 90 Moreover, in so far as, by some of their arguments, the applicants are in fact challenging the merits of the statement of reasons in the confirmatory decision as to the absence of an overriding public interest in disclosure of the requested harmonised standards, such arguments are ineffective in the context of this part of the plea.
- 91 Lastly, it should be borne in mind that, even though the Commission is required to set out the reasons justifying the application to the particular case of one of the exceptions to the right of access provided for by Regulation No 1049/2001, it is not however required to provide more information than is necessary in order for the person requesting access to understand the reasons for its decision and for the Court to review the legality of that decision (see, to that effect, judgment of

26 March 2020, *Bonafous v Commission*, T-646/18, EU:T:2020:120, paragraph 25 and the case-law cited).

92 In those circumstances, the third part of the second plea must be rejected.

(b) *The first part: error of law as regards the existence of an overriding public interest requiring free access to the law*

93 The applicants submit that even if the requested harmonised standards may be covered by the exception relating to the effect on commercial interests, there was an overriding public interest in disclosure of those harmonised standards within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001, consisting of ensuring free access to the law. More specifically, the fact that those harmonised provisions are part of EU law, ‘result[s] in the constitutional imperative to freely access the Requested Standards’.

94 According to the applicants, since the requested harmonised standards form part of EU law, as the Court of Justice held in its judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821), there is an ‘automatic overriding public interest’ justifying the disclosure of those harmonised standards. They rely inter alia on the principle of legal certainty, which can be guaranteed only by proper publication of the law in the official language of the addressee of that law. They also refer to the case-law of the European Court of Human Rights on the accessibility of the law. They also emphasise the link between the accessibility of standards and the proper functioning of the internal market. Lastly, they submit that the principle of good administration, laid down in Article 41 of the Charter, and the free movement of goods and the freedom to provide services, guaranteed in Articles 34 and 56 TFEU, require free access to the standards.

95 In any event, the applicants submit that the confirmatory decision disregards the last clause of Article 4(2) of Regulation No 1049/2001 since the Commission failed to examine the existence of a public interest in disclosure and, more generally, to weigh the interests served by disclosure against those opposing such disclosure. In that regard, they dispute the assertion that they merely put forward general considerations which were not capable of establishing that the principle of transparency was especially pressing in the present case. The reference to the particular nature of the requested harmonised standards was sufficient in the present case to provide proof of the existence of a particular public interest in disclosure for the purposes of that provision.

96 The Commission, supported by the interveners, disputes the applicants’ arguments.

97 It must be observed, as a preliminary point, that even in cases such as the present, in which the Commission relies on a general presumption in order to refuse access to the documents requested pursuant to the first indent of Article 4(2) of Regulation No 1049/2001, the possibility of demonstrating that there is an

overriding public interest which justifies the disclosure of the documents, in accordance with the last clause of Article 4(2), is not ruled out (see, to that effect, judgment of 25 September 2014, *Spirlea v Commission*, T-306/12, EU:T:2014:816, paragraph 90 and the case-law cited).

- 98 By contrast, the onus is on the party arguing for the existence of an overriding public interest to rely on specific circumstances to justify the disclosure of the documents concerned and that setting out purely general considerations cannot provide an appropriate basis for establishing that an overriding public interest prevails over the reasons justifying the refusal to disclose the documents in question (see judgment of 11 May 2017, *Sweden v Commission*, C-562/14 P, EU:C:2017:356, paragraph 56 and the case-law cited).
- 99 In the present case, the applicants are in fact seeking to remove entirely the category of harmonised standards from the scope of application of the system of substantive exceptions established by Regulation No 1049/2001 on the generic ground that they form part of ‘EU law’, which should be freely accessible to the public without charge.
- 100 However, in the first place, having regard to the case-law referred to in paragraph 98 above, setting out such general considerations is not sufficient for the purposes of establishing that an overriding public interest in having freely available access without charge to EU law, including the harmonised standards, even if it proves to be genuine, would prevail over the reasons justifying the refusal to disclose those standards.
- 101 First, aside from general claims as to the need to make ‘EU law’ accessible, the applicants do not substantiate the specific grounds which would justify the disclosure of the requested harmonised standards in the present case. In particular, they do not explain to what extent the disclosure of those harmonised standards ought to prevail over the protection of the commercial interests of CEN or its national members. In that regard, it must be emphasised that, as is apparent from the case-law cited in paragraph 98 above, while the burden of proof, when applying the exception in the first indent of Article 4(2) of Regulation No 1049/2001, rests on the EU institution invoking that exception, in so far as the last clause of Article 4(2) of that regulation is concerned, it is, by contrast, for the party alleging an overriding public interest, within the meaning of that clause, to prove that interest.
- 102 Secondly, even if the applicants’ general allegations concerning the existence of a public interest in the guarantee of access to harmonised standards that is freely available and without charge were to be accepted, the disclosure of the requested harmonised standards in the present case is unlikely to serve that interest. Irrespective of the nature of the right to which their design gives rise for their creators, access to harmonised standards remains subject to restrictions, such as the payment of the fees established by the national standardisation bodies on the basis of the system of European standardisation or the consultation for free in

certain libraries. It is thus necessary to endorse the Commission’s assessment that the public interest in ensuring the functioning of the European standardisation system, the aim of which is to promote the free movement of goods while guaranteeing an equivalent minimum level of safety in all European countries, prevails over the guarantee of freely available access to the harmonised standards without charge.

- 103 In the second place, the approach chosen by the applicants, which seek court-mandated freely available access to the harmonised standards that is without charge by means of the mechanism established by Regulation No 1049/2001, without however challenging the European standardisation system, cannot be regarded as appropriate. Indeed, Regulation No 1025/2012 first, as noted in paragraph 53 above, expressly provides for a system of publication which is limited to the references of harmonised standards only and, secondly, as stated in paragraph 19 above, allows for paid access to those standards for those wishing to benefit from the presumption of conformity attached to them.
- 104 In that regard, it should be noted that the Commission found in the confirmatory decision that there was no overriding public interest justifying the disclosure of the requested harmonised standards under the last clause of Article 4(2) of Regulation No 1049/2001. According to the Commission, the judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821), relied on by the applicants in support of their argument concerning the existence of an overriding public interest in ensuring accessibility to the law, does not create an obligation of proactive publication of the harmonised standards in the Official Journal, nor does it establish an automatic overriding public interest in their disclosure.
- 105 That assessment by the Commission is not vitiated by any error.
- 106 The applicants’ argument is based on inferences which they themselves draw from the classification of harmonised standards as ‘EU law’ by the Court of Justice in its judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821). Accordingly, they submit, in essence, that the fact that harmonised standards belong to EU law ‘result[s] in the constitutional imperative to freely access the Requested Standards’.
- 107 Apart from the fact that the applicants do not state the exact source of a ‘constitutional principle’ which would require access that is freely available and free of charge to harmonised standards, they do not in any way explain the reason why those standards should be subject to the requirement of publication and accessibility attached to a ‘law’, inasmuch as those standards are not mandatory, they produce the legal effects attached to them solely with regard to the persons concerned, and they may be consulted for free in certain libraries in the Member States.
- 108 The first part of the second plea in law must therefore be rejected.

(c) The second part: error of law relating to the existence of an overriding public interest owing to the obligation of transparency in environmental matters

109 The applicants submit, first, that the requested harmonised standards contain environmental information, which results in an overriding public interest justifying their disclosure, in accordance with Article 5(3)(b) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Aarhus Convention'), as implemented by Article 4(2)(a) of Regulation No 1367/2006. Secondly, the harmonised standards concern emissions into the environment and, as a result, there is an overriding public interest in their disclosure, for the purpose of Article 6(1) of that same regulation.

110 The Commission, supported by the interveners, contests the applicants' arguments.

111 In that regard, it should be observed that, as with Regulation No 1049/2001, the objective of Regulation No 1367/2006, as provided for in Article 1 thereof, is to ensure the widest possible systematic availability and dissemination of environmental information held by the institutions and bodies of the European Union.

112 In order to examine the applicants' arguments relating to the existence of an overriding public interest owing to the obligation of transparency in environmental matters, it is necessary to ascertain, assuming that the requested harmonised standards contain environmental information, whether that would have sufficed to conclude that there was an overriding public interest in their disclosure. Next, the Court must, if necessary, analyse whether the harmonised standards in question concern emissions into the environment, so that, in accordance with Article 6(1) of Regulation No 1367/2006, an overriding public interest in their disclosure would be deemed to exist.

(1) The existence of an overriding public interest in cases of requests for environmental information

113 The applicants argue, in essence, that pursuant to Article 5(3)(b) of the Aarhus Convention, as implemented by Article 4(2)(a) of Regulation No 1367/2006, the Commission was required actively to disseminate the requested harmonised standards.

114 In that regard, it should be noted that both Article 5(3)(b) of the Aarhus Convention and Article 4(2)(a) of Regulation No 1367/2006 govern the obligation actively to disseminate information on the environment, without establishing an 'overriding public interest' in that regard.

- 115 It must be pointed out, as the Commission does, that the first sentence of Article 6(1) of Regulation No 1367/2006 is the only provision in that regulation which contains a clear and specific reference to an ‘overriding public interest’ and that it concerns only situations in which the information requested relates to emissions into the environment.
- 116 In addition, the second sentence of Article 6(1) of Regulation No 1367/2006 refers only to a ‘public interest’ in disclosure and not to an ‘overriding’ public interest within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001. It cannot therefore be inferred from the second sentence of Article 6(1) of Regulation No 1367/2006 that there is always an overriding public interest in the disclosure of environmental information (see, to that effect and by analogy, judgment of 23 September 2015, *ClientEarth and International Chemical Secretariat v ECHA*, T-245/11, EU:T:2015:675, paragraph 189).
- 117 It follows from the foregoing considerations that an overriding public interest in the disclosure of the requested harmonised standards cannot be inferred from the mere fact, assuming that fact were established, that they contain environmental information.
- 118 In any event, as is apparent from Article 5(3)(b) of the Aarhus Convention, as implemented by Article 4(2)(a) of Regulation No 1367/2006, the obligation actively to disseminate environmental information is limited to texts of EU legislation on the environment or relating to it, and to policies, plans and programmes relating to the environment. While they form part of EU law, the requested harmonised standards do not, however, fall within the category of EU legislation, which is strictly circumscribed by the Treaties and comes within the exclusive competence of the EU’s own institutions entrusted with powers in that regard. It follows that the applicants’ argument that the Commission was required actively to disseminate the requested harmonised standards is based on the erroneous premiss that those harmonised standards fall within the category of ‘EU legislation on the environment or relating to it’.
- 119 Furthermore, both the Aarhus Convention and Regulation No 1367/2006 provide for public access to environmental information either on request or as part of active dissemination by the authorities and institutions concerned. However, since the authorities and institutions may refuse a request for access to information where that information falls within the scope of a number of exceptions, it necessarily follows that they are under no obligation actively to disseminate that information. Were matters otherwise, the exceptions concerned would cease to serve any useful purpose, which is manifestly incompatible with the spirit and the letter of the Aarhus Convention and that regulation (see, to that effect and by analogy, judgment of 13 September 2013, *ClientEarth v Commission*, T-111/11, EU:T:2013:482, paragraph 128).

(2) *The existence of information relating to emissions into the environment within the meaning of Article 6(1) of Regulation No 1367/2006*

- 120 It is apparent, in essence, from Article 1(1)(b) of Regulation No 1367/2006, read in conjunction with Article 2(1)(d) of that regulation, that the objective of that regulation is to guarantee the right of access to information on factors, such as emissions, affecting or likely to affect the elements of the environment referred to in Article 2(1)(d)(i) of that regulation, including the air, water and soil.
- 121 In that regard, the first sentence of Article 6(1) of Regulation No 1367/2006 lays down a legal presumption that the disclosure of ‘information ... [which] relates to emissions into the environment’, with the exception of information relating to investigations, is deemed to be in the overriding public interest, compared with the interest in protecting the commercial interests of a particular natural or legal person, with the result that the protection of those commercial interests may not be invoked to preclude the disclosure of that information. By establishing such a presumption, that article merely allows actual implementation of the principle that the public should have the widest possible access to information held by the institutions and bodies of the European Union (see, to that effect, judgment of 23 November 2016, *Commission v Stichting Greenpeace Nederland and PAN Europe*, C-673/13 P, EU:C:2016:889, paragraph 54).
- 122 However, it follows from the wording of the first sentence of Article 6(1) of Regulation No 1367/2006 that that provision concerns information which ‘relates to emissions into the environment’, that is to say information which concerns or relates to such emissions and not information with a direct or indirect link to emissions into the environment. That interpretation is confirmed by point (d) of the first subparagraph of Article 4(4) of the Aarhus Convention, which refers to ‘information on emissions’ (judgment of 23 November 2016, *Commission v Stichting Greenpeace Nederland and PAN Europe*, C-673/13 P, EU:C:2016:889, paragraph 78).
- 123 In the light of the objective set out in the first sentence of Article 6(1) of Regulation No 1367/2006 of ensuring a general principle of access to ‘information ... [which] relates to emissions into the environment’, that concept must be understood to include, inter alia, data that will allow the public to know what is actually released into the environment or what, it may be foreseen, will be released into the environment under normal or realistic conditions of use of the product or substance in question, namely those under which the authorisation to place that product or substance on the market was granted and which prevail in the area where that product or substance is intended to be used. Consequently, that concept must be interpreted as covering, inter alia, information concerning the nature, composition, quantity, date and place of the actual or foreseeable emissions, under such conditions, from that product or substance (judgment of 23 November 2016, *Commission v Stichting Greenpeace Nederland and PAN Europe*, C-673/13 P, EU:C:2016:889, paragraph 79).

- 124 It is also necessary to include in the concept of ‘information [which] relates to emissions into the environment’ information enabling the public to check whether the assessment of actual or foreseeable emissions, on the basis of which the competent authority authorised the product or substance in question, is correct, and the data relating to the effects of those emissions on the environment. It is apparent, in essence, from recital 2 of Regulation No 1367/2006 that the purpose of access to environmental information provided by that regulation is, inter alia, to promote more effective public participation in the decision-making process, thereby increasing, on the part of the competent bodies, the accountability of decision-making and contributing to public awareness and support for the decisions taken. In order to be able to ensure that the decisions taken by the competent authorities in environmental matters are justified and to participate effectively in decision-making in environmental matters, the public must have access to information enabling it to ascertain whether the emissions were correctly assessed and must be given the opportunity reasonably to understand how the environment could be affected by those emissions (judgment of 23 November 2016, *Commission v Stichting Greenpeace Nederland and PAN Europe*, C-673/13 P, EU:C:2016:889, paragraph 80).
- 125 On the other hand, while it is not necessary to apply a restrictive interpretation of the concept of ‘information [which] relates to emissions into the environment’, that concept may not, in any event, include information containing any kind of link, even direct, to emissions into the environment. If that concept were interpreted as covering such information, it would to a large extent deprive the concept of ‘environmental information’ as defined in Article 2(1)(d) of Regulation No 1367/2006 of any meaning. Such an interpretation would deprive of any practical effect the possibility, laid down in the first indent of Article 4(2) of Regulation No 1049/2001, for the institutions to refuse to disclose environmental information on the ground, inter alia, that such disclosure would have an adverse effect on the protection of the commercial interests of a particular natural or legal person and would jeopardise the balance which the EU legislature intended to maintain between the objective of transparency and the protection of those interests. It would also constitute a disproportionate interference with the protection of business secrecy ensured by Article 339 TFEU (see, to that effect, judgment of 23 November 2016, *Commission v Stichting Greenpeace Nederland and PAN Europe*, C-673/13 P, EU:C:2016:889, paragraph 81).
- 126 In addition, while the concept of ‘information [which] relates to emissions into the environment’ within the meaning of the first sentence of Article 6(1) of Regulation No 1367/2006, cannot be limited to information concerning emissions actually released into the environment, it does not include however information relating to hypothetical emissions (see, to that effect, judgment of 23 November 2016, *Commission v Stichting Greenpeace Nederland and PAN Europe*, C-673/13 P, EU:C:2016:889, paragraph 72 and the case-law cited and paragraph 73).

- 127 In the present case, according to the Commission, which is not contradicted on this point by the applicants, the requested harmonised standards merely describe tests and methods designed to comply with safety requirements, before certain products are placed on the market. They do not contain any information affecting or likely to affect the elements of the environment referred to in Article 2(1)(d)(i) of Regulation No 1367/2006, but have information on the best ways to make toys safer and to avoid some of the effects of nickel where it is in prolonged contact with the skin.
- 128 As the Commission rightly submits, the mere fact that the requested harmonised standards relate in part to substances and contain some information on the maximum amounts of chemical mixtures and substances certainly does not create a sufficient link with actual or foreseeable emissions for the purposes of the case-law referred to in paragraphs 123 and 124 above.
- 129 It follows from the foregoing that the requested harmonised standards do not come within the sphere of ‘information [which] relates to emissions into the environment’ so as to be subject to the application of the presumption laid down in the first sentence of Article 6(1) of Regulation No 1367/2006.
- 130 The second part of the second plea in law must therefore be dismissed, as must, therefore, that plea in its entirety and the action.

IV. Costs

- 131 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings.
- 132 In this case, since the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by the Commission, in accordance with the form of order sought by it.
- 133 Lastly, under Article 138(3) of the Rules of Procedure, the Court may order an intervener other than those referred to in paragraphs 1 and 2 of that article to bear its own costs. In the present case, CEN, the UNE, the ASRO, the AFNOR, ASI, the BSI, the NBN, DS, the DIN, the NEN, the SNV, SN, the SFS, the SIS and the ISS are to bear their own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber, Extended Composition)

hereby:

- 1. Dismisses the action;**

2. **Orders Public.Resource.Org, Inc. and Right to Know CLG to bear their own costs and to pay those incurred by the European Commission;**
3. **Orders the European Committee for Standardisation (CEN), the Asociación Española de Normalización (UNE), the Asociația de Standardizare din România (ASRO), the Association française de normalisation (AFNOR), Austrian Standards International (ASI), the British Standards Institution (BSI), the Bureau de normalisation/Bureau voor Normalisatie (NBN), Dansk Standard (DS), the Deutsches Institut für Normung eV (DIN), the Koninklijk Nederlands Normalisatie Instituut (NEN), the Schweizerische Normen-Vereinigung (SNV), Standard Norge (SN), the Suomen Standardisoimisliitto ry (SFS), the Svenska institutet för standarder (SIS) and the Institut za standardizaciju Srbije (ISS) to bear their own costs.**

Papasavvas

Spielmann

Öberg

Spineanu-Matei

Norkus

Delivered in open court in Luxembourg on 14 July 2021.

E. Coulon

S. Papasavvas

Registrar

President

Annex

Asociación Española de Normalización (UNE), established in Madrid (Spain),

Asociația de Standardizare din România (ASRO), established in Bucharest (Romania),

Association française de normalisation (AFNOR), established in La plaine Saint Denis (France),

Austrian Standards International (ASI), established in Vienna (Austria),

British Standards Institution (BSI), established in London (United Kingdom),

Bureau de normalisation/Bureau voor Normalisatie (NBN), established in Brussels,

Dansk Standard (DS), established in Copenhagen (Denmark),

Deutsches Institut für Normung eV (DIN), established in Berlin (Germany),

Koninklijk Nederlands Normalisatie Instituut (NEN), established in Delft (Netherlands),

Schweizerische Normen-Vereinigung (SNV), established in Winterthur (Switzerland),

Standard Norge (SN), established in Oslo (Norway),

Suomen Standardisoimisliitto ry (SFS), established in Helsinki (Finland),

Svenska institutet för standarder (SIS), established in Stockholm (Sweden),

Institut za standardizaciju Srbije (ISS), established in Belgrade (Serbia).

ANNEX A2

(Slip Opinion)

OCTOBER TERM, 2019

1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GEORGIA ET AL. *v.* PUBLIC.RESOURCE.ORG, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

No. 18–1150. Argued December 2, 2019—Decided April 27, 2020

The Copyright Act grants monopoly protection for “original works of authorship.” 17 U. S. C. §102(a). Under the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of the works they create in the course of their official duties.

The State of Georgia has one official code—the Official Code of Georgia Annotated (OCGA). That Code includes the text of every Georgia statute currently in force, as well as a set of non-binding annotations that appear beneath each statutory provision. The annotations typically include summaries of judicial opinions construing each provision, summaries of pertinent opinions of the state attorney general, and a list of related law review articles and other reference materials. The OCGA is assembled by the Code Revision Commission, a state entity composed mostly of legislators, funded through legislative branch appropriations, and staffed by the Office of Legislative Counsel.

The annotations in the current OCGA were produced by Matthew Bender & Co., Inc., a division of the LexisNexis Group, pursuant to a work-for-hire agreement with the Commission. Under the agreement, Lexis drafts the annotations under the supervision of the Commission, which specifies what the annotations must include in exacting detail. The agreement also states that any copyright in the OCGA vests in the State of Georgia, acting through the Commission.

Respondent Public.Resource.Org (PRO), a nonprofit dedicated to facilitating public access to government records and legal materials, posted the OCGA online and distributed copies to various organizations and Georgia officials. After sending PRO several cease-and-desist letters, the Commission sued PRO for infringing its copyright in the OCGA annotations. PRO counterclaimed, seeking a declaratory judgment that the entire OCGA, including the annotations, fell in the

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public domain. The District Court sided with the Commission, holding that the annotations were eligible for copyright protection because they had not been enacted into law. The Eleventh Circuit reversed, rejecting the Commission’s copyright assertion under the government edicts doctrine.

Held: The OCGA annotations are ineligible for copyright protection. Pp. 5–18.

(a) The government edicts doctrine developed from a trio of 19th-century cases. In *Wheaton v. Peters*, 8 Pet. 591, the Court held that no reporter can have a copyright in the Court’s opinions and that the Justices cannot confer such a right on any reporter. In *Banks v. Manchester*, 128 U. S. 244, the Court held that judges could not assert copyright in “whatever work they perform in their capacity as judges”—be it “the opinion or decision, the statement of the case and the syllabus or the head note.” *Id.*, at 253. Finally, in *Callaghan v. Myers*, 128 U. S. 617, the Court reiterated that an official reporter cannot hold a copyright interest in opinions created by judges. But, confronting an issue not addressed in *Wheaton* or *Banks*, the Court upheld the reporter’s copyright interest in several explanatory materials that the reporter had created himself because they came from an author who had no authority to speak with the force of law.

The animating principle behind the government edicts doctrine is that no one can own the law. The doctrine gives effect to that principle in the copyright context through construction of the statutory term “author.” For purposes of the Copyright Act, judges cannot be the “author[s]” of “whatever work they perform in their capacity” as lawmakers. *Banks*, 128 U. S., at 253. Because legislators, like judges, have the authority to make law, it follows that they, too, cannot be “authors.” And, as with judges, the doctrine applies to whatever work legislators perform in their capacity as legislators, including explanatory and procedural materials they create in the discharge of their legislative duties. Pp. 5–9.

(b) Applying that framework, Georgia’s annotations are not copyrightable. First, the author of the annotations qualifies as a legislator. Under the Copyright Act, the sole “author” of the annotations is the Commission, 17 U. S. C. §201(b), which functions as an arm of the Georgia Legislature in producing the annotations. Second, the Commission creates the annotations in the discharge of its legislative duties. Pp. 9–11.

(c) Georgia argues that excluding the OCGA annotations from copyright protection conflicts with the text of the Copyright Act. First, it notes that §101 lists “annotations” among the kinds of works eligible for copyright protection. That provision, however, refers only to “annotations . . . which . . . represent an original work of *authorship*.”

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(Emphasis added.) Georgia’s annotations do not fit that description because they are prepared by a legislative body that cannot be deemed the “author” of the works it creates in its official capacity. Second, Georgia draws a negative inference from the fact that the Act excludes from copyright protection works prepared by Federal Government officials, without establishing a similar rule for State officials. §§101, 105. That rule, however, applies to all federal officials, regardless of the nature and scope of their duties. It does not suggest an intent to displace the much narrower government edicts doctrine with respect to the States.

Moving on from the text, Georgia invokes what it views as the official position of the Copyright Office, as reflected in the Compendium of U. S. Copyright Office Practices. The Compendium, however, is a non-binding administrative manual and is largely consistent with this Court’s position. Georgia also appeals to copyright policy, but such requests should be addressed to Congress, not the courts.

Georgia attempts to frame the government edicts doctrine to focus exclusively on whether a particular work has the force of law. But that understanding cannot be squared with precedent—especially *Banks*. Moreover, Georgia’s conception of the doctrine as distinguishing between different categories of content with different effects has less of a textual footing than the traditional formulation, which focuses on the identity of the author. Georgia’s characterization of the OCGA annotations as non-binding and non-authoritative undersells the practical significance of the annotations to litigants and citizens. And its approach would logically permit States to hide all non-binding judicial and legislative work product—including dissents and legislative history—behind a paywall. Pp. 11–18.

906 F. 3d 1229, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, and in which BREYER, J., joined as to all but Part II–A and footnote 6. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined.

Cite as: 590 U. S. ____ (2020)

1

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 18–1150

GEORGIA, ET AL., PETITIONERS *v.*
PUBLIC.RESOURCE.ORG, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[April 27, 2020]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Copyright Act grants potent, decades-long monopoly protection for “original works of authorship.” 17 U. S. C. §102(a). The question in this case is whether that protection extends to the annotations contained in Georgia’s official annotated code.

We hold that it does not. Over a century ago, we recognized a limitation on copyright protection for certain government work product, rooted in the Copyright Act’s “authorship” requirement. Under what has been dubbed the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties.

We have previously applied that doctrine to hold that non-binding, explanatory legal materials are not copyrightable when created *by judges* who possess the authority to make and interpret the law. See *Banks v. Manchester*, 128 U. S. 244 (1888). We now recognize that the same logic applies to non-binding, explanatory legal materials created *by*

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a legislative body vested with the authority to make law. Because Georgia’s annotations are authored by an arm of the legislature in the course of its legislative duties, the government edicts doctrine puts them outside the reach of copyright protection.

I

A

The State of Georgia has one official code—the “Official Code of Georgia Annotated,” or OCGA. The first page of each volume of the OCGA boasts the State’s official seal and announces to readers that it is “Published Under Authority of the State.”

The OCGA includes the text of every Georgia statute currently in force, as well as various non-binding supplementary materials. At issue in this case is a set of annotations that appear beneath each statutory provision. The annotations generally include summaries of judicial decisions applying a given provision, summaries of any pertinent opinions of the state attorney general, and a list of related law review articles and similar reference materials. In addition, the annotations often include editor’s notes that provide information about the origins of the statutory text, such as whether it derives from a particular judicial decision or resembles an older provision that has been construed by Georgia courts. See, *e.g.*, OCGA §§51–1–1, 53–4–2 (2019).

The OCGA is assembled by a state entity called the Code Revision Commission. In 1977, the Georgia Legislature established the Commission to recodify Georgia law for the first time in decades. The Commission was (and remains) tasked with consolidating disparate bills into a single Code for reenactment by the legislature and contracting with a third party to produce the annotations. A majority of the Commission’s 15 members must be members of the Georgia

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Senate or House of Representatives. The Commission receives funding through appropriations “provided for the legislative branch of state government.” OCGA §28–9–2(c) (2018). And it is staffed by the Office of Legislative Counsel, which is obligated by statute to provide services “for the legislative branch of government.” §§28–4–3(c)(4), 28–9–4. Under the Georgia Constitution, the Commission’s role in compiling the statutory text and accompanying annotations falls “within the sphere of legislative authority.” *Harrison Co. v. Code Revision Comm’n*, 244 Ga. 325, 330, 260 S. E. 2d 30, 34 (1979).

Each year, the Commission submits its proposed statutory text and accompanying annotations to the legislature for approval. The legislature then votes to do three things: (1) “enact[]” the “statutory portion of the codification of Georgia laws”; (2) “merge[]” the statutory portion “with [the] annotations”; and (3) “publish[]” the final merged product “by authority of the state” as “the ‘Official Code of Georgia Annotated.’” OCGA §1–1–1 (2019); see *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 906 F. 3d 1229, 1245, 1255 (CA11 2018); Tr. of Oral Arg. 8.

The annotations in the current OCGA were prepared in the first instance by Matthew Bender & Co., Inc., a division of the LexisNexis Group, pursuant to a work-for-hire agreement with the Commission. The agreement between Lexis and the Commission states that any copyright in the OCGA vests exclusively in “the State of Georgia, acting through the Commission.” App. 567. Lexis and its army of researchers perform the lion’s share of the work in drafting the annotations, but the Commission supervises that work and specifies what the annotations must include in exacting detail. See 906 F. 3d, at 1243–1244; App. 269–278, 286–427 (Commission specifications). Under the agreement, Lexis enjoys the exclusive right to publish, distribute, and sell the OCGA. In exchange, Lexis has agreed to limit the price it may charge for the OCGA and to make an unannotated

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version of the statutory text available to the public online for free. A hard copy of the complete OCGA currently retails for \$412.00.

B

Public.Resource.Org (PRO) is a nonprofit organization that aims to facilitate public access to government records and legal materials. Without permission, PRO posted a digital version of the OCGA on various websites, where it could be downloaded by the public without charge. PRO also distributed copies of the OCGA to various organizations and Georgia officials.

In response, the Commission sent PRO several cease-and-desist letters asserting that PRO's actions constituted unlawful copyright infringement. When PRO refused to halt its distribution activities, the Commission sued PRO on behalf of the Georgia Legislature and the State of Georgia for copyright infringement. The Commission limited its assertion of copyright to the annotations described above; it did not claim copyright in the statutory text or numbering. PRO counterclaimed, seeking a declaratory judgment that the entire OCGA, including the annotations, fell in the public domain.

The District Court sided with the Commission. The Court acknowledged that the annotations in the OCGA presented "an unusual case because most official codes are not annotated and most annotated codes are not official." *Code Revision Comm'n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350, 1356 (ND Ga. 2017). But, ultimately, the Court concluded that the annotations were eligible for copyright protection because they were "not enacted into law" and lacked "the force of law." *Ibid.* In light of that conclusion, the Court granted partial summary judgment to the Commission and entered a permanent injunction requiring PRO to cease its distribution activities and to remove the digital copies of the OCGA from the internet.

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The Eleventh Circuit reversed. 906 F. 3d 1229. The Court began by reviewing the three 19th-century cases in which we articulated the government edicts doctrine. See *Wheaton v. Peters*, 8 Pet. 591 (1834); *Banks v. Manchester*, 128 U. S. 244 (1888); *Callaghan v. Myers*, 128 U. S. 617 (1888). The Court understood those cases to establish a “rule” based on an interpretation of the statutory term “author” that “works created by courts in the performance of their official duties did not belong to the judges” but instead fell “in the public domain.” 906 F. 3d, at 1239. In the Court’s view, that rule “derive[s] from first principles about the nature of law in our democracy.” *Ibid.* In a democracy, the Court reasoned, “the People” are “the constructive authors” of the law, and judges and legislators are merely “draftsmen . . . exercising delegated authority.” *Ibid.* The Court therefore deemed the “ultimate inquiry” to be whether a work is “attributable to the constructive authorship of the People.” *Id.*, at 1242. The Court identified three factors to guide that inquiry: “the identity of the public official who created the work; the nature of the work; and the process by which the work was produced.” *Id.*, at 1254. The Court found that each of those factors cut in favor of treating the OCGA annotations as government edicts authored by the People. It therefore rejected the Commission’s assertion of copyright, vacated the injunction against PRO, and directed that judgment be entered for PRO.

We granted certiorari. 588 U. S. ____ (2019).

II

We hold that the annotations in Georgia’s Official Code are ineligible for copyright protection, though for reasons distinct from those relied on by the Court of Appeals. A careful examination of our government edicts precedents reveals a straightforward rule based on the identity of the author. Under the government edicts doctrine, judges—and, we now confirm, legislators—may not be considered

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the “authors” of the works they produce in the course of their official duties as judges and legislators. That rule applies regardless of whether a given material carries the force of law. And it applies to the annotations here because they are authored by an arm of the legislature in the course of its official duties.

A

We begin with precedent. The government edicts doctrine traces back to a trio of cases decided in the 19th century. In this Court’s first copyright case, *Wheaton v. Peters*, 8 Pet. 591 (1834), the Court’s third Reporter of Decisions, Wheaton, sued the fourth, Peters, unsuccessfully asserting a copyright interest in the Justices’ opinions. *Id.*, at 617 (argument). In Wheaton’s view, the opinions “must have belonged to some one” because “they were new, original,” and much more “elaborate” than law or custom required. *Id.*, at 615. Wheaton argued that the Justices were the authors and had assigned their ownership interests to him through a tacit “gift.” *Id.*, at 614. The Court unanimously rejected that argument, concluding that “no reporter has or can have any copyright in the written opinions delivered by this court” and that “the judges thereof cannot confer on any reporter any such right.” *Id.*, at 668 (opinion).

That conclusion apparently seemed too obvious to adorn with further explanation, but the Court provided one a half century later in *Banks v. Manchester*, 128 U. S. 244 (1888). That case concerned whether Wheaton’s state-court counterpart, the official reporter of the Ohio Supreme Court, held a copyright in the judges’ opinions and several non-binding explanatory materials prepared by the judges. *Id.*, at 249–251. The Court concluded that he did not, explaining that “the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case and the syllabus or head note” cannot “be regarded as their author or their proprietor, in the sense of [the Copyright Act].” *Id.*,

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at 253. Pursuant to “a judicial *consensus*” dating back to *Wheaton*, judges could not assert copyright in “whatever work they perform in their capacity as judges.” *Banks*, 128 U. S. at 253 (emphasis in original). Rather, “[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all.” *Ibid.* (citing *Nash v. Lathrop*, 142 Mass. 29, 6 N. E. 559 (1886)).

In a companion case decided later that Term, *Callaghan v. Myers*, 128 U. S. 617 (1888), the Court identified an important limiting principle. As in *Wheaton* and *Banks*, the Court rejected the claim that an official reporter held a copyright interest in the judges’ opinions. But, resolving an issue not addressed in *Wheaton* and *Banks*, the Court upheld the reporter’s copyright interest in several explanatory materials that the reporter had created himself: headnotes, syllabi, tables of contents, and the like. *Callaghan*, 128 U. S., at 645, 647. Although these works mirrored the judge-made materials rejected in *Banks*, they came from an author who had no authority to speak with the force of law. Because the reporter was not a judge, he was free to “obtain[] a copyright” for the materials that were “the result of his [own] intellectual labor.” 128 U. S., at 647.

These cases establish a straightforward rule: Because judges are vested with the authority to make and interpret the law, they cannot be the “author” of the works they prepare “in the discharge of their judicial duties.” *Banks*, 128 U. S., at 253. This rule applies both to binding works (such as opinions) and to non-binding works (such as headnotes and syllabi). *Ibid.* It does not apply, however, to works created by government officials (or private parties) who lack the authority to make or interpret the law, such as court reporters. Compare *ibid.* with *Callaghan*, 128 U. S., at 647.

The animating principle behind this rule is that no one can own the law. “Every citizen is presumed to know the law,” and “it needs no argument to show . . . that all should

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have free access” to its contents. *Nash*, 142 Mass., at 35, 6 N. E., at 560 (cited by *Banks*, 128 U. S., at 253–254). Our cases give effect to that principle in the copyright context through construction of the statutory term “author.” *Id.*, at 253.¹ Rather than attempting to catalog the materials that constitute “the law,” the doctrine bars the officials responsible for creating the law from being considered the “author[s]” of “*whatever work* they perform in their capacity” as lawmakers. *Ibid.* (emphasis added). Because these officials are generally empowered to make and interpret law, their “whole work” is deemed part of the “authentic exposition and interpretation of the law” and must be “free for publication to all.” *Ibid.*

If judges, acting as judges, cannot be “authors” because of their authority to make and interpret the law, it follows that legislators, acting as legislators, cannot be either. Courts have thus long understood the government edicts doctrine to apply to legislative materials. See, e.g., *Nash*, 142 Mass., at 35, 6 N. E., at 560 (judicial opinions and statutes stand “on substantially the same footing” for purposes of the government edicts doctrine); *Howell v. Miller*, 91 F. 129, 130–131, 137–138 (CA6 1898) (Harlan, J., Circuit Justice, joined by then-Circuit Judge Taft) (analyzing statutes and supplementary materials under *Banks* and *Callaghan* and concluding that the materials were copyrightable because they were prepared by a private compiler).

Moreover, just as the doctrine applies to “whatever work [judges] perform in their capacity as judges,” *Banks*, 128

¹The Copyright Act of 1790 granted copyright protection to “the author and authors” of qualifying works. Act of May 31, 1790, §1, 1 Stat. 124. This author requirement appears in the current Copyright Act at §102(a), which limits protection to “original works of *authorship*.” 17 U. S. C. §102(a) (emphasis added); see also §201(a) (copyright “vests initially in the author or authors of the work”).

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U. S., at 253, it applies to whatever work legislators perform in their capacity as legislators. That of course includes final legislation, but it also includes explanatory and procedural materials legislators create in the discharge of their legislative duties. In the same way that judges cannot be the authors of their headnotes and syllabi, legislators cannot be the authors of (for example) their floor statements, committee reports, and proposed bills. These materials are part of the “whole work done by [legislators],” so they must be “free for publication to all.” *Ibid.*

Under our precedents, therefore, copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties.

B

1

Applying that framework, Georgia’s annotations are not copyrightable. The first step is to examine whether their purported author qualifies as a legislator.

As we have explained, the annotations were prepared in the first instance by a private company (Lexis) pursuant to a work-for-hire agreement with Georgia’s Code Revision Commission. The Copyright Act therefore deems the Commission the sole “author” of the work. 17 U. S. C. §201(b). Although Lexis expends considerable effort preparing the annotations, for purposes of copyright that labor redounds to the Commission as the statutory author. Georgia agrees that the author is the Commission. Brief for Petitioners 25.

The Commission is not identical to the Georgia Legislature, but functions as an arm of it for the purpose of producing the annotations. The Commission is created by the legislature, for the legislature, and consists largely of legislators. The Commission receives funding and staff designated by law for the legislative branch. Significantly, the annotations the Commission creates are approved by the legislature before being “merged” with the statutory text

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and published in the official code alongside that text at the legislature's direction. OCGA §1-1-1; see 906 F. 3d, at 1245, 1255; Tr. of Oral Arg. 8.

If there were any doubt about the link between the Commission and the legislature, the Georgia Supreme Court has dispelled it by holding that, under the Georgia Constitution, “the work of the Commission; *i.e.*, selecting a publisher and contracting for and supervising the codification of the laws enacted by the General Assembly, including court interpretations thereof, *is within the sphere of legislative authority.*” *Harrison Co.*, 244 Ga., at 330, 260 S. E. 2d, at 34 (emphasis added). That holding is not limited to the Commission's role in codifying the statutory text. The Commission's “legislative authority” specifically includes its “codification of . . . court interpretations” of the State's laws. *Ibid.* Thus, as a matter of state law, the Commission wields the legislature's authority when it works with Lexis to produce the annotations. All of this shows that the Commission serves as an extension of the Georgia Legislature in preparing and publishing the annotations. And it helps explain why the Commission brought this suit asserting copyright in the annotations “on behalf of and for the benefit of” the Georgia Legislature and the State of Georgia. App. 20.²

2

The second step is to determine whether the Commission creates the annotations in the “discharge” of its legislative “duties.” *Banks*, 128 U. S., at 253. It does. Although the annotations are not enacted into law through bicameralism and presentment, the Commission's preparation of the an-

²JUSTICE THOMAS does not dispute that the Commission is an extension of the legislature; he instead faults us for highlighting the multiple features of the Commission that make clear that this is so. See *post*, at 16 (dissenting opinion).

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notations is under Georgia law an act of “legislative authority,” *Harrison Co.*, 244 Ga., at 330, 260 S. E. 2d, at 34, and the annotations provide commentary and resources that the legislature has deemed relevant to understanding its laws. Georgia and JUSTICE GINSBURG emphasize that the annotations do not purport to provide authoritative explanations of the law and largely summarize other materials, such as judicial decisions and law review articles. See *post*, at 3–4 (dissenting opinion). But that does not take them outside the exercise of legislative duty by the Commission and legislature. Just as we have held that the “statement of the case and the syllabus or head note” prepared by judges fall within the “work they perform in their capacity as judges,” *Banks*, 128 U. S., at 253, so too annotations published by legislators alongside the statutory text fall within the work legislators perform in their capacity as legislators.

In light of the Commission’s role as an adjunct to the legislature and the fact that the Commission authors the annotations in the course of its legislative responsibilities, the annotations in Georgia’s Official Code fall within the government edicts doctrine and are not copyrightable.

III

Georgia resists this conclusion on several grounds. At the outset, Georgia advances two arguments for why, in its view, excluding the OCGA annotations from copyright protection conflicts with the text of the Copyright Act. Both are unavailing.

First, Georgia notes that §101 of the Act specifically lists “annotations” among the kinds of works eligible for copyright protection. But that provision refers only to “annotations . . . which . . . represent an original work of *authorship*.” 17 U. S. C. §101 (emphasis added). The whole point of the government edicts doctrine is that judges and legislators cannot serve as authors when they produce works in their official capacity. While the reference to “annotations”

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in §101 may help explain why supplemental, explanatory materials are copyrightable when prepared by a private party, or a non-lawmaking official like the reporter in *Callaghan*, it does not speak to whether those same materials are copyrightable when prepared by a judge or a legislator. In the same way that judicial materials are ineligible for protection even though they plainly qualify as “[l]iterary works . . . expressed in words,” *ibid.*, legislative materials are ineligible for protection even if they happen to fit the description of otherwise copyrightable “annotations.”

Second, Georgia draws a negative inference from the fact that the Act excludes from copyright protection “work[s] prepared by an officer or employee of the United States Government as part of that person’s official duties” and does not establish a similar rule for the States. §101; see also §105. But the bar on copyright protection for federal works sweeps much more broadly than the government edicts doctrine does. That bar applies to works created by all federal “officer[s] or employee[s],” without regard for the nature of their position or scope of their authority. Whatever policy reasons might justify the Federal Government’s decision to forfeit copyright protection for its own proprietary works, that federal rule does not suggest an intent to displace the much narrower government edicts doctrine with respect to the States. That doctrine does not apply to non-lawmaking officials, leaving States free to assert copyright in the vast majority of expressive works they produce, such as those created by their universities, libraries, tourism offices, and so on.

More generally, Georgia suggests that we should resist applying our government edicts precedents to the OCGA annotations because our 19th-century forebears interpreted the statutory term author by reference to “public policy”—an approach that Georgia believes is incongruous with the “modern era” of statutory interpretation. Brief for Petitioners 21 (internal quotation marks omitted). But we

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are particularly reluctant to disrupt precedents interpreting language that Congress has since reenacted. As we explained last Term in *Helsinn Healthcare S. A. v. Teva Pharmaceuticals USA, Inc.*, 586 U. S. ____ (2019), when Congress “adopt[s] the language used in [an] earlier act,” we presume that Congress “adopted also the construction given by this Court to such language, and made it a part of the enactment.” *Id.*, at ____ (slip op., at 7) (quoting *Shapiro v. United States*, 335 U. S. 1, 16 (1948)). A century of cases have rooted the government edicts doctrine in the word “author,” and Congress has repeatedly reused that term without abrogating the doctrine. The term now carries this settled meaning, and “critics of our ruling can take their objections across the street, [where] Congress can correct any mistake it sees.” *Kimble v. Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015).³

Moving on from the text, Georgia invokes what it views as the official position of the Copyright Office, as reflected in the Compendium of U. S. Copyright Office Practices (Compendium). But, as Georgia concedes, the Compendium is a non-binding administrative manual that at most

³JUSTICE THOMAS disputes the applicability of the *Helsinn Healthcare* presumption because States have asserted copyright in statutory annotations over the years notwithstanding our government edicts precedents. *Post*, at 11–12. In JUSTICE THOMAS’s view, those assertions prove that our precedents could not have provided clear enough guidance for Congress to incorporate. But that inference from state behavior proves too much. The same study cited by JUSTICE THOMAS to support a practice of claiming copyright in non-binding *annotations* also reports that “many states claim copyright interest in their *primary* law materials,” including statutes and regulations. Dmitrieva, *State Ownership of Copyrights in Primary Law Materials*, 23 *Hastings Com. & Entertainment L. J.* 81, 109 (2000) (emphasis added). JUSTICE THOMAS concedes that such assertions are plainly foreclosed by our government edicts precedents. *Post*, at 4. That interested parties have pursued ambitious readings of our precedents does not mean those precedents are incapable of providing meaningful guidance to us or to Congress.

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merits deference under *Skidmore v. Swift & Co.*, 323 U. S. 134 (1944). That means we must follow it only to the extent it has the “power to persuade.” *Id.*, at 140. Because our precedents answer the question before us, we find any competing guidance in the Compendium unpersuasive.

In any event, the Compendium is largely consistent with our decision. Drawing on *Banks*, it states that, “[a]s a matter of longstanding public policy, the U. S. Copyright Office will not register a government edict that has been issued by any state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials.” Compendium §313.6(C)(2) (rev. 3d ed. 2017) (emphasis added). And, under *Banks*, what counts as a “similar” material depends on what kind of officer created the material (*i.e.*, a judge) and whether the officer created it in the course of official (*i.e.*, judicial) duties. See Compendium §313.6(C)(2) (quoting *Banks*, 128 U. S., at 253, for the proposition that copyright cannot vest “in the products of the labor done by judicial officers in the discharge of their judicial duties”).

The Compendium goes on to observe that “the Office may register annotations that summarize or comment upon legal materials . . . unless the annotations themselves have the force of law.” Compendium §313.6(C)(2). But that broad statement—true of annotations created by officials such as court reporters that lack the authority to make or interpret the law—does not engage with the critical issue of annotations created *by judges or legislators* in their official capacities. Because the Compendium does not address that question and otherwise echoes our government edicts precedents, it is of little relevance here.

Georgia also appeals to the overall purpose of the Copyright Act to promote the creation and dissemination of creative works. Georgia submits that, without copyright protection, Georgia and many other States will be unable to

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induce private parties like Lexis to assist in preparing affordable annotated codes for widespread distribution. That appeal to copyright policy, however, is addressed to the wrong forum. As Georgia acknowledges, “[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.” *Eldred v. Ashcroft*, 537 U. S. 186, 212 (2003). And that principle requires adherence to precedent when, as here, we have construed the statutory text and “tossed [the ball] into Congress’s court, for acceptance or not as that branch elects.” *Kimble*, 576 U. S., at 456.

Turning to our government edicts precedents, Georgia insists that they can and should be read to focus exclusively on whether a particular work has “the force of law.” Brief for Petitioners 32 (capitalization deleted). JUSTICE THOMAS appears to endorse the same view. See *post*, at 4. But that framing has multiple flaws.

Most obviously, it cannot be squared with the reasoning or results of our cases—especially *Banks*. *Banks*, following *Wheaton* and the “judicial consensus” it inspired, denied copyright protection to judicial opinions without excepting concurrences and dissents that carry no legal force. 128 U. S., at 253 (emphasis deleted). As every judge learns the hard way, “comments in [a] dissenting opinion” about legal principles and precedents “are just that: comments in a dissenting opinion.” *Railroad Retirement Bd. v. Fritz*, 449 U. S. 166, 177, n. 10 (1980). Yet such comments are covered by the government edicts doctrine because they come from an official with authority to make and interpret the law.

Indeed, *Banks* went even further and withheld copyright protection from headnotes and syllabi produced by judges. 128 U. S., at 253. Surely these supplementary materials do not have the force of law, yet they are covered by the doctrine. The simplest explanation is the one *Banks* provided: These non-binding works are not copyrightable because of who creates them—judges acting in their judicial capacity.

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See *ibid.*

The same goes for non-binding legislative materials produced by legislative bodies acting in a legislative capacity. There is a broad array of such works ranging from floor statements to proposed bills to committee reports. Under the logic of Georgia’s “force of law” test, States would own such materials and could charge the public for access to them.

Furthermore, despite Georgia’s and JUSTICE THOMAS’s purported concern for the text of the Copyright Act, their conception of the government edicts doctrine has *less* of a textual footing than the traditional formulation. The textual basis for the doctrine is the Act’s “authorship” requirement, which unsurprisingly focuses on—the author. JUSTICE THOMAS urges us to dig deeper to “the root” of our government edicts precedents. *Post*, at 5. But, in our view, the text *is* the root. The Court long ago interpreted the word “author” to exclude officials empowered to speak with the force of law, and Congress has carried that meaning forward in multiple iterations of the Copyright Act. This textual foundation explains why the doctrine distinguishes between some authors (who are empowered to speak with the force of law) and others (who are not). Compare *Callaghan*, 128 U. S., at 647, with *Banks*, 128 U. S., at 253. But the Act’s reference to “authorship” provides no basis for Georgia’s rule distinguishing between different categories of content with different effects.⁴

⁴Instead of accepting our predecessors’ textual reasoning at face value, JUSTICE THOMAS conjures a trinity of alternative “origin[s] and justification[s]” for the government edicts doctrine that the Court *might* have had in mind. See *post*, at 5–7. Without committing to one or all of these possibilities, JUSTICE THOMAS suggests that each would yield a rule that requires federal courts to pick out the subset of judicial and legislative materials that independently carry the force of law. But a Court motivated by JUSTICE THOMAS’s three-fold concerns might just as easily have read them as supporting a rule that prevents the officials responsible for

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Georgia minimizes the OCGA annotations as non-binding and non-authoritative, but that description undersells their practical significance. Imagine a Georgia citizen interested in learning his legal rights and duties. If he reads the economy-class version of the Georgia Code available online, he will see laws requiring political candidates to pay hefty qualification fees (with no indigency exception), criminalizing broad categories of consensual sexual conduct, and exempting certain key evidence in criminal trials from standard evidentiary limitations—with no hint that important aspects of those laws have been held unconstitutional by the Georgia Supreme Court. See OCGA §§21–2–131, 16–6–2, 16–6–18, 16–15–9 (available at www.legis.ga.gov). Meanwhile, first-class readers with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal. See §§21–2–131, 16–6–2, 16–6–18, 16–15–9 (available at <https://store.lexisnexis.com/products/official-code-of-georgia-annotated-skuSKU6647> for \$412.00).

If everything short of statutes and opinions were copyrightable, then States would be free to offer a whole range of premium legal works for those who can afford the extra benefit. A State could monetize its entire suite of legislative history. With today’s digital tools, States might even launch a subscription or pay-per-law service.

There is no need to assume inventive or nefarious behavior for these concerns to become a reality. Unlike other forms of intellectual property, copyright protection is both instant and automatic. It vests as soon as a work is captured in a tangible form, triggering a panoply of exclusive

creating binding materials from qualifying as an “author.” Regardless, it is more “[c]onsistent with the judicial role” to apply the reasoning and results the Court voted on and committed to writing than to speculate about what practical considerations our predecessors “may have had . . . in mind,” what history “may [have] suggest[ed],” or what constitutional concerns “may have animated” our government edicts precedents. *Ibid.*

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rights that can last over a century. 17 U. S. C. §§102, 106, 302. If Georgia were correct, then unless a State took the affirmative step of transferring its copyrights to the public domain, all of its judges' and legislators' non-binding legal works would be copyrighted. And citizens, attorneys, non-profits, and private research companies would have to cease all copying, distribution, and display of those works or risk severe and potentially criminal penalties. §§501–506. Some affected parties might be willing to roll the dice with a potential fair use defense. But that defense, designed to accommodate First Amendment concerns, is notoriously fact sensitive and often cannot be resolved without a trial. Cf. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U. S. 539, 552, 560–561 (1985). The less bold among us would have to think twice before using official legal works that illuminate the law we are all presumed to know and understand.

Thankfully, there is a clear path forward that avoids these concerns—the one we are already on. Instead of examining whether given material carries “the force of law,” we ask only whether the author of the work is a judge or a legislator. If so, then whatever work that judge or legislator produces in the course of his judicial or legislative duties is not copyrightable. That is the framework our precedents long ago established, and we adhere to those precedents today.

* * *

For the foregoing reasons, we affirm the judgment of the Eleventh Circuit.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 18–1150

GEORGIA, ET AL., PETITIONERS *v.*
PUBLIC.RESOURCE.ORG, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[April 27, 2020]

JUSTICE THOMAS, with whom JUSTICE ALITO joins, and with whom JUSTICE BREYER joins as to all but Part II–A and footnote 6, dissenting.

According to the majority, this Court’s 19th-century “government edicts” precedents clearly stand for the proposition that “judges and legislators cannot serve as authors [for copyright purposes] when they produce works in their official capacity.” *Ante*, at 11. And, after straining to conclude that the Georgia Code Revision Commission (Commission) is an arm of the Georgia Legislature, *ante*, at 9–10, the majority concludes that Georgia cannot hold a copyright in the annotations that are included as part of the Official Code of Georgia Annotated (OCGA). This ruling will likely come as a shock to the 25 other jurisdictions—22 States, 2 Territories, and the District of Columbia—that rely on arrangements similar to Georgia’s to produce annotated codes. See Brief for State of Arkansas et al. as *Amici Curiae* 15, and App. to *id.*, at 1. Perhaps these jurisdictions all overlooked this Court’s purportedly clear guidance. Or perhaps the widespread use of these arrangements indicates that today’s decision extends the government edicts doctrine to a new context, rather than simply “confirm[ing]” what the precedents have always held. See *ante*, at 5. Because I believe we should “leave to Congress the task of deciding whether the Copyright Act needs an upgrade,” *American*

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Broadcasting Cos. v. Aereo, Inc., 573 U. S. 431, 463 (2014) (Scalia, J., dissenting), I respectfully dissent.

I

Like the majority, I begin with the three 19th-century precedents that the parties agree provide the foundation for the government edicts doctrine.

In *Wheaton v. Peters*, 8 Pet. 591 (1834), the Court first regarded it as self-evident that judicial opinions cannot be copyrighted either by the judges who signed them or by a reporter under whose auspices they are published. Congress provided that, in return for a salary of \$1,000, the Reporter of Decisions for this Court would prepare reports consisting of judicial opinions and additional materials summarizing the cases. *Id.*, at 614, 617 (argument). Wheaton, one of this Court’s earliest Reporters, argued that he owned a copyright for the entirety of his reports. He contended that he had “acquired the right to the opinions by judges’ gift” once they became a part of his volume. *Id.*, at 614 (same). The Court ultimately remanded on the question whether Wheaton had complied with the Copyright Act’s procedural requirements. *Id.*, at 667–668. In doing so, it observed in dicta that “the court [was] unanimously of [the] opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.” *Id.*, at 668.

Fifty-four years later, the Court returned to the same subject, suggesting a doctrinal basis for the rule that judicial opinions and certain closely related materials cannot be copyrighted. In *Banks v. Manchester*, 128 U. S. 244 (1888), the state-authorized publisher of the Ohio Supreme Court’s decisions, Banks & Brothers, sued a competing publisher for copyright infringement. The competing publisher reproduced portions from Banks’ reports, including Ohio Supreme Court decisions, statements of the cases, and syllabi,

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all of which were originally prepared by the opinion’s authoring judge. This Court held that these materials were not the proper subject of copyright. In reaching that conclusion, the Court grounded its analysis in its interpretation of the word “author” in the Copyright Act. It anchored this interpretation in the “public policy” that “the judge who, in his judicial capacity, prepares the opinion or decision [and other materials]” is not “regarded as their author or their proprietor, in the sense of [the Copyright Act], so as to be able to confer any title by assignment.” *Banks*, 128 U. S., at 253. The Court supported this conclusion by stating that “there has always been a judicial consensus . . . that no copyright could[,] under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties.” *Ibid.* (emphasis deleted). And the Court observed that this rule reflected the view that the “authentic exposition and interpretation of the law . . . is free for publication to all,” which in turn prevents a judge from qualifying as an author. *Ibid.*

Importantly, the Court also briefly discussed whether the State of Ohio could directly hold the copyright. In answering this question, the Court did not suggest that States were categorically prohibited from holding copyrights as authors or assignees. Instead, the Court simply noted that the State fell outside the scope of the Act because it was not a “resident” or “citizen of the United States,” as then required by statute, and because it did not meet other statutory criteria. *Ibid.* The Court felt it necessary to observe, however, that “[w]hether the State could take out a copyright for itself, or could enjoy the benefit of one taken out by an individual for it, as the assignee of a citizen of the United States or a resident therein, who should be the author of a book, is a question not involved in the present case, and we refrain from considering it.” *Ibid.*

Finally, in *Callaghan v. Myers*, 128 U. S. 617 (1888), the

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Court addressed the limits of the government edicts doctrine. In that case, the Court settled another dispute between a publisher of court decisions and an alleged infringer. The plaintiff purchased the proprietary rights to the reports prepared by the Illinois Supreme Court’s reporter of decisions, Freeman, including the copyright to the reports. Unlike in *Banks*, these reports also contained material authored by Freeman. *Callaghan*, 128 U. S., at 645. The alleged infringers copied the judicial decisions and Freeman’s materials. In finding for the plaintiff, this Court reiterated that “there can be no copyright in the opinions of the judges, or in the work done by them in their official capacity as judges.” *Id.*, at 647 (citing *Banks*, 128 U. S. 244). But the Court concluded that “no [similar] ground of public policy” justified denying a state official a copyright “cover[ing] the matter which is the result of his intellectual labor.” *Callaghan*, 128 U. S., at 647.

II

These precedents establish that judicial opinions cannot be copyrighted. But they do not exclude from copyright protection notes that are prepared by an official court reporter and published together with the reported opinions. There is no apparent reason why the same logic would not apply to statutes and regulations. Thus, it must follow from our precedents that statutes and regulations cannot be copyrighted, but accompanying notes lacking legal force can be. See *Howell v. Miller*, 91 F. 129 (CA6 1898) (Harlan, J.) (explaining that, under *Banks* and *Callaghan*, annotations to Michigan statutes could be copyrighted).

A

It is fair to say that the Court’s 19th-century decisions do not provide any extended explanation of the basis for the government edicts doctrine. The majority is nonetheless

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content to accept these precedents reflexively, without examining the origin or validity of the rule they announced. For the majority, it is enough that the precedents established a rule that “seemed too obvious to adorn with further explanation.” *Ante*, at 6. But the contours of the rule were far from clear, and to understand the scope of the doctrine, we must explore its underlying rationale.

In my view, the majority’s uncritical extrapolation of precedent is inconsistent with the judicial role. An unwillingness to examine the root of a precedent has led to the sprouting of many noxious weeds that distort the meaning of the Constitution and statutes alike. Although we have not been asked to revisit these precedents, it behooves us to explore the origin of and justification for them, especially when we are asked to apply their rule for the first time in over 130 years.

The Court’s precedents suggest three possible grounds supporting their conclusion. In *Banks*, the Court referred to the meaning of the term “author” in copyright law. While the Court did not develop this argument, it is conceivable that the contemporaneous public meaning of the term “author” was narrower in the copyright context than in ordinary speech. At the time this Court decided *Banks*, the Copyright Act provided protection for books, maps, prints, engravings, musical and dramatic compositions, photographs, and works of art.¹ Judicial opinions differ markedly from these works. Books, for instance, express the thoughts of their authors. They typically have no power beyond the ability of their words to influence readers, and they usually are published at private expense. Judicial opinions, on the other hand, do not simply express the thoughts of the judges who write or endorse them. Instead, they elaborate

¹See 1 Stat. 124; 2 Stat. 171; ch. 16, 4 Stat. 436; 11 Stat. 138–139; 13 Stat. 540; 16 Stat. 212.

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and apply rules of law that, in turn, represent the implementation of the will of the people. Unlike other copyrightable works of authorship, judicial opinions have binding legal effect, and they are produced and issued at public expense. Moreover, copyright law understands an author to be one whose work will be encouraged by the grant of an exclusive right. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U. S. ___, ___ (2016) (slip op., at 6). But judges, when acting in an official capacity, do not fit that description. The Court in *Banks* may have had these differences in mind when it concluded that a judge fell outside the scope of the term “author.” 128 U. S., at 253.

History may also suggest a narrower meaning of “author” in the copyright context. In England, at least as far back as 1666, courts and commentators agreed “that the property of all law books is in the king, because he pays the judges who pronounce the law.” G. Curtis, *Law of Copyright* 130 (1847); see also *Banks & Bros. v. West Publishing Co.*, 27 F. 50, 57 (CC Minn. 1886) (citing English cases and treatises and concluding that “English courts generally sustain the crown’s proprietary rights in judicial opinions”). Blackstone described this as a “prerogative copyrigh[t],” explaining that “[t]he king, as the executive magistrate, has the right of promulgating to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own press, or that of his grantees, all acts of parliament, proclamations, and orders of council.” 2 W. Blackstone, *Commentaries on the Laws of England* 410 (1766) (emphasis deleted); see also *Wheaton*, 8 Pet., at 659–660. This history helps to explain the dearth of cases permitting individuals to obtain copyrights in judicial opinions. But under the Constitution, sovereignty lies with the people, not a king. See *The Federalist* No. 22, p. 152 (C. Rossiter ed. 1961); *id.*, No. 39, at 241. The English historical practice, when superimposed on the Constitution’s recognition that sovereignty resides in the people, helps to explain the

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Court’s conclusion that the “authentic exposition and interpretation of the law . . . is free for publication to all.” *Banks*, 128 U. S., at 253.

Finally, concerns of fair notice, often recognized by this Court’s precedents as an important component of due process, also may have animated the reasoning of these 19th-century cases. As one court put it, “[t]he decisions and opinions of the justices are the authorized expositions and interpretations of the laws, which are binding upon all the citizens. . . . Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions.” *Nash v. Lathrop*, 142 Mass. 29, 35, 6 N. E. 559, 560 (1886) (cited in *Banks*, 128 U. S., at 253–254); see also *American Soc. for Testing and Materials v. Public.Resource.Org, Inc.*, 896 F. 3d 437, 458–459 (CAD9 2018) (Katsas, J., concurring).

B

Allowing annotations to be copyrighted does not run afoul of any of these possible justifications for the government edicts doctrine. First, unlike judicial opinions and statutes, these annotations do not even purport to embody the will of the people because they are not law. The General Assembly of Georgia has made abundantly clear through a variety of provisions that the annotations do not create any binding obligations. OCGA §1–1–7 states that “[a]ll historical citations, title and chapter analyses, and notes set out in this Code are given for the purpose of convenient reference and do not constitute part of the law.” Section 1–1–1 further provides that “[t]he statutory portion of the codification of Georgia laws . . . is enacted and shall have the effect of statutes enacted by the General Assembly of Georgia. The statutory portion of such codification shall be merged with annotations . . . and other materials . . . and shall be published by authority of the state.” Thus, although the materials

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“merge” prior to publication in the “official” code, the very provision calling for that merger makes clear that the annotations serve as commentary, not law.

As additional evidence that the annotations do not represent the will of the people, the General Assembly does not enact statutory annotations under its legislative power. See Ga. Const., Art. III, §1, ¶1 (vesting the legislative power in the General Assembly). To enact state law, Georgia employs a process of bicameralism and presentment similar to that embodied in the United States Constitution. See Ga. Const., Art. III, §5; Art. V, §2, ¶4. The annotations do not go through this process, a fact that even the majority must acknowledge. *Ante*, at 10; Ga. S. 52, Reg. Sess., §54(b) (2019–2020) (“Annotations . . . except as otherwise provided in the Code . . . are not enacted as statutes by the provisions of this Act”).

Second, unlike judges and legislators, the creators of annotations are incentivized by the copyright laws to produce a desirable product that will eventually earn them a profit. And though the Commission may require Lexis to follow strict guidelines, the independent synthesis, analysis, and creative drafting behind the annotations makes them analogous to other copyrightable materials. See Brief for Matthew Bender & Co., Inc., as *Amicus Curiae* 4–7.

Lastly, the annotations do not impede fair notice of the laws. As just stated, the annotations do not carry the binding force of law. They simply summarize independent sources of legal information and consolidate them in one place. Thus, OCGA annotations serve a similar function to other copyrighted research tools provided by private parties such as the American Law Reports and Westlaw, which also contain information of great “practical significance.” *Ante*, at 17. Compare, *e.g.*, OCGA §34–9–260 (annotation for *Cho Carwash Property, L. L. C. v. Everett*, 326 Ga. App. 6, 755 S. E. 2d 823 (2014)) with Ga. Code Ann. §34–9–260 (Westlaw’s annotation for the same).

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The majority resists this conclusion, suggesting that without access to the annotations, readers of Georgia law will be unable to fully understand the true meaning of Georgia’s statutory provisions, such as provisions that have been undermined or nullified by court decisions. *Ante*, at 17. That is simply incorrect. As the majority tacitly concedes, a person seeking information about changes in Georgia statutory law can find that information by consulting the original source for the change in the law’s status—the court decisions themselves. See *ante*, at 17. The inability to access the OCGA merely deprives a researcher of one specific tool, not to the underlying factual or legal information summarized in that tool. See also *post*, at 4 (GINSBURG, J., dissenting).²

C

The text of the Copyright Act supports my reading of the

²The majority contends that, rather than seeking to understand the origins of our precedents, we should simply accept the text of the opinions that the Justices “voted on and committed to writing.” *Ante*, at 16–17, n. 4. But that begs the question: What does the text of the relevant opinions tell us? The answer is not much. It is precisely this lack of explication that makes it necessary to explore the “judicial *consensus*” and public policy referred to in *Banks v. Manchester*, 128 U. S. 244, 253 (1888). Instead, the majority attempts to dissect the language of our prior opinions in the same way it would interpret a statute, an approach we have repeatedly cautioned against. See *St. Mary’s Honor Center v. Hicks*, 509 U. S. 502, 515 (1993); *Reiter v. Sonotone Corp.*, 442 U. S. 330, 341 (1979). The proper approach is to “read general language in judicial opinions . . . as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering.” *Illinois v. Lidster*, 540 U. S. 419, 424 (2004); see also *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821) (Marshall, C. J., for the Court) (“[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision”).

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precedents.³ Specifically, there are four indications in the text of the Copyright Act that the OCGA annotations are copyrightable. As an initial matter, the Act does not define the word “author,” 17 U. S. C. §101, or make any reference to the government edicts doctrine. Accordingly, the term “author” itself does not shed any light on whether the doctrine covers statutory annotations. Second, while the Act excludes from copyright protection “work[s] prepared by an officer or employee of the United States Government as part of that person’s official duties,” §101; see also §105, the Act contains no similar prohibition against works of state governments or works prepared at their behest. “Congress’ use of explicit language in one provision cautions against inferring the same limitation” elsewhere in the statute. *State Farm Fire & Casualty Co. v. United States ex rel. Rigsby*, 580 U. S. ___, ___ (2016) (slip op., at 7) (internal quotation marks omitted); *Pacific Operators Offshore, LLP v. Valladolid*, 565 U. S. 207, 216 (2012). Third, the Act specifically notes that annotations are copyrightable derivative works. §101. Here, again, the Act does not expressly exclude from copyright protection annotations created either by the State or at the State’s request. Fourth, the Act provides that an author may hold a copyright in “material contributed” in a derivative work, “as distinguished from the preexisting material employed in the work.” §103(b); see also *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U. S. 340, 359 (1991). These aspects of the statutory text, taken together, further support the conclusion that the OCGA annotations are copyrightable.

For all these reasons, I would conclude that, as with the

³As the majority explains, *ante*, at 9, the annotations were created as part of a work-for-hire agreement between the Commission and Lexis. See 17 U. S. C. §201(b). Because no party disputes the validity of the contract, I express no opinion regarding whether the contract established an employer/employee relationship or whether the Commission may be considered a “person” under §201(b).

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privately created annotations in *Callaghan*, Georgia’s statutory annotations at issue in this case are copyrightable.

III

The majority reads this Court’s precedents differently. In its view, the Court in *Banks* held that judges are not “authors” within the scope of the Copyright Act for “whatever work they perform in their capacity as judges,” 128 U. S., at 253, so the same must be true for legislators, see *ante*, at 8–9. Accordingly, works created by legislators in their legislative capacity are not “original works of authorship,” §102, and therefore cannot be copyrighted. This argument is flawed in multiple respects.

A

Most notably, the majority’s textual analysis hinges on accepting that its construction of “authorship,” *i.e.*, all works produced in a judge’s or legislator’s official capacity, was so well established by our 19th-century precedents that Congress incorporated it into the multiple revisions of the Copyright Act. See *ante*, at 12–13. Such confidence is questionable, to say the least.

The majority’s understanding of the government edicts doctrine seems to have been lost on dozens of States and Territories, as well as the lower courts in this case. As already stated, the 25 jurisdictions with official annotated codes apparently did not view this Court’s precedents as establishing the “official duties” definition of authorship. See Brief for State of Arkansas et al. as *Amici Curiae*.⁴ And if

⁴According to one study published in 2000, approximately half of States owned copyright in official state statutory compilations, court reports, or administrative regulations. Dmitrieva, *State Ownership of Copyrights in Primary Law Materials*, 23 *Hastings Com. & Entertainment L. J.* 81, 83, 97–105 (2000). The majority attempts to undermine this study by emphasizing that some of these States owned copyright in primary law materials. *Ante*, at 13, n. 3. This misunderstands the point.

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“our precedents answer the question” so clearly, *ante*, at 14, one wonders why the Eleventh Circuit reached its conclusion in such a roundabout fashion. Rather than following the majority’s “straightforward” path, *ante*, at 5, the Eleventh Circuit looked to the “zone of indeterminacy at the frontier between edicts that carry the force of law and those that do not” to determine whether the annotations were “sufficiently law-like” to be “constructively authored by the People.” *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 906 F. 3d 1229, 1233, 1242, 1243 (2018). The District Court likewise does not appear to have viewed the question as well settled. In a cursory analysis, it determined that the annotations were copyrightable based on *Callaghan. Code Revision Comm’n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350, 1356 (ND Ga. 2017). It is risible to presume that Congress had knowledge of and incorporated a “settled” meaning that eluded a multitude of States and Territories, as well as at least four Article III judges. *Ante*, at 13. Cf. *Rimini Street, Inc. v. Oracle USA, Inc.*, 586 U. S. ___, ___–___ (2019) (slip op., at 9–10).

This presumption of congressional knowledge also provides the basis for the majority’s conclusion that the annotations are not “original works of authorship.” See *ante*, at 11–12 (discussing §101). Stripped of the fiction that this Court’s 19th-century precedents clearly demonstrated that “authorship” encompassed all works performed as part of a legislator’s duties, the majority’s textual argument fails.

I do not claim that this evidence demonstrates that the States necessarily interpreted the government edicts doctrine correctly. I merely point out that these divergent practices seriously undercut the majority’s claim that its interpretation of “authorship” was well settled and universally understood. On this score, the majority has no answer but to insinuate that the lawmakers of over half the Nation’s jurisdictions disregarded federal law and the Constitution to pursue their own agendas in the face of supposedly clear precedent.

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The majority does not confront this criticism head on. Instead, it simply repeats, without any further elaboration, its unsupported conclusion that “[t]he Court long ago interpreted the word ‘author’ to exclude officials empowered to speak with the force of law, and Congress has carried that meaning forward in multiple iterations of the Copyright Act.” *Ante*, at 16. This wave of the “magic wand of *ipse dixit*” does nothing to strengthen the majority’s argument, and in fact only serves to underscore its weakness. *United States v. Yermian*, 468 U. S. 63, 77 (1984) (Rehnquist, J., dissenting).⁵

B

In addition to its textual deficiencies, the majority’s understanding of this Court’s precedents fails to account for the critical differences between the role that judicial opinions play in expounding upon the law compared to that of statutes. The majority finds it meaningful, for instance, that *Banks* prohibited dissents and concurrences from being copyrighted, even though they carry no legal force. *Ante*, at 15. At an elementary level, it is true that the judgment is the only part of a judicial decision that has legal effect. But it blinks reality to ignore that every word of a judicial opinion—whether it is a majority, a concurrence, or a dissent—expounds upon the law in ways that do not map neatly on to the legislative function. Setting aside summary decisions, the reader of a judicial opinion will always gain critical insight into the reasoning underlying a judicial holding by reading all opinions in their entirety. Under-

⁵The majority’s approach is also hard to reconcile with the recognition in *Wheaton v. Peters*, 8 Pet. 591 (1834), that annotations prepared by the Reporter of Decisions could be copyrighted. Wheaton was paid a salary of \$1,000, and it is difficult to say whether this salary funded his work on the opinions or his work on the annotations. See *id.*, at 614, 617 (argument).

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standing the reasoning that animates the rule in turn provides pivotal insight into how the law will likely be applied in future judicial opinions.⁶ Thus, deprived of access to judicial opinions, individuals cannot access the primary, and therefore best, source of information for the meaning of the law.⁷ And as true as that is today, access to these opinions

⁶For instance, this Court has not overruled *Lemon v. Kurtzman*, 403 U. S. 602 (1971), which pronounced a test for evaluating Establishment Clause claims. But a reader would do well to carefully scrutinize the various opinions in *American Legion v. American Humanist Assn.*, 588 U. S. ____ (2019), to understand the markedly different way that this precedent functions in our current jurisprudence compared to when it was first decided. Moreover, sometimes a separate writing takes on canonical status, like Justice Jackson’s concurrence regarding the executive power in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 634–638 (1952) (opinion concurring in judgment and opinion of the Court); see also *Katz v. United States*, 389 U. S. 347, 360–361 (1967) (Harlan, J., concurring) (reasonable expectation of privacy Fourth Amendment test). Still other times, the reasoning in an opinion for less than a majority of the Court provides the explicit basis for a later majority’s holding. See, e.g., *McKinney v. Arizona*, 589 U. S. ____, ____ (2020) (slip op., at 5) (discussing *Ring v. Arizona*, 536 U. S. 584, 612 (2002) (Scalia J., concurring)); *Estelle v. Gamble*, 429 U. S. 97, 102 (1976) (incorporating into the majority the Eighth Amendment “evolving standards of decency” test first announced in *Trop v. Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion)). Even “comments in [a] dissenting opinion,” *ante*, at 15, sometimes reemerge as the foundational reasoning in a majority opinion. See, e.g., *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U. S. ____ (2019) (discussing *Nevada v. Hall*, 440 U. S. 410, 433–439 (1979) (Rehnquist, J., dissenting)); *Lawrence v. Texas*, 539 U. S. 558, 578 (2003) (“JUSTICE STEVENS’ [dissenting] analysis, in our view, should have been controlling in *Bowers v. Hardwick*, 478 U. S. 186 (1986),] and should control here”). These examples, and myriad more, demonstrate that the majority treats the role of separate judicial opinions in an overly simplistic fashion.

⁷*Banks* also stated that judicially prepared syllabi and headnotes cannot be copyrighted. 128 U. S., at 253. The majority cites these materials as further evidence of its broad rule, because the majority finds it beyond cavil that “these supplementary materials do not have the force of law.” *Ante*, at 15. The majority feels it appropriate to assume—without any historical inquiry—that the words “syllabus” and “headnote” carried the same meaning, or served the same function, in 1888 as they do now.

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was even more essential in the 19th century before the proliferation of federal and state regulatory law fundamentally altered the role that common-law judging played in expounding upon the law. See also *post*, at 2 (GINSBURG, J., dissenting).

These differences provide crucial context for *Banks*' reasoning. Specifically, to ensure that judicial "exposition and interpretation of the law" remains "free for publication to all," the word "author" must be read to encompass all judicial duties. *Banks*, 128 U. S., at 253. But these differences also demonstrate that the same rule does not *a fortiori* apply to all legislative duties.⁸

C

In addition to being flawed as a textual and precedential

Without briefing on this issue, I am not willing to make that leap. See *Hixson v. Burson*, 54 Ohio St. 470, 485, 43 N. E. 1000, 1003 (1896) ("reluctantly overrul[ing] the second syllabus" of a previous decision); *Holliday v. Brown*, 34 Neb. 232, 234, 51 N. W. 839, 840 (1892) ("It is an unwritten rule of this court that members thereof are bound only by the points as stated in the syllabus of each case"); see also *Frazier v. State*, 15 Ga. App. 365, 365–367, 83 S. E. 273, 273–274 (1914) (clarifying the meaning of a court-written headnote and emphasizing that to understand an opinion's meaning, the headnote and opinion must be read together); *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337 (1906) (acknowledging that some state statutes rendered headnotes the work of the court carrying legal force).

⁸Although legislative history is not at issue in this case, the majority also contends that its rule is necessary to fend off the possibility that "[a] State could monetize its entire suite of legislative history." *Ante*, at 17. Putting aside the jurisprudential debate over the use of such materials in interpreting federal statutes, many States can, and have, specifically authorized courts to consider legislative history when construing statutes. See, e.g., Colo. Rev. Stat. §2–4–203(1)(c) (2019); Iowa Code §4.6(3) (2019); Minn. Stat. §645.16(7) (2018); N. M. Stat. Ann. §12–2A–20(C)(2) (2019); N. D. Cent. Code Ann. §1–02–39(3) (2019); Ohio Rev. Code Ann. §1.49(C) (Lexis 2019); 1 Pa. Cons. Stat. §1921(c)(7) (2016). Given the direct role that legislative history plays in the construction of statutes in these States, it is hardly clear that such States could subject their legislative histories to copyright.

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matter, the majority’s rule will prove difficult to administer. According to one group of *amici*, nearly all jurisdictions with annotated codes use private contractors that “almost invariably prepare [annotations] under the supervision of legislative-branch or judicial-branch officials, including state legislators or state-court judges.” Brief for State of Arkansas et al. as *Amici Curiae* 16–17. Under the majority’s view, any one of these commissions or counsels could potentially be reclassified as an “adjunct to the legislature.” *Ante*, at 11. But the majority’s test for ascertaining the true nature of these commissions raises far more questions than it answers.

The majority lists a number of factors—including the Commission’s membership and funding, how the annotations become part of the OCGA, and descriptions of the Commission from court cases—to support its conclusion that the Commission is really part of the legislature. See *ante*, at 9–10. But it does not specify whether these factors are exhaustive or illustrative and, if the latter, what other factors may be important. The majority also does not specify whether some factors weigh more heavily than others when deciding whether to deem an oversight body a legislative adjunct.

And even when the majority does list concrete factors, pivotal guidance remains lacking. For example, the majority finds it meaningful that 9 out of the Commission’s 15 members are legislators. *Ante*, at 9; see OCGA §28–9–2 (noting that the other members of the Commission include the State’s Lieutenant Governor, a judge, a district attorney, and three other state bar members). But how many legislative members are needed for a commission to become a legislative adjunct? The majority provides no answers to any of these questions.

* * *

The majority’s rule will leave in the lurch the many

THOMAS, J., dissenting

States, private parties, and legal researchers who relied on the previously bright-line rule. Perhaps, to the detriment of all, many States will stop producing annotated codes altogether. Were that to occur, the majority’s fear of an “economy-class” version of the law will truly become a reality. See *ante*, at 17. As Georgia explains, its contract enables the OCGA to be sold at a fraction of the cost of competing annotated codes. For example, Georgia asserts that Lexis sold the OCGA for \$404 in 2016, while West Publishing’s competing annotated code sold for \$2,570. Should state annotated codes disappear, those without the means to pay the competitor’s significantly higher price tag will have a valuable research tool taken away from them. Meanwhile, this Court, which is privileged to have access to numerous research resources, will scarcely notice. These negative practical ramifications are unfortunate enough when they reflect the deliberative legislative choices that we as judges are bound to respect. They are all the more regrettable when they are the result of our own meddling. Fortunately, as the majority and I agree, “critics of [today’s] ruling can take their objections across the street, [where] Congress can correct any mistake it sees.” *Ante*, at 13 (quoting *Kimble v. Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015)).

We have “stressed . . . that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives,” *Eldred v. Ashcroft*, 537 U. S. 186, 212 (2003), because “it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors,” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417, 429 (1984). Because the majority has strayed from its proper role, I respectfully dissent.

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GINSBURG, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 18–1150

GEORGIA, ET AL., PETITIONERS *v.*
PUBLIC.RESOURCE.ORG, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[April 27, 2020]

JUSTICE GINSBURG, with whom JUSTICE BREYER joins,
dissenting.

Beyond doubt, state laws are not copyrightable. Nor are other materials created by state legislators in the course of performing their lawmaking responsibilities, *e.g.*, legislative committee reports, floor statements, unenacted bills. *Ante*, at 8–9. Not all that legislators do, however, is ineligible for copyright protection; the government edicts doctrine shields only “works that are (1) created by judges and legislators (2) *in the course of their judicial and legislative duties.*” *Ante*, at 9 (emphasis added). The core question this case presents, as I see it: Are the annotations in the Official Code of Georgia Annotated (OCGA) done in a legislative capacity? The answer, I am persuaded, should be no.

To explain why, I proceed from common ground. All agree that headnotes and syllabi for judicial opinions—both a kind of annotation—are copyrightable when created by a reporter of decisions, *Callaghan v. Myers*, 128 U. S. 617, 645–650 (1888), but are not copyrightable when created by judges, *Banks v. Manchester*, 128 U. S. 244, 253 (1888). That is so because “[t]he whole work done by . . . judges,” *ibid.*, including dissenting and concurring opinions, ranks as work performed in their judicial capacity. Judges do not outsource their writings to “arm[s]” or “adjunct[s],” *cf. ante*, at 9, 11, to be composed in their stead. Accordingly, the

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judicial opinion-drafting process in its entirety—including the drafting of headnotes and syllabi, in jurisdictions where that is done by judges—falls outside the reach of copyright protection.

One might ask: If a judge’s annotations are not copyrightable, why are those created by legislators? The answer lies in the difference between the role of a judge and the role of a legislator. “[T]o the judiciary” we assign “the duty of interpreting and applying” the law, *Massachusetts v. Mellon*, 262 U. S. 447, 488 (1923), and sometimes making the applicable law, see Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N. Y. U. L. Rev. 383 (1964). See also *Marbury v. Madison*, 1 Cranch 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). In contrast, the role of the legislature encompasses the process of “making laws”—not construing statutes after their enactment. *Mellon*, 262 U. S., at 488; see *Patchak v. Zinke*, 583 U. S. ___, ___ (2018) (plurality opinion) (slip op., at 5) (“[T]he legislative power is the power to make law.”). The OCGA annotations, in my appraisal, do not rank as part of the Georgia Legislature’s *lawmaking process* for three reasons.

First, the annotations are not created contemporaneously with the statutes to which they pertain; instead, the annotations comment on statutes already enacted. See, *e.g.*, App. 268–269 (text of enacted laws are transmitted to the publisher for the addition of commentary); *id.*, at 403–404 (publisher adds new case notes on a rolling basis as courts construe existing statutes).¹ In short, annotating begins

¹ For example, OCGA §11–2A–213 was enacted, in its current form, in 1993. See 1993 Ga. Laws p. 633. The case notes contained in the OCGA summarize judicial decisions construing the statute years later. See §11–2A–213 (2002) (citing *Griffith v. Medical Rental Supply of Albany, Ga., Inc.*, 244 Ga. App. 120, 534 S. E. 2d 859 (2000); *Bailey v. Tucker Equip. Sales, Inc.*, 236 Ga. App. 289, 510 S. E. 2d 904 (1999)).

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only after lawmaking ends. This sets the OCGA annotations apart from uncopyrightable legislative materials like committee reports, generated before a law’s enactment, and tied tightly to the task of law-formulation.

Second, the OCGA annotations are descriptive rather than prescriptive. Instead of stating the legislature’s perception of what a law conveys, the annotations summarize writings in which others express *their* views on a given statute. For example, the OCGA contains “case annotations” for “[a]ll decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia and all decisions of the federal courts in cases which arose in Georgia construing any portion of the general statutory law of the state.” *Id.*, at 403. Per the Code Revision Commission’s instructions, each annotation should “accurately reflect the facts, holding, and statutory construction” adopted by the court. *Id.*, at 404. The annotations are neutrally cast; they do not opine on whether the summarized case was correctly decided. See, e.g., OCGA §17–7–50 (2013) (case annotation summarizing facts and holdings of nine cases construing right to grand jury hearing). This characteristic of the annotations distinguishes them from preenactment legislative materials that touch or concern the correct interpretation of the legislature’s work.

Third, and of prime importance, the OCGA annotations are “given for the purpose of convenient reference” by the public, §1–1–7 (2019); they aim to inform the citizenry at large, they do not address, particularly, those seated in legislative chambers.² Annotations are thus unlike, for example, surveys, work commissioned by a legislature to aid in

²Suppose a committee of Georgia’s legislature, to inform the public, instructs a staffer to write a guide titled “The Workways of the Georgia Legislature.” The final text describing how the legislature operates is circulated to members of the legislature and approved by a majority. Contrary to the Court’s decision, I take it that such a work, which entails no lawmaking, would be copyrightable.

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determining whether existing law should be amended.

The requirement that the statutory portions of the OCGA “shall be merged with annotations,” §1–1–1, does not render the annotations anything other than explanatory, referential, or commentarial material. See *Harrison Co. v. Code Revision Comm’n*, 244 Ga. 325, 331, 260 S. E. 2d 30, 35 (1979) (observation by the Supreme Court of Georgia that “inclusion of annotations in [the] ‘official Code’” does not “give the annotations any official weight”).³ Annotations aid the legal researcher, and that aid is enhanced when annotations are printed beneath or alongside the relevant statutory text. But the placement of annotations in the OCGA does not alter their auxiliary, nonlegislative character.

* * *

Because summarizing judicial decisions and commentary bearing on enacted statutes, in contrast to, for example, drafting a committee report to accompany proposed legislation, is not done in a legislator’s law-shaping capacity, I would hold the OCGA annotations copyrightable and therefore reverse the judgment of the Court of Appeals for the Eleventh Circuit.

³That the Georgia Supreme Court described the Commission’s work as “within the sphere of legislative authority” for state separation-of-powers purposes, *Harrison Co. v. Code Revision Comm’n*, 244 Ga. 325, 330, 260 S. E. 2d 30, 34 (1979), does not resolve the federal Copyright Act question before us. Cf. *Yates v. United States*, 574 U. S. 528, 537 (2015) (plurality opinion) (“In law as in life, . . . the same words, placed in different contexts, sometimes mean different things.”); Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 Yale L. J. 333, 337 (1933) (“The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.”).

ANNEX A3



Access to Standardisation

Study for the European Commission,
Enterprise and Industry Directorate-General

Final Report

Koos van Elk, Rob van der Horst (contact: kve@eim.nl)
Zoetermeer, 10 March 2009

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This report has been prepared by a project team of EIM Business & Policy Research in the Netherlands that mainly consisted of Koos van Elk (team leader), Jennifer Telussa and Rob van der Horst of EIM. The assistance of Alex Mekking in implementing the Internet surveys is appreciated.

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Summary

Introduction

Private voluntary standardisation developed in Europe over the last 100 years. The system mainly developed from the need of private enterprise to increase efficiency. The ongoing development of international markets created a need for international communication about and harmonisation of national standards. So after the emerging of National Standards Bodies in the 1920's, European Standards Organisations emerged: CEN¹ in 1961, CENELEC in 1973, and ETSI in 1988.

Using voluntary standards as reference documents in legislation exists already for a considerable time (e.g. national building codes), however the relationship between legislation and standardisation became more prominent after the introduction of the New Approach by the European Commission in the eighties. Standards are still (de jure) voluntary, but economic players get the presumption of compliance with the law (based on European directives) if products and services are in line with the European standards to which the directive refers.

These new harmonised standards aim to support achieving a range of public policy goals like health and safety at the workplace, safety of toys, and energy efficiency. The most obvious stakeholders needed around the table – in addition to industry – are environmental interest groupings², consumers, trade unions and market surveillance agencies.

The fact that harmonised European standards have an important role to play in European legislation warrants an additional concern of the European Institutions as democratic legitimacy and free access become even more important.

The project

The objectives of the study were defined as:

- to determine to what extent the European standardisation system in its present form can guarantee appropriate access to all interested parties;
- to recommend avenues for exploration by the standards bodies, the Commission and interested parties with a view to improving the conditions of access to standardisation activities.

The focus is both on access to the European standardisation processes (drafting standards) and on access to standard documents (use). The study covers 30 countries: the 27 Member States of the EU and the EFTA countries Norway, Switzerland and Iceland. The study was implemented in five major steps:

Step 1 - View of European Standards Organisations: CEN, CENELEC, and ETSI.

Step 2 - View of European interested parties.

Step 3 - View of National Standards Organisations: NSOs.

Step 4³ - View of NSBs and NSOs in 12 selected countries.

Step 5 - View of national interested parties in selected countries.

These views are whenever possible supported by facts and figures. 'Stakeholders' as used in the report refer to (1) Large enterprises; (2) Small and me-

¹ CEN was created as de facto association in 1961 and converted in a de jure association in 1975.

² In this report "environmental organisations" refers to environmental non-profit citizens' organisations representing civil society.

³ Step 4 and Step 5 are implemented in a group of 12 countries that have been selected considering characteristics as old versus new Member States, small and large economies and geographical location.

dium-sized enterprises (SMEs); (3) Employers' federations and trade associations; (4) Consumer associations; (5) Trade unions; (6) Environmental organisations (private NGOs); (7) Public authorities; (8) Universities and research organisations. Wherever possible, the category of certifiers, consultants and laboratories has been considered separately (9).

European standardisation, its importance

Every year, some 1,500 European standards are adopted by the European Standards Organisations. The European Standards Organisations, consist of the European Committee for Electrotechnical Standardisation **CENELEC**; the European Telecommunications Standard Institute **ETSI**, and the European Committee for Standardisation **CEN** (covering all other fields). Although the model of CEN and CENELEC is different from the ETSI model, in both models, National Standards Organisations in all Member States of EU and EFTA play an important role in the development of EN harmonised European standards.

Standardisation, participation of stakeholders

The standards making process has been described as an open process based on a collaborative, balanced and consensus-based approval process for the promulgation of domestic or international standards. Participation of all stakeholders to the process of standard making is important because it fosters the credibility of standards being developed and which has a positive impact on the use of standards and the important role standards play in society.

In practice however there might be a range of factors that hamper the full participation of the various types of stakeholders. These factors may both be related to characteristics of the stakeholders themselves and to the characteristics of the standardisation system. The organisation and business models, the procedures, the culture and the regulations, all affect access and may result in a less than optimal participation of stakeholders and use of standards in society.

The most obvious factors that are linked to the characteristics of the stakeholders themselves – but not to be seen in isolation from the characteristics of the system at large – relate to limited awareness of the importance of standards; to technical knowledge and knowledge of the system and to resources in terms of staff, time and money.

This study has been initiated by the European Commission in order to find out whether there is indeed a gap between declared principles of openness and actual conditions of access as experienced by stakeholders.

Structure of the report

Part I consists of Chapter 2 providing an overview of European standardisation to serve as a framework and Chapter 3 presenting the main findings, conclusions and recommendations. Part II consist of the Chapters 4 -7 that provide detailed information collected in the various research steps from standardisers and stakeholders at European and national level.

Much information collected and presented

As the terms of reference of the study focussed to a large extent on collection of information and views from the different players, the contribution of the study consists for a large part of reporting in a detailed manner on a wide range of issues. A large number of tables and charts in the main report present this information collected from standardisers as well as stakeholders; it is however hardly possible to summarise this information in a few lines. In the main report there is a section 'main findings' that takes the long list of questions formulated by the Commission in advance¹ as a guide to present an overview of these results. Below some highlights of these findings are presented.

Main findings

Both large and small enterprises are believed to have a rather high commitment to standardisation in general and to have the required knowledge to participate meaningfully in standardisation (as assessed by the standards organisations). Public authorities get a high score only with commitment, whereas universities and research organisations get only a high score with knowledge. Consumers, environmental organisations and trade unions receive relatively low scores on both accounts.

When the various stakeholders make a self assessment of their awareness about standardisation, business representatives score very high, but public authorities, universities, consultants and certifiers score even higher. Also by their own standards consumer organisations, and especially environmental organisations and trade unions score relatively low. Also when focussing on what standardisation might do for the own (objectives of the) organisation, trade unions and environmental organisations score lowest.

The most important reason for stakeholders to participate in the process is to influence the contents of the standards being developed, either negatively formulated (to avoid that potentially harmful issues will be incorporated) or positively (to make sure that things that are important to them are properly incorporated). The negative or defensive motive is especially high with trade unions, whereas the idea that 'contributing their knowledge results in better standards' is especially important for consumer organisations.

Most stakeholders that participated in the survey judge rather mildly about the existence of barriers to participate in the standardisation process. On a scale from 1 (not at all) to 5 (very important) public authorities, large enterprises, SMEs and consultants all score between 2.5 and 3.0. Consumer organisations and environmental organisations experience the highest barriers (score respectively 3.5 and 3.9).

About half of the respondents see these barriers as mainly internal to their own organisation, about half as mainly external, i.e. related to the characteristics and procedures of the standardisation system. Trade unions see to a relatively large extent mainly external barriers (40% of respondents).

¹ Section 4.1.4 of the Technical Specification in the contract.

The four most important barriers identified for *access to the standardisation process* are:

- amount of time required;
- travel and subsistence costs;
- the cost of participating in technical committees (fee);
- the cost of becoming a member of standards body (fee);

The highest barrier (amount of time) is considered to be (very) important by two thirds of all respondents.

The top 3 barriers for *using standards* are:

- price of standards;
- cost of implementing the standards;
- the number of cross references in the standards.

The price of standards is an (very) important barrier for 52 % of the respondents.

The seven most important benefits cited by respondents are¹:

- complying with (European) legislation;
- complying with requirements of customers;
- products and services are up to date;
- to be in a position to communicate clearly and unambiguously with relevant parties in the market place;
- compatibility of our products with other products is assured;
- environmental interests are covered;
- better reputation of our products and services in the market place.

Obviously the score is quite different for different types of stakeholders, e.g. with trade unions 'Improve health and safety conditions at the work place' scores very high (4.8) and with environmental organisations environmental concerns score 5. For large enterprises, two items score above 4.5: 'comply with legislation' and 'comply with requirements of clients'. For SMEs the highest score of 4.3 is for 'comply with requirements of customers'.

Main conclusions

Although the report does not take away the general feeling that access to standardisation is difficult for individual SMEs and indeed concludes that the cost/benefit ratio of SMEs for participation in the system is much worse than for larger enterprises, SMEs are generally rather well represented in the technical committees of the NSOs. This is simply due to the fact that there are 500 times more SMEs in Europe than large enterprise. Even if the percentage of SMEs participating would be 100 times less than the percentage of large enterprise, there would still be five times more SMEs present in the standardisation system than large enterprises. Obviously this does not take away all concerns with regard to an adequate representation of SMEs because the simple number is only one aspect, whereas there are also huge differences in expertise and influence.

The major issue emphasized in the report – and reflected in the recommendations – is that it is of utmost importance to work at the organisation of the various stakeholders and make sure that their representative organisations are

¹ Those issues - out of a list of 13 – that score 3.8 up to 4.1 on a scale from 1 to 5.

strong enough to stand up for the interest concerned (and share the cost of participation among the members).

In addition it was concluded to be important to have a much better and standardised registration system with the 50 to 60 standardisation organisations in Europe. There is for example a need to look into the characteristics of the SMEs that do indeed participate. Certifiers and consultants might be registered as SMEs, whereas their position in the standardisation process is quite different from small engineering companies when discussing for example machine safety standards.

But the emphasis should not be on SMEs only, as the study has found that especially consumers', environmental and trade unions' interests are only marginally represented in many countries.

Already a long time ago the European Commission has recognised this insufficient representation of several interests in European standardisation and has therefore decided to financially support organisations like ANEC (consumers), ECOS (environment), NORMAPME (SMEs) and ETUI (labour) to fill this gap at European level. However the study concludes that the elaboration of a European standard in a model based on national representation - consensus between the different interests is developed at national level and this consensus is later casted at European level - with a representation of these stakeholders interests at European level does not really coincide smoothly.

Recommendations

The information and views collected in the framework of this study were the basis to formulate 13 recommendations to further improve access to standardisation. In line with the objectives of the study specified by the Commission, these 13 recommendations are really "*...avenues for exploration by the standards bodies, the Commission, Member States and interested parties with a view to improving the conditions of access to standardisation activities.*" In the main report these 13 recommendations have each been introduced by making reference to the findings of the study on which they are based (Section 3.3 of the main report). In this summary we merely list the recommendations:

Recommendation 1

European policy initiatives aiming at increased access to standards need to take different shapes because of the different organisational structures and different business models in the various Member States¹. These differences hamper the development of a harmonised European policy. We therefore recommend striving for more uniform organisational structures and business models of the National Standards Organisations as a prerequisite for more efficient and effective European policy making in the area of access to standardisation.

¹ For example 'free access to standards' as advocated in 'Towards an increased contribution from standardisation to innovation in Europe', COM (2008) -133 final will impact private standardisation organisations rather differently from government run standardisation bodies. Hence this might call for an approach in which the national level is dominant in policy making. Compare the model of the European Employment Strategy, in which actions are agreed upon based on the commitment from Member States to establish a set of common objectives and targets for policy. Under this new framework, policy co-ordination can be fostered by a "management by objectives" approach.

Recommendation 2

Seriously consider the relationship between the standards organisations and the European Institutions and the procedures for the development and distribution of standards used for two different purposes: standards initiated and mainly paid for by private enterprises and standards that are used to bring about public policy goals and that are partly paid by public money.

The recommendation is to develop all standards within one system, but adjust procedures and conditions of access for harmonised standards (e.g. lower prices for EU harmonised standards, see Recommendation 13).

Recommendation 3

Improvement in access to and actual participation in standardisation must not only be achieved by reorganising business models of standards organisations, but also by fostering the organisation of the relevant stakeholder interest to allow meaningful participation. This holds for representation of interests outside the business community as well as for the business community: efforts to increase the representation of SMEs in standardisation should be aimed at organisations of SMEs such as trade associations and professional organisations.

Recommendation 4

The contradiction between the system of national delegation and the efforts to have specific interests represented at European level with the support of the European Commission should be gradually resolved, either:

- by promoting the access to the standards making process at the national level¹ for other stakeholders than the traditionally strongest stakeholders such as large enterprises;*
- or:*
- by gradually dismantling the system of national delegation and moving towards a truly European system, in which a consensus between the various interests is actually developed and obtained at the European level.*

Recommendation 5

If other membership organisations do exist that claim to represent the same interest as the one organisation selected by the Commission to receive financial support to represent that interest in European standardisation, the position of that organisation may be disputed.

There are two options to arrive at a solution: either:

- the policies to support the participation of stakeholders should aim to improve framework conditions rather than support directly individual organisations;*
- any direct support should preferably be to all existing membership organisations, representing the European stakeholders, not just one.*

Obvious a proper mix between these options might result for an exploration by the standards bodies, the Commission and interested parties.

¹ Hence this might call for an approach in which the national level is dominant in policy making. Compare the model of the European Employment Strategy, in which actions are agreed upon based on the commitment from Member States to establish a set of common objectives and targets for policy. Under this new framework, policy co-ordination can be fostered by a "management by objectives" approach.

Recommendation 6

More support to training and information campaigns on standardisation issues would be most welcome. This holds for courses aimed at specific target groups among stakeholders such as SMEs or consumer associations, as well as for improving the position of standardisation in regular education such as - but not limited to - regular vocational education and academic curricula.

Recommendation 7

Monitor continuously the possibilities to merge different institutions that cater for standardisation in different, but increasingly related fields of expertise (at national as well as European level) in order to reduce complexity and costs with a view to increase ease of access further.

Obviously within merged organisations there will remain a certain specialisation to cater for the different working areas.

Recommendation 8

The cooperation of standards organisations with a wide range of stakeholder organisations (whether business associations or special interest groupings) should be further improved in order to see to it that more relevant, more targeted information on standardisation reaches the stakeholders at grassroots level. In addition to reaching stakeholders adequately and efficiently with information, such cooperation may result in specific sets of standards to be composed and actually distributed among the target group.

Recommendation 9

To allow monitoring progress in increasing access to and actual participation in standardisation by the various types of stakeholders, the ESOs and NSOs should have a uniform registration of the participation of the various types of stakeholders in technical bodies, either by the number of organisations represented or by the number of experts participating on their behalf. A uniform classification of stakeholders is important to judge to which extent a balanced composition of TCs is indeed achieved in the various countries.

To also allow assessing the problems that still exist, they should also have a uniform complaints register with all National Standards Organisations.

Recommendation 10

It should be further encouraged that public enquiries are indeed published widely and that stakeholders not (yet) participating in standardisation are indeed reached. The NSOs should be more proactive in obtaining comments from a wide range of stakeholders during the public enquiry. Just a reference in the State Gazette might not suffice.

Recommendation 11

In designing the various communication tools used by standard organisations – and stakeholder groups for that matter – the need to make these communication tools accessible for people with impairments should be better taken into account.

Recommendation 12

The use of ICT tools should be further encouraged in.

- Organizing the standards developing process.*
- Distributing information on the standards documents.*
- Distributing the standard documents themselves.*

In fostering this, good practices that exist with several NSOs might be a useful instrument.

Recommendation 13

For European harmonized standards (cf. Recommendation 2), that are closely linked to legal requirements, the aim should be to make the standards available for free on the Internet. This obviously brings with it the need to make available alternative sources of finance in order to avoid that as a consequence participation in the standards development process will become much more expensive in order to maintain the economic viability of the standards organisations.

Part I – Introduction and main findings

1 Introduction

The European standardisation system

Standardisation is really very old, but the system of standards organisations caring for private voluntary standardisation developed in Europe over the last 100 years. The system mainly developed from the need of private enterprise to increase efficiency.

The ongoing development of international markets created a need for international communication about and harmonisation of national standards. So after the emerging of National Standards Bodies in the 1920's, European Standards Organisations emerged: CEN¹ in 1961, CENELEC in 1973, and ETSI in 1988. This facilitated the process of developing standards (organising the process); archiving the stock of existing standards that grew enormously in those 100 years, and distributing the normative documents for onwards use and reference.

Using voluntary standards as reference documents in legislation exists already for a considerable time (e.g. national building codes), however the relationship between legislation and standardisation became more prominent after the introduction of the New Approach by the European Commission in the eighties. Standards are still (de jure) voluntary, but economic players get the presumption of compliance with the law (based on European directives) if products and services are in line with the European standards to which the directive refers. This implies that in practical terms these harmonised standards are almost obligatory for most economic players.

The fact that harmonised European standards have an important role to play in European legislation warrants an additional concern of the European Institutions as democratic legitimacy and free access become even more important. These new harmonised standards aim to support achieving a range of public policy goals like health and safety at the workplace, safety of toys, or energy efficiency. The most obvious stakeholders needed around the table – in addition to industry – are environmental interest groupings², consumers, trade unions and market surveillance agencies.

The major part of standardisation work covering a wide range of topics is done within the organisational structures of the three formally recognised European Standards Organisations³ as described in Chapter 2. There also consist a range of standardisation activities outside this domain for example private consortia in the ICT business, however this report focuses on formal European standardisation.

¹ CEN was created as de facto association in 1961 and converted in a de jure association in 1975.

² In this report "environmental organisations" refers to environmental non-profit citizens' organisations representing civil society.

³ Directive 98/34/EC defines in Art 1.7 "European standardisation body" by referring to Annex I of the directive in which are listed: CEN European Committee for Standardisation; CENELEC European Committee for Electrotechnical Standardisation and ETSI European Telecommunications Standards Institute.

The project

The objectives of the study¹ were defined as:

- to determine to what extent the European standardisation system in its present form can guarantee appropriate access to all interested parties;
- to recommend avenues for exploration by the standards bodies, the Commission and interested parties with a view to improving the conditions of access to standardisation activities.

The focus is both on access to the European standardisation processes (drafting standards) and on access to standard documents (use).

The project was implemented in five major steps:

- Step 1 - View of European Standards Organisations (CEN, CENELEC, ETSI).
- Step 2 - View of European interested parties.
- Step 3 - View of National Standards Bodies and Organisations (NSBs, NSOs).
- Step 4 - View of NSBs and NSOs in 12 selected countries.
- Step 5 - View of national interested parties in selected countries.

These views are whenever possible supported by facts and figures. For example, the Internet survey among NSBs and NSOs in Step 3 did not produce all the factual information regarding access and participation issues at national level as required. To remedy this situation, it was decided to develop an additional *10 points questionnaire* and to distribute this to all NSBs (members of CEN and CENELEC) and to NSOs cooperating with ETSI in the ICT domain (all 30 countries concerned).

All National Standards Bodies and Organisations (NSBs, NSOs) are listed in Table 2.1 in Chapter 2. 'Stakeholders' refer to eight or nine categories:

- 1 Large enterprises;
- 2 Small and medium-sized enterprises (SMEs);
- 3 Employers federations and trade associations;
- 4 Consumer associations;
- 5 Trade unions;
- 6 Environmental organisations (private NGOs);
- 7 Public authorities;
- 8 Universities and research organisations.

In addition - wherever possible - the category of certifiers, consultants and laboratories has been considered separately (9).

The study covers 30 countries: the current 27 Member States of the EU and the three EFTA countries Norway, Switzerland and Iceland. However as mentioned above, Step 4 and Step 5 are implemented in a group of 12 countries that have been selected² considering characteristics as old versus new Member State, small and large economies and geographical location (see Table 1.1).

¹ Invitation to tender 'Study on the access to standardisation' No. ENTR/07/012. The contract for the study was awarded to EIM Business & Policy Research in The Netherlands (www.eim.nl) in December 2007. EIM implemented the study in co-operation with the European Network for Social and Economic Research ENSR in the 30 countries involved (www.ensr.eu).

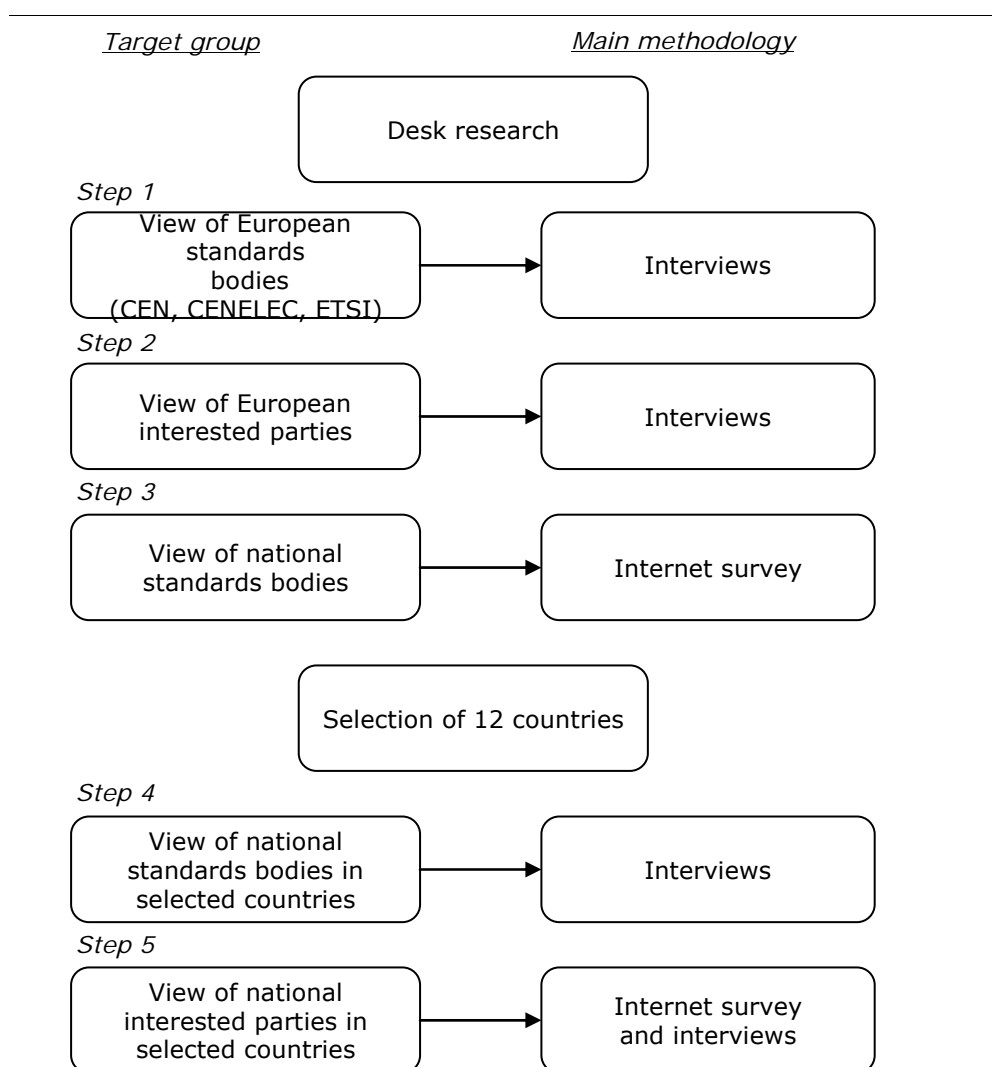
² Selection has been decided in the meeting of the Steering Group on 9 July 2008.

Table 1.1 12 countries selected for Steps 4 and 5

	Old Member States		New Member States		Total
	Small	Large	Small	Large	
North	Denmark Sweden		Estonia		3
Central	Netherlands	France Germany UK	Czech Republic	Poland	6
South		Italy Spain	Cyprus		3
Total	3	5	3	1	12

The research methodologies applied for the various steps are portrayed in Figure 1.1.

Figure 1.1 Approach of collecting the required information



Source: Technical proposal EIM.

European standardisation, its importance

Every year, some 1500 European standards are adopted by the European Standards Organisations. The European Standards Organisations (ESOs), consist of the European Committee for Electrotechnical Standardisation **CENELEC**; the European Telecommunications Standard Institute **ETSI**, and the European Committee for Standardisation **CEN** (covering all other fields)¹. Standards - as voluntary norms of the business community itself - play an important role in national economies within Europe as well as in the European economy and global economy as a whole.

A report by the German Institute for Standardization (DIN) noted the following economic benefits²:

- 1 Standards contribute more to economic growth than patents and licenses;
- 2 Transaction costs are lower when standards are used;
- 3 Companies that participate actively in standards work have a head start on their competitors in adapting to market demands and new technologies; and
- 4 Research risks and development costs can be reduced for companies contributing to the standardisation process.

Especially with the New Approach Directives³ since the mid 1980s, standards play also an important role in serving public goals such as public safety, health and environmental issues. Starting with Single Market regulations, the new regulatory technique and strategy of the New Approach is now believed to be beneficial for many other areas of public policy making as well⁴. The principles of the New Approach with regard to technical harmonisation and standardisation are described in Chapter 2. By contributing to the emergence of harmonized regulation across Europe, the European standardisation system has contributed a lot to removing technical barriers to trade and hence allowed free movement of goods between EU and EFTA Member States.

Standardisation, participation of stakeholders

The European standardisation process formally allows for participation and input from all interested stakeholders via the National Standards Bodies (NSB) and via European Standards Organisations (ESO)⁵ for work done in the domains of CEN and CENELEC or via direct participation and the National Standards Organisations (NSOs) cooperating with ETSI⁶. Stakeholders refer to various types of organisations such as large enterprises, small and medium-sized enterprises (SMEs),

¹ See Text box 2.1 in Chapter 2.

² German Institute for Standardization, Economic Benefits of Standardization, 2000 (as quoted on the website of Standards Council of Canada, see: <http://www.scc.ca>).

³ European Commission, White Paper on the completion of the internal market, 14 June 1985. The New Approach was defined in a Council Resolution of May 1985, for the New Approach and European standardisation, see: <http://www.newapproach.org>.

⁴ European standardisation supports European policies in the areas of competitiveness, ICT, public procurement, interoperability, environment, transport, energy, consumer protection, etc.

⁵ The main mechanism is national representation, there are however mechanisms whereby for example European trade associations are given liaison status and appoint representatives in the technical committees and groups (With CEN this concerns 600 European trade associations).

⁶ In the elaboration, approval and implementation of European Standards (ETSI ENs), ETSI is assisted by 38 NSOs in 36 European countries. See: Table 2.1.

consumer associations, trade unions, environmental organisations, public authorities, universities and research organisations.

Therefore the standards making process has been described as being open, and the term "openness" describes a collaborative, balanced and consensus-based approval process for the promulgation of domestic or international standards¹. Participation of all stakeholders to the process of standard making is important because it fosters the credibility of standards being developed and this will have a positive impact on the use of standards and the role standards play in society. In practice however there might be a range of factors that hamper the full participation of these various types of stakeholders. These factors may both be related to characteristics of the stakeholders themselves and to the characteristics of the standardisation system: the organisation and business models, the procedures, the culture and the regulations that all affect access and may result in a less than optimal participation of stakeholders and use of standards by all stakeholders.

The most obvious factors that are linked to the characteristics of the stakeholders themselves – but not to be seen in isolation from the characteristics of the system at large – relate to limited awareness of the importance of standards and other standard documents; to technical knowledge and knowledge of the system and to resources in terms of staff, time and money

This study has been initiated by the European Commission in order to find out whether there is indeed a gap between declared principles of openness and transparency by the European Standards Organisations CEN, CENELEC and ETSI and the opinions expressed by some stakeholders that the standardisation system does not allow them to be sufficiently involved and their position to be sufficiently taken into account. The study discusses perceptions of the various types of stakeholders with regard to actual conditions of access by considering as much factual information as possible. Based on the acceptance or rejection of such perceptions, ways and means to improve the conditions of access to standardisation are suggested.

The European Standards Organisations (ESOs), CEN, CENELEC and ETSI, play a central role in this study. In addition, other relevant parties that are closely related to these European organisations are also considered, i.e. National Standards Bodies (NSBs, members of CEN and CENELEC), National Standards Organisations (NSOs cooperating with ETSI) and International Standards Organisations operating at a global scale, i.e. ISO, IEC, ITU².

¹ As used by many recognized standards bodies such as the American National Standards Institute (ANSI). See: Lawrence Rosen, presentation Defining "Open Standards" at the conference Standardisation, Unifier or Divider?, 5-7 December 2005, Vancouver, see: http://www.thebolingroup.com/unifier_divider/presentations.html

² The Vienna and the Dresden Agreements determine the cooperation between respectively CEN and ISO and between CENELEC and IEC (originally established in 1991 and 1996 respectively).

Structure of the report

Part I – Introduction and main findings

Chapter 2 provides an overview of European standardisation to serve as a framework. To illustrate that the European system is not a homogeneous structure in which only large, well known institutions such as DIN and BSI operate, a report on the overall situation with regard to standardisation in Estonia and a brief report on recent changes in the organisational structure in the Czech Republic towards a more directly state controlled standardisation system have been included in Annex 1 and Annex 2.

Chapter 3 presents the main findings, conclusions and recommendations.

Part II – More detailed information

Chapter 4 presents some information of the actual participation of stakeholders in the system at European level. In Chapter 5 an overview is provided of the views expressed by European players on issues of access and participation. These observations are based on the interviews held at European level (Step 1 and Step 2 in the research plan that is pictured in Figure 1.1). Chapter 6 presents the results from the Internet survey among NSBs and NSOs in Europe (in section 6.2). In addition more factual information obtained through an additional *10 points questionnaire* is summarised in section 6.3. The information obtained from stakeholders in 12 selected countries in Step 5 is discussed in Chapter 7. Next to the annexes 1 and 2 already introduced above, Annex 3 presents an annotated bibliography.

Throughout the report references have been inserted to the 13 recommendations presented in Chapter 3, such as [cf. Recommendation 10]. These references do not imply that that recommendation is directly and only based on the information provided in that paragraph. The paragraph concerned has however been taken into consideration together with other information respondents when the recommendation was formulated.

2 European standardisation: an overview

2.1 Introduction

Standards have existed since the beginning of recorded history. Some describe the calendar as one of the earliest examples of standardisation. The Chairman of the Malta Standards Authority MSA refers to the architecture of the huge megalithic temples (the oldest free standing stone structures of the world, claimed to be 1,000 years older than the pyramids in Egypt and Stonehenge in UK), to suggest that the Maltese are even earlier pioneers in the use of standards than the Egyptians¹.

Some standards were created by royal decree. For example, King Henry I of England standardized measurement in 1120 AD by instituting the ell, which was equivalent to the length of his arm². The history of BSI British Standards, a division of BSI Group that is formally designated as the National Standards Body (NSB) for the UK goes back to 1901, when the first meeting of the Engineering Standards Committee took place initiated by Sir John Wolfe-Barry - the man who designed London's Tower Bridge - to consider standardizing iron and steel sections³.

In the early years of the previous century, private industry led standardisation in Europe resulted in the establishment of many National Standards Organisations that took the form of privately formed associations or foundations. Since the 1920s officially recognized National Standards Bodies (NSBs) have developed in Europe⁴. Each Member State of the EU and EFTA - with the exception of Liechtenstein - has such an organisation, to mention a few: BSI in UK, DIN in Germany, SN in Norway and BDS in Bulgaria⁵. In addition European Standards Organisations (ESOs) have developed.

Standardisation is the activity of establishing and recording a limited set of solutions to actual or potential matching problems, directed at benefits for the party or parties involved, balancing their needs and intending and expecting that these solutions will be repeatedly or continuously used, during a certain period, by a substantial number of the parties for whom they are meant⁶.

In order to attain the status of a standard, a series of *internationally acknowledged basic principles* have to be observed which ensures that the contents of standards are generally accepted and are fit for the purpose of daily practice.

¹ Francis E. Farrugia, Malta Standards Authority Chairman, The Malta Financial and Business Times, 5 September 2001.

² History of standards at <http://www.ansi.org>

³ See: <http://www.bsigroup.com>

⁴ Some of these organisations are older. The Austrian Electrotechnical Association (OVE) was for example founded in 1883, when electrical engineering was a new but fast developing technology. OVE focussed on supporting the development of electrical engineering in combination with safe applications.

⁵ See for a full list Table 2.1

⁶ Vries, Henk de (1997) 'Standardization - What's in a name?' Terminology - International Journal of Theoretical and Applied Issues in Specialized Communication, 4, 1, 55-83 (rectification in 4, 2). See also: Standards for the Nation, Henk de Vries, Doctoral Thesis, 1999, (also published as Standardization: A Business Approach to the Role of National Standardization Organisations).

These principles are:

- *Collective achievement on a neutral basis.* All parties concerned are invited to and should be represented in standardisation work at all levels.
- *Consensus.* Consensus implies general agreement characterised by the absence of sustained opposition to substantial issues of the document, consideration of all points of view voiced by all important parties and to reconciliation of any conflicting arguments. European and international standards shall be passed by a qualified majority (See also section 6.3.3).
- *Publicity.* Prior to publication, a normative document has to be submitted as a draft standard for public enquiry. Justified objections have to be considered by the technical standards committee responsible.
- *Coherence.* The preparation of every single standard entails the attention to coherence and uniformity both at national, regional and international level¹. For European standardisation this implies that conflicting national standards have to be withdrawn. Thus, uniformity of the body of standards and continuity are safeguarded to the benefit of the user.

The Council Resolution of 28th October 1999² on the role of standardisation in Europe confirms that standardisation is a voluntary, consensus driven activity and that standards should have a high degree of acceptability as a result of the full involvement of all relevant interested parties. This resolution also calls for a co-operation between the Community and the European Standards Bodies, based on a partnership, characterised by common objectives. [cf. Recommendation 2]

In the Directive 98/48/EC of the European Parliament and the Council amending Directive 98/34/EC further improvements are laid down to the European standardisation system in terms of openness, transparency, impartiality, and participation of all stakeholders³. In addition the standard-setting process needs to be in line with European competition provisions⁴.

In the Communication 'Towards an increased contribution from standardisation to innovation in Europe' (COM/2008/0133 final, Brussels, 11.3.2008) the importance of the issue of access is again underlined.

¹ This is a trade-facilitating objective. International standards contribute maximally to trade facilitation when they are part of a single and coherent set of standards. If international standards are used in relation to technical regulations as promoted by the WTO TBT Agreement, international standards bodies need to have a clearly defined constituency. The relevant WTO principles taken as a whole ensure that international standards bodies are open to participation by national standards bodies and produce international standards that do not conflict with each other (See: Commission Staff Working Paper, European Policy Principles on International Standardisation, SEC(2001) 1296).

² Council Resolution of 28 October 1999, OJ No C 141/1 of 19 May 2000.

³ Directive 98/34, a basic document defining the position of standardisation within the European Union, confirms that the European standardisation system must be organised by and for the parties concerned, on a basis of coherence, transparency, openness, consensus, independence of special interests, efficiency and decision-making based on national representation (Directive 98/34/EC of the European Parliament and the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, published in the Official Journal of the European Communities, 21.7.98).

⁴ See also the more recent communication COM (2008) 133 final, On the contribution from Standardisation to innovation in Europe, Brussels, 11.3.2008.

One of the nine key elements identified by the Commission for focussing EU standardisation policy on innovation is (item 5): to facilitate the access to standardisation of all interested stakeholders, in particular SMEs¹, but also users/consumers and researchers. This will facilitate the uptake of innovation by the market.

Text box 2.1 Diversity in Europe

This chapter provides an overview of European standardisation to serve as a framework for studying access to standardisation. The structure of the European Standardisation system is described in which the three European Standard Organisations play an important role.

- CENELEC, the European Committee for Electrotechnical Standardization;
- ETSI, the European Telecommunications Standards Institute;
- CEN, the European Committee for Standardization, responsible for standardisation in most other domains.

Although ETSI is also officially recognized by the European Commission as a European Standards Organization, it is not a membership organisation based on national membership. ETSI is a not-for-profit organization with almost 700 ETSI member organizations drawn from 60 countries world-wide. However in the elaboration, approval and implementation of European Standards, ETSI is assisted by 38 National Standards Organisations (NSOs) in 36 European countries.

All in all, the National Standards Organisations are an important part of the European Standardisation system. However as will be demonstrated in the remaining chapters of this report, the National Standard Organisations in the various Member States differ quite a lot with regard to history, scope of activities, business model, links to the national government etc.

To illustrate that the European system is not a homogeneous structure in which only well known large organisations such as DIN in Germany and BSI in United Kingdom operate, two other cases have been described in an annex:

- Annex 1: The overall situation with regard to standardisation in Estonia;
- Annex 2: The recent changes in the organisational structure in the Czech Republic towards a more directly state controlled standardisation system.

[cf. Recommendation 1]

¹ On 25 June 2008, the European Commission unveiled the Small Business Act for Europe (SBA). The SBA is based on ten guiding principles and proposes policy actions to be undertaken by both the Commission and Member States. The idea is to put a comprehensive policy framework in place for the EU and the Member States to improve the business environment for SMEs a.o. by reducing bureaucratic hurdles and obstacles in order to unlock their potential of long term sustainable growth and of more job creation. In the press release the Commission notes that the SBA includes measures to make it easier for SMEs to participate in the standard-setting process. Source: Enterprise & Industry - e-news of the European Commission - 25/06/2008.

2.2 The role of standards in the economy

The exchange of goods and services, especially across national and regional borders, needs uniform international regulations in order to achieve compatibility and interoperability in the widest sense. International standards facilitate collaboration on a worldwide scale in the economic, scientific and technical field.¹ Standards allow for one thing to match another (interoperability), but not only in a technical sense. Standards can be used as a market-regulating tool for the removal of barriers to trade or for the alleviation or relief from routine tasks.

Standards further rationalise the economy by for example reducing the number of items of different sizes to be produced and to be stocked; facilitate quality assurance; unify test methods and procedures, such as in the field of environment, and facilitate in general the communication between the economic sector, technology, science, administration and public services. All in all standards have a clear positive impact on economic growth².

A CEN study of 2002 by two economists³ explained why standards are important and the effect standards have on enterprises, markets and the economy at large. The authors look at standards, in a broad historical perspective, as a 'public good' and also as an instrument of marketing policy in the life cycle of products. The authors conclude that standards are beneficial to the overall structure of industrialised economies and explain how diverse stakeholders implicitly rely on standards. To summarise some of the findings:

- Standards are vital in assuring that expectations are met. They contribute to the trust needed for any economy to operate.
- Already, since the days of Adam Smith in the eighteenth century, economic development is based on an ever-increasing specialisation and division of labour⁴. This implies that production is broken down into a series of linked activities, into what is nowadays called a value chain. Obviously standards do a lot to make this possible.
- The competitive advantage of firms is based on a complex of different factors, amongst which is reputation. Certain standards such as EN ISO 9001 on quality assurance⁵ help in building a strong reputation.
- At the beginning of a product life cycle, enterprises may obtain patents to protect their investments in innovation. This allows setting relatively high prices; the rent that follows is an incentive for innovation and may therefore also be beneficial for society at large.

¹ Input for the sections 2.2 to 2.5 has a.o. been derived from a.o.: www.on-norm.at, www.cen.eu, www.cenelec.eu, www.etsi.eu, http://ec.europa.eu/enterprise/standards_policy; www.nen.nl, www.normapme.com, <http://ec.europa.eu/enterprise/entrepreneurship/craft/craft-priorities/craft-standardisation.htm>, and the literature listed in Annex II.

² Research carried out in 2005 by DTI in the UK presented clear evidence that standardisation contributes to economic growth. The effects of UK standards on GDP and labour productivity were analysed. About 13 percent of the improvements in productivity and about 10 percent of GDP growth since World War II was attributed to standards. See: <http://www.iram.com.ar/Eventos/Seminario70/presentaciones/MikeLow.pdf>.

³ Paul Temple and Geoffrey Williams, *The Benefits of Standards*, A CEN Management Centre Publication, CEN, 2002.

⁴ Adam Smith, *An Enquiry into the Nature and Causes of the Wealth of Nations*, 1776.

⁵ This International Standard (EN ISO refers to a norm that has been established in cooperation between CEN and ISO) describes fundamentals of quality management systems, which form the subject of the EN ISO 9000 family.

- However users gain from the transition over time of this protected situation to a situation of more open competition on the basis of 'standardised' products as it brings down prices. An econometric study showed that technical standards do not (always, only) create technical barriers to trade, but rather increase imports and hence competition within an industry¹.
- Standardisation makes it easier and cheaper to outsource production. This may not only be relevant in a situation of direct foreign investments from developed economies to lower wage economies (as referred to by Temple and Williams), but also for outsourcing from large enterprises to SMEs.
- A concept in economics is 'asymmetric information'. Here standardisation may help by (i) raising overall quality; (ii) reducing information search costs (knowing that a product conforms to a standard might be sufficient to assess the quality of the product) and (iii) reducing the need to find out exact technical specifications of a product. An official standard may indicate that safety and performance criteria are met.

A study by economists from the Fraunhofer Institute for Systems and Innovation Research assessing the contribution of standards to total factor productivity of the German business sector over the period 1960-1996², found that an increased stock of capital goods is the single largest factor explaining economic growth, but that the availability of a stock of relevant standards was the second largest factor (and nearly ten times more important than the fruits of innovation³).

In addition standards play other important roles such as ensuring the safety at the work place and during recreational activities and bringing about unified test methods and procedures, such as in the field of environment.

2.3 The role of standards in European policy making

The origin of standards as 'by and for private business' does not imply that standards have no role to play in public policy and are not instrumental in bringing about public goals. As already mentioned in the Introduction, especially since the acceptance of the so called New Approach⁴ by the European Union in 1985, the role of harmonised European standards in legislation and policy has become paramount.

[cf. Recommendation 2]

The New Approach to technical harmonisation and standardisation is based on the following principles⁵:

¹ Peter Swann (2000), The Economics of Standardisation, Final report for Standards and Technical Regulations Directorate, Department of Trade and Industry, DTI (available as PDF file at the website of DTI: <http://www.dti.gov.uk/files/file11312.pdf>).

² DIN (German Institute for Standardisation), The benefits of standardisation, Summary of results. Final report and practical examples; Part A: Benefits for businesses and Part B: Benefits for the economy as a whole; Berlin Beuth Verlag GmbH, 2000 (Available from: <http://www.beuth.de>).

³ In addition there is of course a link between innovation and standardisation, see for example: European Commission, Communication from the Commission, Towards an increased contribution from standardisation to innovation in Europe, Com(2008) 133 final, Brussels, 11.3.2008.

⁴ European Commission, White Paper on the completion of the internal market, 14 June 1985. The New Approach was defined in a Council Resolution of May 1985, for the New Approach and European standardisation, see: <http://www.newapproach.org/>

⁵ Source: Guide to the implementation of directives based on the New Approach and the Global Approach, Luxembourg: Office for Official Publications of the European Communities, 2000.

- Legislative harmonisation is limited to essential requirements that products placed on the Community market must meet, if they are to benefit from free movement within the Community (safety requirements of general interest).
- The technical specifications of products meeting the essential requirements set out in the directives are laid down in harmonised standards that are drawn up by standards bodies.
- Application of harmonised or other standards remains voluntary, and the manufacturer may always apply other technical specifications to meet the requirements.
- Products manufactured in compliance with harmonised standards benefit from a presumption of conformity¹ with the corresponding essential requirements.

Starting with Single Market regulations, the new regulatory technique and strategy of the New Approach is now believed to be beneficial for many other areas of public policy making as well. By contributing to the emergence of harmonized regulation across Europe the European standardisation system has contributed a lot to removing technical barriers to trade and hence allowed free movement of goods between EU and EFTA Member States.

2.4 The European players

Some standards are developed by industry such as the Universal Serial Bus (USB) that allows us to connect many different type of peripherals (keyboard, printer or camera) to our computers using one type of socket. The design of USB was standardized in the mid nineties by an industry standards body incorporating leading companies from the computer industry.

When the term European standardisation system is used, reference is made to the standards bodies that are officially recognised by the European Commission and that have links to international standards bodies at global level and to National Standards Bodies (NSBs) in the Member States.

The three recognised European Standards Organisations (ESOs) are:

- CEN: the European Committee for Standardization, a non-profit technical organisation founded in 1961² by the NSBs in the EU and EFTA countries.
- CENELEC: the European Committee for Electrotechnical Standardization, created in 1973³. Also CENELEC is a non-profit technical organisation composed of National Standards Organisations: the National Electrotechnical Committees of 30 European countries.

¹ Presumption of conformity is a legal concept surrounding Harmonized Standards that denotes the relationship between the legislative and standardisation processes. The European Commission (the lawmaking body) and the European Standards Bodies collaborate to produce Harmonized Standards. The contract (or mandate) stipulates that the standards body will produce a standard that will provide a technical solution, or a technical interpretation, of for example an essential health and safety requirement. When the conditions of the Commission's mandate are met, the Commission publishes the notice of its completion in the Official Journal of the European Communities. Once the notice is published, the standard takes on the presumption of conformity mantle. A manufacturer, therefore, using a Harmonized Standard in the design and/or production of the product, is presumed to be in conformity with the essential requirements of the law (based on A Guide to EU Standards and Conformity Assessment, <http://ts.nist.gov>).

² CEN was created as de facto association in 1961 and was later converted in a de jure association in 1975.

³ a merger of two previous European organisations: CENELCOM and CENEL

- ETSI: the European Telecommunications Standards Institute (ETSI), which was created in January 1988. It has a different structure. ETSI is also officially recognized by the European Commission as a European Standards Organisation, but it is not composed of National Standards Bodies. ETSI is a non-profit organisation with about 700 member organisations from 60 countries world-wide. Many individual companies are direct ETSI members.

ETSI works in the ICT domain, including telephone, radio-TV and internet technologies. CENELEC is active in developing standards for electrical and electronic goods and services. Simply put, CEN covers all the remaining areas of standardisation.

All players in the thirty countries concerned are listed in Table 2.1 organised by the three different domains. The National Standards Bodies are the members of CEN and CENELEC. ETSI is an organisation with almost 700 members from 60 countries world-wide. However, in the elaboration, approval and implementation of European standards (ENs) ETSI is assisted by 38 National Standards Organisations (NSOs) in 36 European countries, only half of the ETSI NSOs are also ETSI members, but all NSOs perform the public approval stages for ENs, transpose the adopted ENs into national standards and handle the standstill and notification procedures for their countries.

To get an idea of the annual production of standard documents by the ESOs, see Text box 2.2 below.

The development of *international* standards is the responsibility of the International Organization for Standardization ISO (www.iso.org), the International Electrotechnical Commission IEC (www.iec.ch) and the International Telecommunication Union ITU (www.itu.int). The International Organization for Standardization ISO (founded in 1947) is an independent association of the National Standards Bodies from 130 countries altogether. There are agreements between the European organisations and the global organisations to aim at an efficient cooperation and the development of a consistent set of standards.

Table 2.1 National Standards Bodies (members of CEN and CENELEC) and National Standards Organisations cooperating with ETSI.

	Country (no. of NSBs/NSOs)	CEN members	CENELEC members	ETSI NSO
1	Austria (2)	Österreichisches Normungsinstitut (ON)	Österreichischer Verband für Elektrotechnik	OVE (acting) & ON
2	Belgium (2)	Bureau de Normalisation/Bureau voor Normalisatie (NBN)	Comité Electrotechnique Belge / Belgisch Elektrotechnisch Comité	Bureau de Normalisation/Bureau voor Normalisatie (NBN)
3	Bulgaria (2)	Bulgarian Institute for Standardisation (BDS)		Communications Regulation Commission
4	Cyprus (1)	Cyprus Organization for Standardisation (CYS)		
5	Czech Rep. (1)	Czech Office for Standards, Metrology and Testing - UNMZ, also known by its English acronym COSMT (since 1-1-2009, before Czech Standards Institute -CNI)		
6	Denmark (2)	Danish Standards (DS)		National IT - and Telecom Agency
7	Estonia (2)	Estonian Centre for Standardisation (EVS)		
8	Finland (3)	Suomen Standardisoimiliitto r.y. (SFS)	SESKO Standardization in Finland	Finnish Communications Regulatory Authority
9	France (2)	Association Française de Normalisation (AFNOR)	Union Technique de l'Electricité	Association Française de Normalisation (AFNOR)
10	Germany (2)	Deutsches Institut für Normung e.V. (DIN)	DKE Deutsche Kommission Elektrotechnik Elektronik Informationstechnik im DIN und VDE	
11	Greece (1)	Hellenic Organization for Standardization (ELOT)		
12	Hungary(1)	Hungarian Standards Institution (MSZT)		
13	Iceland (1)	Icelandic Standards (IST)		
14	Ireland (2)	National Standards Authority of Ireland (NSAI)	Electro-Technical Council of Ireland Limited	National Standards Authority of Ireland (NSAI)
15	Italy (3)	Ente Nazionale Italiano di Unificazione (UNI)	Comitato Elettrotecnico Italiano	CEI/CONCIT CONCIT/ISCTI
16	Latvia (1)	Latvian Standards Ltd (LVS)		
17	Lithuania (1)	Lithuanian Standards Board (LST)		
18	Luxembourg (1)	Organisme Luxembourgeois de Normalisation (ILNAS)		
19	Malta (1)	Malta Standards Authority (MSA)		
20	Netherlands (2)	Nederlands Normalisatie-instituut (NEN)	NEN/ NetherlandsElektrotechnisch Comité	
21	Norway (3)	Standard Norge (SN)	Norsk Elektroteknisk Komite	Norwegian Post & and Telecommunication Authority
22	Poland (1)	Polish Committee for Standardization (PKN)		
23	Portugal (1)	Instituto Português da Qualidade (IPQ)		
24	Romania (1)	Romanian Standards Association (ASRO)		
25	Slovak Rep. (2)	Slovak Standards Institute (SUTN)	Slovak Electrotechnical Committee /Slovak Standards Institute	Slovak Standards Institute (SUTN)
26	Slovenia (1)	Slovenian Institute for Standardization (SIST)		
27	Spain (1)	Asociación Española de Normalización y Certificación (AENOR)		
28	Sweden (3)	Swedish Standards Institute (SIS)	SEK Svensk Elstandard	ITS - Information Technology Standardization
29	Switzerland (3)	Schweizerische Normen-Vereinigung (SNV)	Electrosuisse	Association Suisse des Télécommunications (ASUT)
30	UK (2)	British Standards Institution (BSI)	British Electrotechnical Committee / BSI	British Standards Institution (BSI)
	Total (51)			

Text box 2.2 Annual production of standards documents by ESOs

CEN

In 2007 CEN produced 1,124 documents: European Standards (ENs), Technical Specifications (TSs), Technical Reports (TRs) and CEN Workshop Agreements (CWAs). This brings the total number of available published documents to 11,268 (end 2007).

Details of production 2006 en 2007:

Type of document	2006	2007
EN	1,287	1,006
CEN/TS	101	55
CEN/TR	53	31
CWA	31	32
Total	1,472	1,124

These documents are produced by different types of technical bodies: active CEN technical committees 282; sub-committees 85, active CEN Workshops 38 and Working Groups 1,418

Source: *Standards for a better world, CEN Annual report 2007*, available at:
<http://www.cen.eu/cenorm/aboutus/information/annual+report/annual+report.asp>

CENELEC

Total deliverables published during the year:	2006	2007
Standards (ENs + HDs)	402	380
Interpretation sheets (EN)	0	9
CLC/TR	5	21
CLC/TS	8	3
CWA	0	0
CECC Specifications	0	0
CENELEC Guides	3	2
CEN/CENELEC Guides	1	0
Total	419	415

Source: *CENELEC Annual Report 2007*, available at:
<http://www.cenelec.eu/Cenelec/CENELEC+in+action/News+Centre/Annual+report/Default.htm>

ETSI

The number of standards and reports published by ETSI in 2007 increased by about 18% over 2006 and amounted to 1,938 documents. By the end of 2007, ETSI had published a total of almost 20,000 standards, specifications, reports and guides since the Institute was established in 1988.

Annual production	2006	2007
European Standard (telecommunications series) (EN)	60	68
Technical Specification (TS)	1383	1,658
Technical Report (TR)	114	147
ETSI Standard (ES)	65	49
ETSI Guide (EG)	14	11
Special Report (SR)	5	5
Total	1,641	1,938

Source: *Annual Report ETSI 2007*, available at:
<http://www.etsi.org/website/newsandevents/annualreport.aspx>

2.5 The European standardisation process

The European standardisation is a coherent system based on the principle of national delegation. CEN and CENELEC are membership organisations with National Standards Bodies as their members. ETSI is not based on national membership, but is also officially recognized by the European Commission as a European Standards Organization and is - in developing European standards - assisted by National Standards Organizations (NSOs)¹.

For the elaboration of a European standard, a European technical committee in CEN or CENELEC is set up under the responsibility of one of its members. The members of CEN and CENELEC are the respective National Standards Bodies. National so-called 'mirror committees' are established by National Standards Bodies where all interested national parties (enterprises, consumers, public authorities, NGOs) can participate. They develop a national position for the drafting and voting of a European standard which is then presented at the European technical committee.

ETSI (telecommunication) is based on direct participation of industry and other stakeholders at international level but also foresees national votes on European standards (ENs).

Each year, about 1,500 European standards are adopted through this system by the three European Standards Organisations (see Text box 2.2 Annual production of standards documents by ESOs).

The initiative for or the request to start developing a new standard could in theory come from anywhere. Once a request has been formally made, it finds its way through the different procedures of the standardisation system². When the request comes to the responsible technical committee (TC) within the relevant recognised standards body, this TC decides whether a standard should and could be developed. The flow chart taken from this leaflet illustrates the procedure that follows (See Figure 2.1).

Mandates³

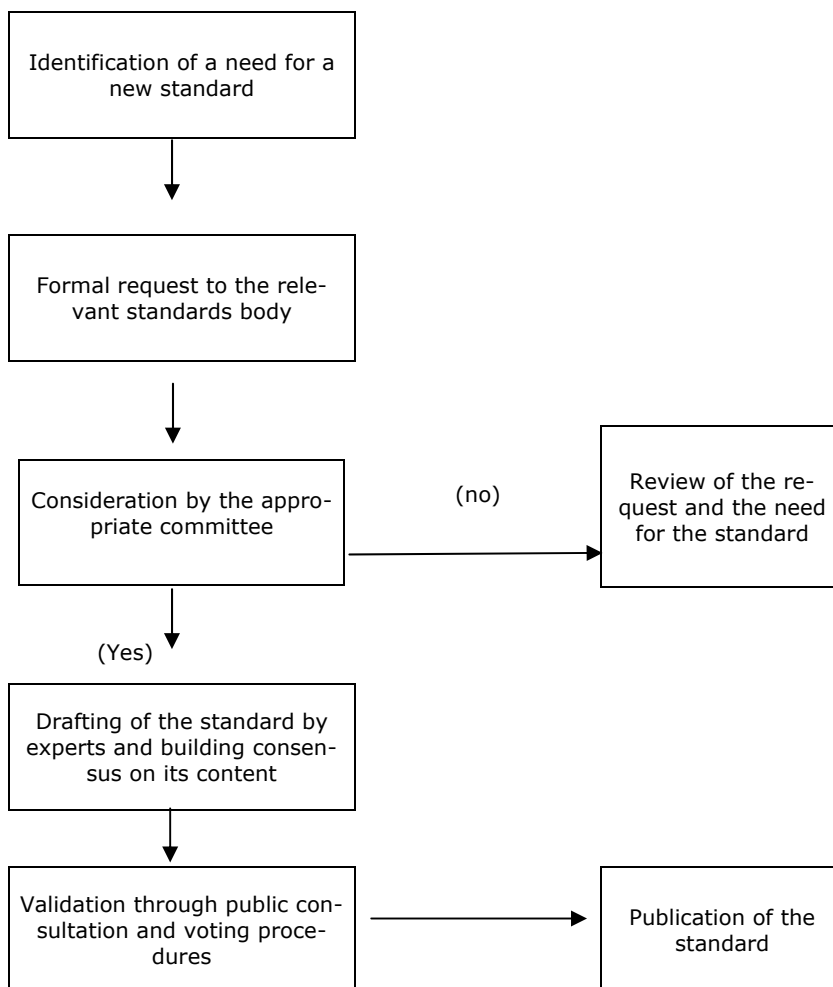
As mentioned above, the initiative for or the request to start developing a new standard could in theory come from anywhere. When the European Commission requests the European Standards Organisations (ESO) to develop and adopt European standards in support of European policies and legislation the Commission uses standardisation mandates. Draft mandates are drawn up by the Commission services through a process of consultation with a wide group of stakeholders. Before being formally addressed to the ESOs, they are submitted for opinion to the Standing Committee of the 98/34/EC Directive. New standardisation mandates are approved by the TBT Working Group, in which also Iceland, Liechtenstein and Norway participate (EEA).

¹ In the elaboration, approval and implementation of European standards, ETSI is assisted by 38 National Standards Organizations (NSOs) in 36 European countries that are a.o. responsible for the standstill agreement, the national public enquiries and establishing the national position for the vote).

² See for example the flyer developed by DG Enterprise and Industry at: http://ec.europa.eu/enterprise/standards_policy/european/flyer/index.htm

³ Source: http://ec.europa.eu/enterprise/standards_policy/mandates

Figure 2.1 Flow chart: Development of European standards



Source: *European standardisation flyer - Questions and answers, DG Enterprise and Industry*

The ESOs, which are independent organisations, have the right to refuse a mandate if they do not think that standards can be produced in the area being covered. In practice this refusal happens rarely due to the informal consultation mentioned above. [cf. Recommendation 2]

Three types of mandates could be considered:

- study mandates to check the feasibility of standardisation;
- mandates requesting the elaboration of a standardisation programme;
- mandates for the development and adoption of European standards.

Even European standards developed under a mandate and for European legislation, remain voluntary in their use.

National Standards Bodies are obliged to implement European standards (ENs that follow the entire procedure as sketched above including the validation through public consultation and voting procedures) as national standards without any modification and to withdraw any conflicting national standards. As a conse-

quence national standards that result from this procedure are identical¹ across Member States of the European Union and EFTA. However one should note that the term harmonised standards is restricted to one specific set of standards: Harmonised standards are European standards established on request of the European Commission, but only those that provide a presumption of conformity to European directives based on the so-called "New Approach" principles as described in Section 2.3.

2.6 Access to the standardisation process

The participation of SMEs and societal stakeholders can be hampered by a lack of resources and technical expertise. This can, in turn, affect the consensus-reaching process and therefore cause delays in standards development. The Commission is therefore providing financial support to European organisations and associations representing SMEs and societal stakeholder interests. This enables them (as associate members in the European Standards Organisations) to participate more effectively in the standardisation process at the European level and to co-ordinate the involvement of all national experts in the standardisation development process.² These stakeholders are amongst others:

- NORMAPME (European Office of Crafts, Trades and SMEs for Standardisation);
- ANEC (the European Association for the Co-ordination of Consumer Representation);
- ETUI (European Trade Union Institute);
- ECOS (the European Environmental Citizens Organisation for Standardisation).

[cf. Recommendation 4]

Also EFTA provides financial support to assist European stakeholders organisations to take part in European standardisation work³, beneficiaries are a.o. ANEC, EOTA (the European Organisation for Technical Approvals; related to the construction industry) and ECOS.

¹ However there are some provisions for exceptions. The scope of the EN might for example not fully cover the scope of existing national standards that have to be withdrawn. There may be good reasons why remaining aspects dealt with by the national standards are still needed by the market. However it is important that the basic rule should be adhered to: avoid the creation (or recognition) of barriers to trade. National standard bodies have to be aware that additional national requirements may adversely affect trade within the European market. For all national activities, the notification procedure 98/34 should be followed strictly (See: Guidance - CEN policy on implementation of European Standards not one-to-one related to National Standards, document 2005 available at website CEN: www.cen.eu)

² In addition the Commission funds standards bodies for the translation of standards into Community languages other than the working languages of the European Standards Organisations.

³ EFTA Study on Certification and Marks in Europe, executive summary of the final report, Consumer Research Associates Ltd, UK, December 2007.

3 Conclusions and recommendations

3.1 Introduction

Conclusions of the European Council

The Council of the European Union adopted 29 conclusions on standardisation and innovation at the Council meeting in Brussels on 25 September 2008¹. Many of these conclusions cover more general topics in the field of access to standardisation, e.g. Council Conclusion 7 asking standards organisations to further facilitate participation of all interested parties or Council Conclusion 9 asking a.o. business associations to strengthen their support of SMES to promote their interest in standardisation work. [cf. Recommendation 8]

There are also more specific conclusions that more or less coincide with conclusions reached in this study such as Council Conclusions 12 and 13 regarding the importance of having standards available in the national languages of the Member States concerned; Council Conclusion 19 regarding the attention for the costs of standards as a possible barrier to their use² and Council Conclusion 27 encouraging Member States to improve the position of standardisation in education and academic curricula. [cf. Recommendation 6]

There are other Council Conclusions, such as number 14 asking for a validated, freely available summary of each standard that we would like to support as it would indeed facilitate access for many stakeholders. However as also noted by the Council in conclusion 19 concerning a possible reduction in the costs associated with access to standards, it has to be carefully considered what the effect would be on the financial viability of the standardisation system. Free summaries might help guiding users to the standards that are indeed relevant for them and hence increase turnover of standards organisations. However some users may also decide only to use the free summaries with a negative effect on the turnover of standards organisations.

The share of sales of standards in the overall budgets of standards organisations varies quite a lot, however it may be a significant component. DIN in Germany for example recovers more than 50% of its operating costs from the sales of standards. For all NSOs the percentage range from 0 to 99%, generally it is between 30 to 50%.

Information from this study supporting these conclusions

The information collected in the framework of this study show many characteristics of the standardisation system that support these Council Conclusions. In Section 3.2 the main findings of the study will first be summarised before recommendations are formulated in Section 3.3.

¹ Available as PDF at:
http://ec.europa.eu/enterprise/standards_policy/standardisation_innovation/doc/councilconclusions_20080925_en.pdf

² The council encouraged standardisation bodies to review their business model in order to improve access to standardisation a.o. by reducing the cost associated with access to standards, but while ensuring their financial viability.

3.2 Main findings

This section presents an overview of the main findings of the study that are discussed in more detail in the Chapters 4, 5, 6 and 7.

In formulating the questions that have been used to collect views and information from standardisers and stakeholders, both at European and national level, the research team in cooperation with the Steering Group of the study took the questions as specified in the tender dossier as guidance. These questions were categorised by: questions on access to the standardisation process (QP) and questions referring to access to standards documents (QD). The questions were used to draft a series of questionnaires and checklists for interviews. The detailed information resulting from these activities are reported in Part II of this report:

- checklist for face-to-face interviews with European standardisers and European stakeholders (Chapter 5);
- Internet survey among National Standards Organisations in 30 countries (Section 6.2);
- additional '10 points questionnaire' addressed to 51 standards organisations in 30 countries (Section 6.3);
- checklist for face-to-face interviews with stakeholders in 12 selected countries (Section 7.2);
- Internet survey among stakeholders in the 12 selected countries (Section 7.3).

Although not all questions could directly be answered by the information as presented by the different types of respondents, the following section uses the original questions from the tender dossier as structure:

- QP1 – QP17 on the standardisation process;
- QD1 – QD7 on standards and other standards documents.

3.2.1 Access to the standardisation process

QP1 What are the possibilities offered to interested parties to be informed about the activities of the standards bodies?

The situation as described in detail in Annex 1 for Estonia, describes rather well the situation as found in most countries: a regular newsletter and much information available for free on the website. Issues covered are harmonised standards, WTO notifications, national standards, translations of standards, European and national draft standards 'open for comments', etc. Most NSOs (70 to 100%) state to use such means to inform stakeholders as shown in Table 6.9:

- Direct dissemination (printed newsletters, journals and/or email bulletins);
- Available on website (passive);
- Published in magazines of third parties (i.e. trade, sector or professional journals);
- Regular contacts with external parties, e.g. sector and professional organisations, consumer or environmental interest organisations;
- Regular seminars, workshops, conferences etc.

These activities are not always judged to be sufficient by the stakeholders. Section 7.2 describes for example that also PKN in Poland has several publications

(such as PKN News) but stakeholders still report that adequate information is lacking.

However, Table 7.5 shows that 75% of the stakeholders feel to be (very much) aware of what standardisation is and also 75% are of the opinion that standardisation is (very much) important for their own organisation (Table 7.8). About 40% of the responding stakeholders feel the information policy of the NSOs is more active, whereas some 28% judge it to be more passive (Figure 7.1). However it should be realised that respondents are to a large extent incumbents¹.

A general feeling among stakeholders is that their specific focus (i.e. sector of activity or aspect such as safety or environmental impact) is lacking. In our analysis it is rather difficult for an NSO to offer this itself. We feel that this could be better developed in close cooperation with representatives of these target groups as they cannot only filter the large amount of information available within the standardisation system but they also speak 'the language' of the target group. [cf. Recommendation 8]

QP2 Is access to the standardisation process significantly different from one Member State to another? What are the main differences, and do they follow an identifiable classification (relating, for example, to the size of the standards bodies, the local industrial fabric, the infrastructures of the standards bodies, etc.)?

The general principles of standardisation are widely and strongly adhered to by all NSOs: an open and democratic system based on consensus and that balances the various interests to the extent possible. All NSOs – see for example the results of the *10 points questionnaire* presented in Section 6.3 – report to actively work on a balanced representation of stakeholders with technical committees and other bodies. So the basic principles are really very much the same. However, the devil is in the detail. Nearly all practical details are quite different from one country to the other, such as membership structure of standards organisations, membership fees, reduction and exemption schemes for different types of stakeholders, specific support to selected types of stakeholders and prices and reduction on prices for obtaining standards.

Table 6.6 indicates for example that with 14 of the 47 NSOs that have answered the survey (30%) stakeholders need to be a member of the NSO in order to participate in standardisation, whereas with 17 NSOs (36%) a payment is required to participate in TCs. But there is no general pattern in the way these fees are structured, it differs from NSO to NSO as described in detail in Section 6.3.3. However the most important factor determining the fee to be paid is 'type of stakeholder' as shown in Table 6.7. This variation goes hand in hand with differences in access and actual participation of stakeholders as shown in the detailed Table 6.20.

One of the consequences of the huge variation between different NSOs – not only in fee structure and discounts, but also with regard to the entire organisational structure and business model – is that it becomes more difficult to have a harmonised European policy to foster access to standardisation.

¹ Due to the process of inviting parties to participate in the surveys as well as to the bias that will be associated by non-response (see Section 7.3.2).

[cf. Recommendation 1]

QP3 Is standardisation sufficiently attractive, and is the investment required of interested parties perceived as being commensurate with the anticipated returns?

The seven most important benefits of participation in standardisation cited by respondents are:

- complying with (European) legislation;
- complying with requirements of customers;
- products and services are up to date;
- to be in a position to communicate clearly and unambiguously with relevant parties in the market place;
- compatibility of our products with other products is assured;
- environmental interests are covered;
- gives our products and services a better reputation in the market place.

Obviously the score is quite different for different types of stakeholders, e.g. with trade unions 'improve health and safety conditions at the work place' scores very high on a 5-points scale (4.8) and with environmental organisations 'environmental concerns' score 5. For large enterprises, two items score above 4.5: comply with legislation and comply with requirements of clients. For SMEs the highest score of 4.3 is for 'comply with requirements of customers'.

The importance ascribed by stakeholders to standardisation for (the objectives of) their own organisation is (as shown in Table 7.9 on a scale from 1 to 5):

- highest with the group of consultants, laboratories and certifiers (4.4), large enterprises (4.3), universities (4.1) and SMEs (4.1);
- middle position: employers' federations and trade associations (3.8) and consumer associations (3.7);
- lowest with trade unions (3.0), environmental organisations (3.1).

The investment required and the anticipated returns in money terms are especially relevant for stakeholders from the business community as their returns are indeed of a financial nature, either through efficiency gains or improved access to markets. However a large scale effect was found that results in cost benefit ratios being much better for large enterprises than for SMEs (See Section 5.2). For other (societal) stakeholders there are even no immediate financial returns. This may be one of the reasons to opt for improving the organisation of stakeholders in the standardisation process in order to share costs. [cf. Recommendation 3]

QP4 Do standardisation system models exist that interested parties would find more attractive, and can these satisfactorily serve the public interests (i.e. without undermining the principles of transparency and consensus)?

As reported in Section 7.2, respondents in the study praise the higher speed of alternative models such as private consortia but indeed realise that this is often at the cost of not being based on a wide consensus, i.e. less democratic legitimacy. It should however be noted - as mentioned in the Introduction - that this report focuses on formal European standardisation and hence the experience of the respondents selected is mainly with this system rather than with the domain of private consortia in the ICT business for example.

QP5 Given that certain participants in the standardisation process can be described as contributors (through providing the necessary expertise, participating actively in committee work, etc.), while others confine themselves to an observer role without actively contributing, is it possible to identify differences in the conditions of access proposed by the standards bodies for these two types of participants?

The most important reason for a large majority of stakeholders to participate in the process is to influence the contents of the standards being developed. Some are mainly there to avoid that potentially harmful issues will be incorporated, others focus on making sure that things that are important to them are properly incorporated (See Table 7.20 for details by type of stakeholder).

The motives 'to be informed' and 'networking' that are more related with a role of observer score lower.

Standardisers indeed recognise these two roles from observing the process within technical committees. However stakeholders do not *enter* the process as either a contributor or an observer, hence differences in access do not exist, other than the motivation of the stakeholder to be involved (willingness to sacrifice time and money).

QP6 What are the conditions laid down for participation in the standardisation process: must participants be members of the standards bodies? Are they required to pay a financial contribution? How is this contribution calculated? Does it depend on the type of standards document being prepared, or on the type of committee (national, European, international, strategic committee, technical committee, working group, "workshop")?

There are not many conditions laid down, except having to pay a fee (all parties that have a declared interest can join). Mostly – as shown in Table 6.7 – fees depend on the 'type of stakeholder'. Often NGOs receive reductions or even exemptions. Also for business representatives it is rather common that membership fees vary: "... fees depend on the size of the company in terms of employees and turnover" (details described in Section 6.3.3 for many NSOs).

When discussing recommendation 13 below, we argue that fees have also a role to play in setting priorities for the agenda for standardisation.

[cf. Recommendation 13]

QP7 What are the possibilities offered to interested parties to have a say in the strategic choices made by the standards bodies?

National level

In Section 7.2 some examples are described of NSOs that state that the different types of stakeholders may participate in the debate about the standardisation agenda and on strategic choices to be made. DS from Denmark reports for example that stakeholders have fair and good possibilities to influence the strategic

choices. But although everyone has the opportunity to participate, some types of organisations such as environmental organisations could be better represented¹.

European level

Results show that European stakeholders such as ANEC, ECOS and NORMAPME are indeed represented in administrative and technical boards of CEN, CENELEC and ETSI (See: Table 4.1). To which extent these organisations have indeed an impact or are merely observers is much more difficult to assess. Conflicting views were recorded in the study.

Some of the European stakeholders' representatives complain that they sometimes feel like second-class citizens and that their interests and views are not sufficiently taken into account by the standards bodies.

QP8 What means are in place to facilitate the circulation of standards-related information outside the system?

See QP1.

QP9 What processes and procedures have been introduced by the national, European and international standards bodies to guarantee and promote fair access to the standardisation process? Have they developed different strategies for different interested parties?

National Level

This question mainly relates to reductions in memberships fees as described in Section 6.3.3. Nearly 50% of the NSOs report that support such as subsidies are available from national governments. In some cases also the NSO provides such support (See Table 6.8). The type of subsidies available, such as reimbursement of travel and subsistence costs to participate in European standards meetings have been described in 'SMEs and Standardisation in Europe: 23 Good Practices to promote the participation of craft and SME in standardisation, and the use of standards' (DG Enterprise and Industry, Brussels, 2006), see also QP12 below.

European level

At the European level specific strategies are developed to assist the weaker stakeholders to get access at the European Level. Although the basic model is that of national representation based on consensus between the different views at national level, European representative organisations like ANEC, ECOS, NORMAPME and ETUI are not only subsidized by the European Commission to promote the importance of standardisation with their 'rank and file' but are also provided access to the system at European level. Table 4.1 shows that they are generally represented in administrative and technical boards and in selected TCs. However there are more mechanisms in place to incorporate European representatives of the stakeholders in addition to the model of national delegation. CEN reports for example there are as much as 600 European trade associations that

¹ More details are provided in the Interim report on the 10 points questionnaire completed by 34 NSOs, submitted by EIM Business & Policy Research to DG Enterprise and Industry, January 2009.

have been given liaison status and that may appoint representatives in technical committees and groups.

QP10 Are there differences in access to standardisation activities depending on the types of interested parties (large enterprises, SMEs, consumer associations, NGOs, trade unions, employers' federations, etc.)?

QP11 What, according to the interested parties, are the barriers to participation in the standardisation process (resources, expertise, length of the process, financial contributions?)

According to the standards organisations, both large and small enterprises have a rather high commitment to standardisation in general and have the required knowledge to participate meaningfully in standardisation. Public authorities get a high score only with commitment, whereas universities and research organisations get only a high score with knowledge. Consumers, environmental organisations and trade unions receive relatively low scores on both accounts.

When the various stakeholders make a self assessment of their awareness about standardisation, business representatives score very high, but public authorities, universities, consultants and certifiers score even higher. Also by their own standards consumer organisations, and especially environmental organisations and trade unions score relatively low. Also when focussing on what standardisation might do for the own (objectives of the) organisation, or the importance of standardisation for the own organisation, trade unions and environmental organisations score lowest.

The extent to which stakeholders themselves see barriers to participate in standardisation on a scale from 1 (not at all) to 5 (very much) is shown in Table 7.22. The conclusion is that:

- the lowest barriers are seen by public authorities (2.5), large enterprises (2.6) and SMEs (2.8).
- middle position: consultants, laboratories and certifiers (3.0), employers' federations and trade associations (3.1) and universities (3.1);
- the highest barriers are seen by: trade unions (3.4), consumer organisations (3.5) and environmental organisations (3.9).

The study also established the barriers for stakeholders as perceived by standardisers. The 'overall picture' shows' mainly:

- lack of financial resources / not willing to pay the costs involved;
- lack of staff (time);
- failing to properly understand the benefits of standardisation;
- lack of technical expertise.

Differences by type of stakeholders are shown in Table 6.3.

Stakeholders have been asked whether such barriers are mainly internal, i.e. related to the characteristics of their own organisation (such as lack of expertise or resources) or external, i.e. related to the characteristics of the standardisation system.

The results shown in Table 7.23 are:

- mainly or a bit more internal 30%;
- both 37%;
- mainly or a bit more external 32%.

Figure 7.3 shows that universities, consultants etc., and trade unions see the highest external barriers. The lowest external barriers are seen by public authorities, environmental organisations and large enterprises.

Finally the actual barriers identified by the stakeholders are shown in Table 7.25. Again using a scale from 1 (not at all an important barrier) to 5 (very important barrier), the ranking that emerges is:

- 1 Amount of time required (3.9);
- 2 Travel and subsistence costs (3.4);
- 3 The cost of participating in technical committees, fees (3.4);
- 4 The cost of becoming a member of standards body, fees (3.2);
- 5 Bureaucracy of the process (3.1);
- 6 Perceived benefits for the organisation or enterprise itself are low (2.8);
- 7 The process is too complicated, too technical' (2.7);
- 8 Not enough technical expertise or experts within our type of organisation (2.6);
- 9 Lack of awareness, information on what standardisation is, how it works (2.4);
- 10 Language used in formulating the standards is too complicated, too technical (2.3);
- 11 Use of foreign languages (2.2).

QP12 What public policy mechanisms have been created to facilitate access to standardisation activities?

Hardly any stakeholder or National Standards Organisation reported public policy mechanism to facilitate access to standardisation that had not been documented before, such as in 'SMEs and Standardisation in Europe: 23 Good Practices to promote the participation of craft and SME in standardisation, and the use of standards', DG Enterprise and Industry, Brussels, 2006:

- Financial contributions by national governments to keep cost of standards and participation in standardisation low (for example reduced prices or membership fees for specific types of stakeholder as described in Section 6.3.3 in this report).
- Also the subsidies to cover travel and subsistence costs that are applied by several national governments (often managed by the NSO) were reported.

Especially in Germany several specific and targeted public policy initiatives became apparent (see Section 7.2):

- A two days seminar 'Success factor standardisation' organised by DIN in cooperation with the Federal Ministry of Economic Affairs in April 2008 to better integrate medium-sized companies by raising their awareness on the benefits to be gained.

- KNU¹, the coordinating unit for environmental organisations' work on standardisation, is a joint project of several Environmental Protection Groups that is partly financed by the Federal Ministry for the Environment. Since 1996 KNU works to increase environmental organisations' participation in standardisation work at DIN and DKE. KNU might reimburse travel costs and under special conditions can also pay an expert fee.
- Also for consumer interests there is a special initiative. The Consumer Council of DIN is an entity established in 1974 within DIN to represent consumer interest in standardisation. The Council comprises five members named by the DIN President in consultation with the Federation of German Consumer Organisations (VZBZ) and the Federal Ministry of Food, Agriculture and Consumer Protection (BMELV). The Council members work on an honorary and independent basis and set down guidelines for consumer policy issues in standards work². Consumer representatives are exempted from fees. Also their travel expenses are paid.

QP13 What public consultation procedures exist? Are they judged to be effective by the standards bodies and stakeholders?

The public consultation procedures are clearly considered to be important ('a need') by the National Standards Organisations. However the actual description of the consultation system that they provide shows that in practice the comments are far too often only generated by the incumbents. This is documented in a list of 12 quotes at the end of Chapter 6 (Section 6.3.3).

As the stakeholders that responded to the various surveys generally belong to that circle of incumbents (already participating in TC work, being on the mail list of the NSO etc.), this issue did not come out of the stakeholders' interviews.

[cf. Recommendation 10]

QP14 Does the fact that participation in standardisation is generally regarded as a costly investment for enterprises represent more a barrier to the lasting involvement of partners or a guarantee of credibility of the standard?

In our analysis, the cost of the system functions as a filter to avoid that work items will be taken up that are not really necessary. As parties participating in the development of standards are generally also financing these efforts, they really need to be convinced of the need / the benefits of the standards in order to join. [cf. Recommendation 13]

However, costs are indeed seen by the stakeholders as the main barrier as described above with QP10&11.

¹ Koordinierungsbüro Normungsarbeit der Umweltverbände, see flyer available at: http://www.bund.net/fileadmin/bundnet/pdfs/umweltschutz_normung/KNU-Flyer_en.pdf.

² See: <http://www.din.de/cmd;jsessionid=688E11D7D4BCE6E8CBBE2409164416C6.2?level=tpl-unterru-brik&menuid=47564&cmsareaid=47564&cmsrubid=57765&menurubricid=57765&cmssubrubid=57782&menusubrubid=57782&languageid=en>

QP15 Do the different levels of participation (national, European, international) and the division of competences between independent organisations (for example, CEN, CENELEC and ETSI) constitute deterrents to participation in the standardisation process?

Several stakeholders have mentioned the complexity of the system and their conviction that having all these different organisations makes standard development more costly than necessary. In this they do not only point at duplication of the three vertical pillars (CEN, CENELEC and ETSI), but also question the need to have such large standards organisation at the national level. See also Annex 1. [cf. Recommendation 7]

QP16 Can the conditions of access to the standardisation process cause situations where no consensus can be reached? Can the conditions be manipulated so as to serve particular interests? (Cite examples if necessary);

Many standards organisations report that they revert to voting if consensus cannot be reached¹. The examples of processes being manipulated so as to serve particular interests, do not necessarily refer to situations where no consensus could be reached at the national level. What has been quoted by several respondents are examples in which large players make serious efforts to being represented strongly at various national (mirror) committees. By influencing consensus in many countries they have a (unduly?) strong influence at the European level. If these large players have a serious position on the market in each country this cannot be termed misuse, however this is not always the case:

- A case has been reported of a standard that was really only considered to be important in a small number of Member States. A large firm that had an important position on the market in these few countries, made sure to be represented in TCs in many other countries. As other participants in these countries had no strong opposition, this was a way to manipulate the outcome at European level.
- A manufacturer of safety devices not only participated in the TC developing standards for such devices, but was also accused of organising influence in the TC working on safety of hotels, with the aim to get such devices introduced as obligatory fittings of hotels.
- A large employer that could not reach an agreement with the trade union on working conditions in a specific type of activities reverted to standardisation to get certain aspects 'fixed' as the trade union was not represented in that TC.

QP17 Are there real problems of access to the standardisation process due to the organisation of the system? Are there barriers created by stakeholders' ability to access the standardisation process?

In our perspective, an important barrier related to the organisation of the European standardisation system is the misfit between the system of national delegation and the effort to improve the access of the so called weak stakeholders by

¹ More details are provided in the Interim report on the 10 points questionnaire completed by 34 NSOs, submitted by EIM Business & Policy Research to DG Enterprise and Industry, January 2009.

supporting these at the European level as described in Section 2.6, Chapter 4, and Section 5.3. [cf. Recommendation 4]

With QP10 and QP11 it has already been mentioned that the distribution between stakeholders that see barriers for participation mainly as internal to their own organisation vs. those that see barriers as being mainly related to the characteristics of the standardisation system is about 50-50.

As also already mentioned with QP10 and QP11, stakeholders mention as the four most important barriers for *access to the standardisation process* issues related to 'costs' (amount of time required; travel and subsistence costs; fee to participate in technical committees; fee to become member of standards body). However, as mentioned in the report, these lacking resources are only one side of the story. The other part (not that often told) concerns setting priorities, in other words making the resources available. One way or the other, we conclude that lack of access to standardisation is quite often related to characteristics of the stakeholders themselves rather than to the rules and procedures of the European standardisation system. One way to overcome this is not to focus on individual stakeholders but rather on organising stakeholders better, having representative organisations.

[cf. Recommendations 3, 5, 8, 13]

3.2.2 Access to standards and standards documents

QD1 What conditions have the standards bodies put in place to guarantee fair and easy access to the standards? What is the situation regarding availability of standardisation documents in national languages?

The survey among NSOs provide the following picture with regard to availability of standards that have been adopted in the country concerned in the national language (46 NSOs responding, see Table 6.12):

- None of the standards are available in the national language (3 NSOs);
- 1 - 25% are available in national language (21 NSOs);
- 26 - 50% are available in national language (3 NSOs);
- 51 - 75% are available in national language (2 NSOs);
- 76 - 99% are available in national language (9 NSOs);
- All standards that have been adopted are available in national language (8 NSOs).

The interviews showed that even in Germany the translation of standards documents is an issue, although German is one of the three official languages used by the ESOs and most of the standards become available in German. This is because in the development process, when the course of things might be influenced, drafts are generally not available in German. This point was raised by both NGOs and business representatives.

Quite a lot of the stakeholders interviewed express the opinion that wider availability of standards in the local language would be highly appreciated and expected to have a positive effect on the use of standards (See Section 7.2). Still also here different views were recorded. Even NSOs that translate most of the standards in their national language feel that for some sectors such as telecommunications, English is the main working language anyway so it is judged not to

make sense to translate standards in these areas. Moreover, translations are never perfect and might therefore contribute to differences in interpretation.

Table 7.36 shows that stakeholders (in the 12 selected countries) judge the situation with regard to the availability of standards in the national language - for those standards that are relevant for the own organisation - to be rather positive:

- 23% state that less than 50% of those standards are available in their own language;
- 59% report that 75% or more of those standards are available in the national language.

Asked whether the fact that some standards are only available in a foreign language poses a problem for their enterprise or organisation as much as 61 % state that this is hardly a problem, vs. 22% indicate that it is a rather serious problem (See Table 7.37).

Also when asked about the barriers for using standards (as reported below with QD2) the fact that the text of standards are in a foreign language is one of the less important barriers identified by the stakeholders.

QD2 Is the purchase cost of standards a barrier to their use? What arrangements exist to reduce this barrier?

The top 3 barriers for *using standards* are:

- price of standards;
- cost of implementing the standards;
- the number of cross references in the standards.

The price of standards is an (very) important barrier for 52 % of the respondents, however also this finding is not undisputed. Although stakeholders cite this frequently, standardisers argue that it has been demonstrated that lowering prices does not increase the volume of sales. In addition it should be mentioned that identical standards are offered at quite different prices in some Member States without attracting much customers from other Member States.

This is in line with the results presented in Table 6.15 that 85% of the NSOs feel that the price of standards is not at all, or only to some extent a barrier to their use, whereas only 9% feel it is a barrier to a large extent. With Table 6.15 a long list of arrangements has been listed that are applied by NSOs to reduce this barrier, ranging from discounts to making standards available via libraries.

What remains is the perception expressed by stakeholders that it is indeed the price that is the main barrier. In addition stakeholders find it especially difficult to accept that they have to pay for standard texts that are referred to in legislation and that are used to bring about public policy objectives. Therefore especially for EN harmonised standards one might want to opt for free standards.

[cf. Recommendations 2, 13]

QD3 Has the Internet made access to standardisation activities easier?

Table 6.13 shows the view of NSOs, 85% report that the Internet has made the access to standard documents much easier. The possibilities offered may differ:

- information on standards is more easily available;
- hardcopies of standards can be ordered at the website;
- hardcopies of standards can be ordered and paid at the website;
- electronic copies of standards can be bought and paid at the web site;
- electronic copies of standards are freely available at the web site.

However, several stakeholders suggest that more advanced and more frequent use of ICT tools might help in further improving access.

[cf. Recommendations 12]

QD4 What are the distribution channels for standards? Are they deemed to be effective?

EVS in Estonia is an example of an NSO that has some cooperation agreements with re-sellers, unfortunately it is reported in Annex 1 that these have not been effective.

The most reasonable and expected development in the field of distribution is for many NSOs to further improve websites using ICT tools in order to make searches more effective and to enable also downloads of standards.

Making the complete set of standards accessible via the Internet would create further cooperation opportunities with trade associations, libraries etc.

QD5 Is providing user guides for standards an appropriate response to the criticisms concerning the quality of standards drafting?

Table 6.14 shows that nearly a quarter of all NSOs are of the opinion that user guides are "to a large extent" an appropriate response to the criticisms that the text of standard documents is too complicated and that it contains too many references to other standards. Another 57% feel that it is "to some extent" an appropriate response.

The face-to-face interviews in the 12 selected countries showed that in general, a lot of stakeholders would appreciate to have user guides for standards to assist them in better understanding the issues covered by the standards. However from Estonia a more mixed story was reported. EVS has issued very few user guides due to the limited market in Estonia and states that it is therefore not possible to estimate whether the guides are considered to be an appropriate response to the criticism concerning the complexity of the text of standards. The stakeholders however are not very enthusiastic about the user guides. Some consider them to be helpful, others find them confusing. The major problem with user guides is however financing. In case there are not enough funds available to translate standards the state cannot afford to support the elaboration of user guides.

QD6 Is there a need on the part of stakeholders (and if so, which ones?) for access to complete collections of standards? Is access to complete collections possible, and under what conditions?

33 from the 47 NSOs that responded to the Internet survey mentioned several arrangements that are applied by NSOs to reduce the barrier of price. 14 of the suggestions referred to a collection of standards:

- 4 times: subscription to collections of standards (four times);
- 3 times: the option of providing 'sets of standards' at a lower average price;
- 2 times: packages editions;
- 2 times: series of standards on CD-ROM with reduced price;
- 1 time: development of special products, e. g. handbooks, collections of standards;
- 1 time: publications that compile sectoral standards are continuously published;
- 1 time: PDF-on line access to series of standards.

The report from Estonia in Annex 1 shows that EVS reported that nobody has ever wanted to get a complete collection of standards. Still there have been requests to have access to the collection of standards. As regards targeted collections, they have been introduced in few areas such as construction and electricity. EVS has plans to develop in the future such specific sets of standards.

Unfortunately no specific clear information was obtained from stakeholders on this subject.

QD7 What are the conditions of access to draft standards and preparatory documents?

Generally drafts are only made available freely to members of technical committees. In addition there are opportunities to consult the draft, for example in the premises of the NSO or in public libraries, in order to offer the possibilities to develop comments during the public enquiry stage. Sometimes also drafts are offered for sale.

3.3 Conclusions and recommendations

In line with the objectives of the study specified by the Commission, these 13 recommendations are really "...avenues for exploration by the standards bodies, the Commission, Member States and interested parties with a view to improving the conditions of access to standardisation activities."

Many of these recommendations concern more than one of these parties. Hence, if a party would like to follow-up a recommendation, it should reach a mutual understanding with the other parties concerned.

The recommendations are presented independently in the sections below. However if it would be considered to implement some of these recommendations their mutual interdependency should also be considered.

3.3.1 Organisational structure of standards organisations

CEN and CENELEC are membership organisations with National Standards Bodies as their members. ETSI is not based on national membership, but is also officially recognized by the European Commission as a European Standards Organization and is - in developing European standards - assisted by National Standards Organizations (NSOs)¹.

However the National Standards Organisations are not a homogeneous group. The history, ownership structure, organisation model, scope of activities and the business models of the National Standards Organisations differ quite a lot. They range from entities that are part of a ministry to companies with a range of commercial activities. The findings of the study show this large variation in characteristics of the National Standards Organisations, e.g.:

- governmental versus private organisations;
- not for profit membership associations vs. corporations;
- focussing on standardisation only vs. mixing standardisation work with a lot of other (commercial) operations such as certification, consultancy, training etc.;
- focussing on standardisation vs. organisations that have a much wider interest (i.e. representing a specific sector of industry also in completely different areas);
- centralised national organisations vs. organisations which use a more decentralised approach involving associated organisations;
- entirely different business models of financing standardisation work, e.g. government support, membership fees, fees to participate in technical committees, sales of standards or auxiliary activities such as certification or training.

Recommendation 1

European policy initiatives aiming at increased access to standards need to take different shapes because of the different organisational structures and different business models in the various Member States². These differences hamper the development of a harmonised European policy. We therefore recommend striving for more uniform organisational structures and business models of the National Standards Organisations as a prerequisite for more efficient and effective European policy making in the area of access to standardisation.

¹ In the elaboration, approval and implementation of European standards, ETSI is assisted by 38 National Standards Organizations (NSOs) in 36 European countries that are a.o. responsible for the standstill agreement, the national public enquiries and establishing the national position for the vote).

² For example 'free access to standards' as advocated in 'Towards an increased contribution from standardisation to innovation in Europe', COM (2008) -133 final will impact private standardisation organisations rather differently from government run standardisation bodies. Hence this might call for an approach in which the national level is dominant in policy making. Compare the model of the European Employment Strategy, in which actions are agreed upon based on the commitment from Member States to establish a set of common objectives and targets for policy. Under this new framework, policy co-ordination can be fostered by a "management by objectives" approach.

3.3.2 Standards used for two purposes

Private voluntary standardisation developed from the need of private enterprise to increase efficiency and have products and techniques widely accepted in the market place. The link between legislation and harmonised standards that developed in the 1980's (the New Approach) drives the European Commission to interfere more with standardisation. See for example the policy aim formulated by the Commission¹ in March 2008:

*"The European and National Standards Bodies are invited to address as a matter of priority the conditions of access to standardisation, and to reconsider, in close cooperation with the Member States and the Commission, their business model in order to reduce the cost of access to standards, with the ultimate goal of providing free access to standards developed in support of EU legislation and policy"*².

This signals the somewhat blurred relation between the European Institutions and the European Standards Organisations (ESOs). On the one hand the ESOs are private independent organisations, on the other they are formally recognised by the Commission and have an important role to play in producing European harmonised standards in the framework of the New Approach in Single Market directives and beyond. This situation emerged because standards initiated and mainly paid for by private enterprises and standards that are used to bring about public policy goals and that are partly paid by public money, are dealt with in one process and using identical procedures and terms and conditions.

However, because harmonised European standards play an important role in European legislation, democratic legitimacy and free access become even more important. In addition, the study has shown that stakeholders are reluctant to pay for standard texts that are referred to in legislation and that are used to bring about public policy objectives.

Still, there are also several good reasons not to take the two apart completely:

- It is not always clear from the outset what use will be made of a standard.
- Having 'public standards' developed outside the standardisation structure will destroy some of the benefits of the technique introduced by the New Approach: specify policy aims in legislation, but define ways and means to achieve and monitor these by consensus of stakeholders including the business world.
- Two different production and maintenance structures will introduce additional complexity and problems with regard to overlapping or possibly contradictory normative texts.

Recommendation 2

Seriously consider the relationship between the standards organisations and the European Institutions and the procedures for the development and distribution of standards used for two different purposes: standards initiated and mainly paid for by private enterprises and standards that are used to bring about public policy goals and that are partly paid by public money.

The recommendation is to develop all standards within one system, but adjust procedures and conditions of access for harmonised standards (e.g. lower prices for EU harmonised standards, see Recommendation 13).

¹ Communication from the Commission COM (2008) -133 final.

² Reducing the price of standards would indeed seriously affect the business models of the National Standards Organisations, as the present study has shown that several of these organisations recover some 50% of their overall budget (costs) from selling standards.

3.3.3 Access and actual participation: organise stakeholders

Quite obviously the study showed that access to and participation in standardisation are two interlinked concepts. Without access there is no participation, but if there is no participation this does not imply that there is no or very limited access.

SMEs, consumers or environmental NGOs may for example state that access is limited because participation in technical committees or acquiring the standards themselves is simply too costly. However to arrive at the conclusions that standards are indeed too costly requires two distinct steps:

1. It has to be determined whether costs are really the most important factor, or that it is just *easier* to state that costs are the impediment than to acknowledge that it is difficult to mobilize the required (technical) expertise within the rank and file of the stakeholder category.
2. Even if costs are indeed the relevant factor, it is not simply the amount of Euro's involved¹ but rather the priority given to the subject and the willingness to accept that serious costs are involved in producing standards.

If we agree that costs are too high to succeed in getting all the relevant parties around the table, it still does not follow automatically that prices need to be lowered. The options that could be considered are:

- more efficiency in the development of standards (lowering costs and hence prices);
- more contribution from tax payers' money (lowering prices for participants);
- put more efforts in getting the stakeholders organised. The study showed for example that some trade associations in Denmark and the Netherlands in sectors with mainly small enterprises are very active in organising their representation. They find individual SMEs ready to send an expert to participate in standardisation, but facilitate such participation by sharing the travel costs etc. and sometimes even the costs of the hours spent². This addresses directly the unbalance discussed in this report in Section 5.2, that the cost/benefit ratio of participation in the standardisation process is much larger for smaller than for larger enterprises (see also footnote²).

Recommendation 3

Improvement in access to and actual participation in standardisation must not only be achieved by reorganising business models of standards organisations, but also by fostering the organisation of the relevant stakeholder interest to allow meaningful participation. This holds for representation of interests outside the business community as well as for the business community: efforts to increase the representation of SMEs in standardisation should be aimed at organisations of SMEs such as trade associations and professional organisations.

¹ However as discussed in the study (See Section 5.2), it should not be neglected that the cost benefit ratio for the traditional strong stakeholders such as large enterprises is much better than for other, weaker stakeholders such as SMEs. For SMEs, the absolute costs to participate in the standardisation process are almost identical as for large enterprises but the potential efficiency and marketing gains are much smaller in absolute terms. For other stakeholders such as consumers, environmentalist and trade unions there are not even direct financial gains to compensate the costs made.

² If a small entrepreneur would represent his national trade association in the standardization process, it should not be a big problem to cover his entire costs, as in many cases he is representing hundreds or even thousands of businesses in the same sector of industry, who may all benefit from his work.

3.3.4 European vs. national level

The European standardisation is a coherent system based on the principle of national delegation. CEN and CENELEC are membership organisations with National Standards Bodies as their members. ETSI is not based on national membership, but is also officially recognized by the European Commission as a European Standards Organization and is - in developing European standards - assisted by National Standards Organizations (NSOs)¹.

The system of national delegation requires a consensus between the various different interests at national level that result in a national vote by a national delegation at European level². The importance of the principle of national delegation is again emphasised in conclusion 10 of the European Council of September 2008 (See introduction to this chapter).

However, many efforts have been made to strengthen various interests at the European level in order to increase their influence in the elaboration of European standards: the European Union financially supports organisations like ANEC (consumers), ECOS (environment), NORMAPME (SMEs) and ETUI (labour).

This is a conflicting combination of the system of national delegation where national delegations come to European meetings with an 'iron-casted' national vote³ that is the outcome of consensus building at the national level and the idea to influence the European outcome by having a specific interest weighted in at the European level⁴.

Recommendation 4

The contradiction between the system of national delegation and the efforts to have specific interests represented at European level with the support of the European Commission should be gradually resolved, either:

- *by promoting the access to the standards making process at the national level⁵ for other stakeholders than the traditionally strongest stakeholders such as large enterprises;*
- or:*
- *by gradually dismantling the system of national delegation and moving towards a truly European system, in which a consensus between the various interests is actually developed and obtained at the European level.*

¹ In the elaboration, approval and implementation of European standards, ETSI is assisted by 38 National Standards Organizations (NSOs) in 36 European countries that are a.o. responsible for the standstill agreement, the national public enquiries and establishing the national position for the vote).

² See for example: Hands on standardization, a starters' guide to standardization for experts in CEN technical bodies; available as PDF at: <http://www.cen.eu/cenorm/workarea/handson/handsonguidejan09.pdf>.

³ The study clearly showed that with almost all National Standards Organisations, there is a strict control by the Technical Committees that national delegations at the European table indeed plead for the national position agreed before at home.

⁴ This explains part of the frustration expressed by respondents from organisations that may be associate members in the European Standards Organisations, but that still feel that their actual influence is only marginal.

⁵ Hence this might call for an approach in which the national level is dominant in policy making. Compare the model of the European Employment Strategy, in which actions are agreed upon based on the commitment from Member States to establish a set of common objectives and targets for policy. Under this new framework, policy co-ordination can be fostered by a "management by objectives" approach.

3.3.5 *Original interest vs. supported institutions*

As described in the study, the European Union financially supports various interest groupings to strengthen their position in European standardisation: ANEC (consumers), ECOS (environment), NORMAPME (SMEs) and ETUI (labour). This indeed brings about a lot of benefits, however not without a cost. Some of these supported organisations operate at the European level in a relative vacuum: no other European level organisations claim to represent the interest of that type of European stakeholders. However in the case of SMEs this is different. NORMAPME is financially supported by the European Commission¹ and is doing a good job in representing the interest of SME and craft enterprises in European standardisation². However other business organisations, such as those in the SME dominated construction sector, expressed in the study that they consider themselves as the 'real' representatives of the business community being a European sectoral organisations with a large SME membership. Such organisations are found to question the legitimacy of NORMAPME speaking on behalf of the SME community: 'With us, SMEs are paying members, and we should speak on their behalf, not an EC financed entity'.

Recommendation 5

If other membership organisations do exist that claim to represent the same interest as the one organisation selected by the Commission to receive financial support to represent that interest in European standardisation, the position of that organisation may be disputed.

There are two options to arrive at a solution: either:

- the policies to support the participation of stakeholders should aim to improve framework conditions rather than support directly individual organisations;*
- any direct support should preferably be to all existing membership organisations, representing the European stakeholders, not just one.*

Obviously a proper mix between these options might result for an exploration by the standards bodies, the Commission and interested parties.

¹ NORMAPME is an international non-profit association created in 1996 with the support of the European Commission, under the full name of the "European Office of Crafts, Trades and Small and Medium- Sized Enterprises for Standardisation". NORMAPME focuses on small enterprise interests in the European standardisation system (source: <http://www.normapme.com>).

² See for example the Evaluation of EU actions for the promotion of craft and SME interests in the standardisation area, Final Evaluation report submitted by GHK / Technopolis to DG Enterprise and Industry, 27 February 2009.

3.3.6 Training and education

Much information collected in this study pointed at a general lack of understanding and lack of awareness of the importance of standardisation among the different types of stakeholders. A higher level of awareness of the importance of standardisation – also in bringing about public policy objectives – in society may allow several interest groups to allocate more resources to participation in standardisation with a positive impact on access. This holds for all stakeholders, whether these are consumer organisations, environmental interest groupings or business.

For example technical staff of somewhat larger enterprises reported in the study that they are of the opinion that they themselves properly understand and see the importance for their firm of participating in standardisation. However often adequate support from higher management levels is lacking, the technical staff ascribe this to a lack of awareness and understanding with general management.

Improved understanding may result in better awareness and access and hence increase the use and impact of standardisation in society at large with a positive effect on efficiency and welfare of Europe as several economic studies quoted in Chapter 1 and 2 of this report have demonstrated.

Recommendation 6

More support to training and information campaigns on standardisation issues would be most welcome. This holds for courses aimed at specific target groups among stakeholders such as SMEs or consumer associations, as well as for improving the position of standardisation in regular education such as – but not limited to – regular vocational education and academic curricula.

3.3.7 Integration of different standardisation domains

In European standardisation three domains are distinguished that are covered by the three officially recognised standards organisations CEN, CENELEC and ETSI. Similarly there are a lot of different organisations at the national level; more than 50 national organisations in the 30 EFTA and EU Member States considered in this study.

Respondents in the study have pointed at the consequences of the variety of standardisation organisations that exist in the official European standardisation system:

- It is often difficult for stakeholders to know 'where to go', which is limiting access.
- High costs for stakeholders (representative organisations), as they have to maintain contact and participate in meetings etc. of several organisations, which has also a negative impact on access.
- Inefficiency of the European standardisation system itself as standards development takes place in three parallel organisations. As a consequence costs and prices for participation and standards documents are higher than reasonably necessary. This has again a negative effect on access.

The study has found that much cooperation and coordination between the various standardisation domains exist already. However due to the ever increasing combination of different fields of specialisation (electrical and mechanical components in machinery, ICT in cars, etc. etc.) and in order to reduce complexity, barriers to access, and double costs, it must continuously be monitored whether having separate entities to cater for standardisation in different fields should be continued, both at European and national level.

Recommendation 7

Monitor continuously the possibilities to merge different institutions that cater for standardisation in different, but increasingly related fields of expertise (at national as well as European level) in order to reduce complexity and costs with a view to increase ease of access further.

Obviously within merged organisations there will remain a certain specialisation to cater for the different working areas.

3.3.8 Cooperation between standards organisations and sectoral organisations

Some of the complaints that are expressed by respondents in the study might be serious issues, but it can be questioned whether solutions only have to be sought by adjustments within the standardisation system.

It is for example indeed very difficult for a small gate producer running a workshop with only four employees to find his way in a huge collection of technical standards. This may take more time than can reasonably be expected from a small manufacturer. However the solution might not only have to come from the standards organisations (giving more focussed information and offering sets of standards for specific target groups), one should also consider the relevant business organisation or trade association that should be in a position to provide such more targeted (filtered) information to its members about which standards are most relevant and how to deal with them.

We recognise of course that a lot of cooperation already takes place. Just to mention two examples, one from either side of the wide range that does exist:

- Fully integrated within the standardisation system. The Mechanical Engineering Standards Committee (NAM) operates within DIN (German Institute for Standardisation) on behalf of the Verband Deutscher Maschinen- und Anlagenbau e.V., VDMA (Federation of German Machine and Plant Building Industry). It results in 'standardisers' really using the language of the business world and presents a good example¹;
- Ad-hoc external cooperation as done by all NSOs. For example NEN in the Netherlands organising a symposium in January 2009 on packaging and sterility in cooperation with two professional organisations in that field.

Recommendation 8

The cooperation of standards organisations with a wide range of stakeholder organisations (whether business associations or special interest groupings) should be further improved in order to see to it that more relevant, more targeted information on standardisation reaches the stakeholders at grassroots level. In addition to reaching stakeholders adequately and efficiently with information, such cooperation may result in specific sets of standards to be composed and actually distributed among the target group.

¹ Described more in detail in: EIM Business & Policy Research, SMEs and Standardisation in Europe: 23 Good Practices to promote the participation of craft and SMEs in standardisation, and the use of standards, European Commission, DG Enterprise and Industry, Brussels, 2006.

3.3.9 Uniform registration of participation of stakeholders

A lot of discussion is going on in Europe about the need for SMEs to be better represented in standardisation, and it is obviously the case that most SMEs are not involved or aware. However given the fact that there are roughly 500 times more SMEs in Europe than large enterprises (having more than 250 employees), SMEs are overall reasonably well present in standardisation¹. In other words: if 10% of the large enterprises in Europe would be active in the standardisation system and only 0.1% of the SMEs (incidence 100 times less), there would on average still be five times more SMEs present in each technical committee than large enterprises (about 20,000 vs. 4,000 members).

Table 6.20 in this report shows that the absolute number of SMEs reported to participate in the technical committees with the various National Standards Organisations is indeed generally larger than the number of large enterprises. However one important issue still needs to be documented much better, because with most National Standards Organisations, certifiers and consultants are registered as SMEs, whereas there are valid reasons to argue that when discussing for example machine safety standards, the position of engineering companies is really different from the position of certifiers and consultants and hence a distinction should be made when their participation is registered and assessed. The study has found that the real problem lies in the limited representation of consumers' and especially environmental and trade unions' interests in many countries. Generally large enterprises, government institutions and universities seem to be properly represented.

However, the study also established that it is not really possible to obtain proper statistics on the participation of the different types of stakeholders in the European standardisation system. Much registration is only done on a case-by-case basis (to verify the balanced composition of one technical committee), without developing an overall registration system able to produce reliable, comprehensive statistics. This makes it impossible to monitor actual participation of the various stakeholders, and hence to monitor the effect of policy actions to improve access. If registration takes place with the National Standards Organisation, it follows an own model making monitoring at European level even more difficult.

In addition the study found (See Section 6.2.1) that only one third of the National Standards Organisations report that a complaints register does exist in their country. Also in this respect a further harmonisation across Member States would improve the possibility to monitor developments with regard to (complaints about) access.

Recommendation 9

To allow monitoring progress in increasing access to and actual participation in standardisation by the various types of stakeholders, the ESOs and NSOs should have a uniform registration of the participation of the various types of stakeholders in technical bodies, either by the number of organisations represented or by the number of experts participating on their behalf. A uniform classification of stakeholders is important to judge to which extent a balanced composition of TCs is indeed achieved in the various countries.

To also allow assessing the problems that still exist, they should also have a uniform complaints register with all National Standards Organisations.

¹ They also make up 20% of response in the stakeholder survey.

3.3.10 *Public hearing*

The development of European standards (EN) includes a public commenting period (public enquiry) followed by an approval by weighted voting by national standards organisation. When asked during this study, most National Standards Organisations (NSOs) obviously refer to this accepted principle, such as an NSO stating: "The procedure for public enquiry is announced on the NSOs website and published in the official bulletin. The draft national standards are notified to the competent authorities in accordance with the NSOs notification procedure under EC Directive 98/34."

However the study recorded also signals from a range of Member States that these public hearings mainly, or even exclusively, are targeted at those stakeholders that are already participating in technical committees¹.

However the situation is not black and white. In those cases for which we tend to conclude that in practice the focus of the 'public' enquiry is a bit too much on those parties that are already participating in standardisation work, NSOs generally also state that in addition 'everybody in the country can participate in the public enquires' or 'additionally, all enquiries are announced in the bulletin'.

In many other Member States it is really a public hearing and all drafts are for example announced in the state gazette.

The practice of circulating drafts mainly among insiders does not only seem to be detrimental to the basic characteristic and meaning of a public hearing to collect additional comments on that specific draft, it might also be a missed opportunity to raise awareness on what is going on in standardisation in general.

Recommendation 10

It should be further encouraged that public enquiries are indeed published widely and that stakeholders not (yet) participating in standardisation are indeed reached. The NSOs should be more proactive in obtaining comments from a wide range of stakeholders during the public enquiry. Just a reference in the State Gazette might not suffice.

¹ The following findings originate from the additional "10 points questionnaire" reported by EIM in an internal document to DG Enterprise and Industry (See also Section 6.3 of this report):

- So called IEC/CENELEC-experts (a special kind of national committee member) are nominated by the national TCs. These experts are coordinating the national consultation and are responsible to provide the NSO with the national comments".
- European and international public enquiries are addressed to all known members of the NSO.
- About 40 organisations are on the mailing list for public enquiries: ...
- Only members of national Technical Committees are involved in the development and (public) enquiries of European and international standards."
- For public enquiries, the members of the national TC prepare comments on the draft.

3.3.11 *Accessibility*

A lot of information on standardisation is distributed by means of special publications, e-mail newsletters and dedicated websites. Hardly any of the standard organisations pay special attention to access to this information for people with limited eyesight or other impairments.

It is rather easy in ordering printed material or in giving design assignments for websites to ask for features that will make it better accessible and usable to as wide an audience as possible (colour schemes, font type and size, navigation tools, magnifiers for on screen display etc.).

Recommendation 11

In designing the various communication tools used by standard organisations – and stakeholder groups for that matter – the need to make these communication tools accessible for people with impairments should be better taken into account.

3.3.12 Use of ICT

In providing information on the standardisation process and on the standard documents that are available, much has already improved by using ICT tools. Many websites provide a lot of information on standards and make it much easier to search through the available information and filter out the information and standards that are relevant for that specific user.

Still many stakeholders judged that the use of ICT tools could be further improved.

- Most of the work of technical committees is almost entirely focussed on physical meetings as reported in the last paragraph of Chapter 6. Although it is probably not a good idea to do away with physical meetings altogether, more use of ICT tools might help to reduce the cost associated with participation in standardisation. If part of the work is done using web fora etc., significant savings in terms of time and money may be accomplished, especially by reducing the travel frequency.
- Also people active at Member State level were found to complain about the time lags in getting answers from the European Standards Organisations. Distributing more information using advanced ICT tools will help to reduce time lags.
- As shown in Annex 1 on Estonia, stakeholders state "It is of utmost importance to have an opportunity to get information, comment on it and buy standards via the Internet".

Reduce cost and 'time-consumption' in these ways would improve access further.

Recommendation 12

The use of ICT tools should be further encouraged in.

- *Organizing the standards developing process.*
- *Distributing information on the standards documents.*
- *Distributing the standard documents themselves.*

In fostering this, good practices that exist with several NSOs might be a useful instrument.

3.3.13 *Price of standards*

Based on the information and views collected in the course of this study we concluded that generally the importance of prices as an impediment to the use of standards or to participating in the standards development process (membership fees) is less important than often stated. Indications are for example:

- With stakeholders, ascribing insufficient priority to standardisation is often interlinked with the stated argument 'too expensive'.
- Standardisers report that lowering prices of standards does not result in a sizeable effect on the volume of standards being sold (low price elasticity).
- Although EN standards are available from a large number of National Standards Organisations at diverging prices, stakeholders do not seem to shop to buy from the cheapest supplier in Europe.

We do not advise to opt for free standard documents and having no fees for participation in standardisation work), because it might destroy the industry led standardisation as it evolved over the last 100 years. As one stakeholder *stated "as a matter of principle, standardisation should continue to be a tool of self-regulation by industry. Therefore, public funding is not an option"*.

One has to understand that in private standardisation there is a balance between the agenda for standardisation, the amount of standardisation work (work items) taken up and the willingness of stakeholders to finance such activities and contribute their expertise and time in the process. This implies priority setting. If standardisation would be financed by public money this mechanism will stop to function, and it may be difficult to arrange alternative mechanisms that would result in a proper prioritisation and in keeping the budgets required within reasonable limits.

However, for those standards that are mainly used to bring about public policy goals (EN harmonised standards), this reasoning does not apply:

- The need for democratic legitimacy is more important hence having an open system with all societal stakeholders around the table is more important.
- Priority setting and financing can be done by the public sector (cf. mandates).
- Stakeholders find it especially difficult to accept that they have to pay for standard texts that are referred to in legislation and that are used to bring about public policy objectives test¹.

It should also be noted that having the possibility to sell European standards at a price that is interesting for the National Standards Organisations, might also function as a stimulus to arrange for translations in the local language (aiming to increase the volume of sales).

Recommendation 13

For European harmonized standards (cf. Recommendation 2), that are closely linked to legal requirements, the aim should be to make the standards available for free on the Internet. This obviously brings with it the need to make available alternative sources of finance in order to avoid that as a consequence participation in the standards development process will become much more expensive in order to maintain the economic viability of the standards organisations.

¹ On 31 December 2008 there was a ruling in a Dutch court case. A private enterprise - Knooble Ltd. active in providing information and consulting with regard to construction projects - demanded that standards that are referred to by the Dutch building code will be no longer legally binding because the text of the standards is copyrighted by NEN and not freely available. The ruling stated that these standards are no longer mandatory because the law demands that legally binding texts are freely available.

Part II – More detailed information

4 Access and participation of European stakeholders

The actual participation in the standardisation process can be described as the outcome of several factors:

- A. Availability and dissemination of information on the standardisation system and its processes.
- B. Awareness by the various stakeholders of the importance of standardisation and the possibilities to influence the outcomes of the process.
- C. The rules and regulations of the standardisation process. Are specific organisations allowed to join, what are the conditions for joining?
- D. The priority given by the various stakeholders to participation.
- E. The resources available with the (individual) stakeholders in terms of expertise, money and time (and made available given their priorities) to actually participate.

When access to standardisation is being discussed, reference is often made to factors A and C only, being factors related to the system and the process. However it has to be realised that actual participation not only depends on these characteristics but also on characteristics of the (potential) participants, i.e. the factors B, D and E. [cf. Recommendation 3]

In the report from the Commission on the operation of directive 98/34/ec from 2002 to 2005¹, it is stated that "The European standardisation stakeholders ANEC (European association for the co-ordination of consumer representation in standardisation), ECOS (European Environmental Citizens Organisation for Standardisation), NORMAPME (European Office of Crafts, trades and Small and Medium-sized Enterprises for Standardisation) and ETUI (European Trade Union Institute) were well-integrated into the process by the end of the reporting period. Two remarks are in order:

- it should be noted that here only three type of stakeholders are considered, as these are supposed to be weak stakeholders (in terms of participation in standardisation);
- next to participation, it has of course to be considered whether this participation goes hand in hand with the ability to actually influence the outcomes of the process.

In Table 4.1 the participation of three of these four European interest groupings at the European level is considered². However in CEN and CENELEC technical bodies, these interest groupings are observers. In arguing their case they are faced by the 'effective' members of the CEN and CENELEC technical bodies, the national delegations. This highlights the importance of a good representation of the various interests at national level because in the national mirror committees the national votes are being developed. The national delegations have to adhere to the agreed national position, when participating in the technical committees at European level. [cf. Recommendation 4]

¹ Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee, the operation of directive 98/34/ec from 2002 to 2005, {sec(2007) 350} , COM(2007) 125 final , Brussels, 21.3.2007

² ETUI did not make this information available.

The representation of the various types of stakeholders at national level is discussed in Chapter 7 based on the surveys among NSBs and NSOs (Step 4 of this study, as shown in Figure 1.1) and the consultation of the stakeholders at national level in Step 5.

Table 4.1 Participation of European stakeholders in technical bodies of the three ESOs*

	number of technical bodies						
	Presently active	ANEC		ECOS		NORMAPME	
European Standards Organisations		considered relevant	actual participate	considered relevant (estimate)	actual participate	considered relevant	actual participate
CEN							
Administrative Board			X		X		X
General Assembly			X		X		X
Technical Board			X		X		X
Technical Committees (TC)	282		25	30	12		23
- sub-committees	85						
Workshops	38		1				
Working Groups	1,418		6	50	12		
BT/Task Force			5	5	2		1
CENELEC							
Administrative Board							
General Assembly			X		X		X
Technical Board			X	X			X
Technical Committees, sub-committees	73		9	10	2		1
TC/SC Working Groups	220			20	4		1
BT/Task Forces/Working Groups	24		2				
ETSI							
Board			X	?			X
General Assembly			X	?			X
Operational Coordination Group			X				X
Technical Committees (TC)	21		2	5			1
Work Groups/Task Groups	100						1
ETSI Project (EP)	1						
ETSI Partnership Project (EPP)	5						
Special Committee	4		1				1

* The number of technical bodies is derived from: (1) CEN Annual Report 2007, p. 55; (2) CENELEC Annual Report 2006, p. 44, plus e-mail 2008-07-17; (3) ETSI website, July 2008, plus e-mail 2008-07-08. The number of technical bodies in which stakeholders participate is based on (4) ANEC Annual Report 2007, p. 38 - 39, plus e-mail 2008-08-07; (5) List supplied by ECOS, March 2008, revised e-mail 2008-07-08; (6) NORMAPME website June 2008, plus e-mail 2008-07-07.

5 Views of European players

5.1 Introduction

Extensive interviews with large and high level delegations of CEN and CENELEC in Brussels and ETSI in the south of France¹ have been held. Subsequently meetings were held with representatives of some European representative organisations such as consumers, business, trade unions, environmental organisations² and market surveillance organisations.

5.2 Overview and summary

The findings from the interviews can be summarized as follows.

- The management of CEN, CENELEC and ETSI are convinced that their procedures and business models are overall adequate. They provide the best guarantees for an open and democratic standardisation system that is based on consensus and balances the various interests to the extent possible. They admit that minor improvements might be possible, but overall they feel that their system provides the best conditions for access. They also believe that there is little doubt that their system is superior to the other (CEN/CENELEC vs. ETSI and the other way around) and that most 'stories' of stakeholders about limited access or stories about for example large corporations dominating procedures are generally based on individual cases that are greatly over-exposed.
- Some of the stakeholders (stakeholders' representatives at European level) on the other hand complain that they sometimes feel like second-class citizens and that their interests are not sufficiently taken into account.

[cf. Recommendation 4]

How is it possible that such contradicting views are so firmly expressed? There might be various factors contributing to this:

- Lack of access to standardisation is quite often related to characteristics of the stakeholders themselves rather than to characteristics of the European standardisation system (rules and procedures). Often a lack of resources is said to hamper the full involvement for various types of stakeholders. However, it is also reported that a lack of resources in terms of money, staff (-time), and the required technical expertise may be actually be related to setting priorities.
- Within the business community, 'scale' is one of the important factors. For large corporations standardisation may have a major impact on how they can and will serve their markets in Europe and beyond. The same holds for small scale operators, however whereas the costs of participation in the standardisation process are more or less similar (sending an expert to meetings for a few years, paying for travel and subsistence), the benefits are of a completely different scale. If participation in the process would lead to one percent reduction of production costs of a business, this is a huge sum for a major manufacturer (allowing to financing an own standardisation department within the

¹ ETSI is located in the Sophia Antipolis science park, between Nice and Cannes.

² In this report "environmental organisations" refers to environmental non-profit citizens' organisations representing civil society.

company), whereas for a small company the absolute gains are rather moderate. In addition the owner/manager has to keep his business running and rarely finds the time to participate in such long term administrative procedures. In summary:

- in absolute terms, the costs of participation in the standardisation process are for large enterprises and SMEs more or less the same, whereas the benefits are much higher for large firms;
 - however in relative terms, the cost/benefit ratio is much better for large enterprises than for smaller enterprises.
- For many other stakeholders, such as trade unions, consumers or environmentalists there is no immediate financial return. Hence financing their input is even more difficult, but again also here prioritisation is reported to be a relevant issue as it determines the amount of resources organisations are willing to mobilise for the issue of standardisation.

In addition we feel that another major issue - to which in our view surprisingly little attention is paid - is the fact that two different 'types' of standardisation are dealt with in one system that have basically different drivers, characteristics, financial consequences etc.:

- In the 'old' days standards emerged as voluntary agreements between *private parties* to enable a.o. interoperability of their products and in this way hugely contributed to conquering markets, efficiently etc. The 35 mm film introduced in photography (and film) in the early twentieth century fitted cameras of many manufacturers and could be processed anywhere around the world. A4 sized paper¹ contributed to efficient markets for a.o. copiers, fax machines and printers. These different models of printers can all be connected via a standardized printer port² to numerous brands of computers. Manufacturers and users have benefited a lot.
- On the other hand there are harmonised standards in the framework of the New Approach Directives of the European Commission and EFTA. These were originally meant to support the development of the Single Market. However, over the years ideas have grown to widen the scope of the New Approach - at least some of the techniques used - considerably (as also expressed in official documents); for example by covering environmental legislation in the harmonised standards. The link between legislation and these harmonised European standards helps in removing technical barriers to trade, and hence plays a vital role in ensuring the free movement of goods between Member States and EFTA countries. The over 25 Directives³ that have developed since the mid 1980's that are based on the New Approach and the Global Approach⁴ have

¹ One out of a series of standards measures starting from A0 (1 m²), defined by the international paper size standard, ISO 216, that is based on the German DIN 476 standard that was already adopted by a range of countries before the Second World War.

² Originally a de facto standard (Centronics in the 1970's) was popularized when IBM used it as the basis for the printer port on the early days PCs in the 1980's. The standard further developed, bi-directional faster communications, to become the IEEE 1284 in 1994.

³ Some 22 New Approach directives that provide for CE marking (e.g. pressure equipment, lifts, safety of toys); 4 that do not provide for CE marking (e.g. packaging and packaging waste) and 4 others that are based on some principles of the New Approach and the Global Approach (e.g. transportable pressure equipment) are listed on <http://www.newapproach.org>.

⁴ The common thread between these complementary approaches is that they limit public intervention to what is essential and leave business and industry the greatest possible choice on how to meet their public obligations. The New Approach concerns regulation (New Approach Directives) whereas the Global Approach concerns conformity assessment.

the dual purpose of ensuring the free movement of goods through technical harmonisation of entire product sectors, and a high level of protection of public interests. The essence is that these harmonised European standards are providing ways and means to companies to show that their products are believed to comply with European legislation ¹and hence can be marketed in the Single Market. So the idea of 'voluntary standards initiated by private parties' is being distorted somewhat. Here standards help in 'imposing' obligations upon enterprises to ascertain that products and services are complying with important essential *public policy* requirements² relating to a.o. safety of workers and consumers and to environmental impacts.

In summary: standards are on the one hand used to increase efficiency (of businesses) and on the other hand to reach public policy goals set by the European Union.

The question to be addressed is whether the mixing together of these two 'uses' into one European standardisation system has not blurred the overall picture, because characteristics, drivers, interests of and acceptance by various types of stakeholders differ for standards used for these two purposes.

[cf. Recommendation 2]

However the European standardisation system might manage both 'types', including their rules of access. But there might be an additional need for public authorities to consider the access issue in case standards are used in the public domain. This might warrant additional checks on and measures to support access and the actual participation of all relevant parties in such cases.

Also within ISO an approach is advocated based on the tripod of a balance of stakeholder interests at the national level, voting by ISO's national members, and consensus decision process (i.e. efforts to convince dissidents, see ISO/IEC Guide 2:2004)³. In practice, however, the ISO committees may also lack diversity. In 2005 a draft guideline was issued to involve a wider set of stakeholders in committee negotiations, in particularly the usually absent stakeholders such as consumers, labour representatives and NGOs. Special efforts were made by ISO on representation in the standards committee on Social Responsibility (i.e. ISO 26000). For this process a guide on relevant stakeholder categories was specifically drafted. Representation was to be based on six stakeholder categories.

These categories are: consumers; government; industry; labour (workers); NGOs and other, namely "service, support, research and others".

¹ The Guide to the implementation of directives based on the New Approach and the Global Approach (Office for Official Publications of the European Communities, Luxembourg 2000) states in Section 4.3: Conformity with a national standard that transposes a harmonised standard, whose reference has been published, confers a presumption of conformity with the essential requirements of the applicable New Approach directive that is covered by such a standard. The application of harmonised standards, which give a presumption of conformity, remains voluntary in the field of New Approach directives. Thus, the product may be manufactured directly on the basis of the essential requirements.

² These standards relate to both the definition of mandatory essential requirements and appropriate conformity assessment procedures.

³ This paragraph is mainly based on T.M. Egyedi (Delft Univ. of Technology) & S. Toffaletti (NOR-MAPME), Standardising Social Responsibility; Analysing ISO representation issues from an SME perspective, EURAS Workshop on "Standards and Conflict Resolution", 26-27 October 2007 Dresden, Germany. Available as PDF at: http://www.tbm.tudelft.nl/live/pagina.jsp?id=0b330c26-def4-45e3-a367-43b61bf0ae45&lang=en&binary=/doc/EURAS_Dresden_2007_SMEs_ISO26000.pdf

A balance of experts from these categories was explicitly desired. However ISO has stated that such a sophisticated approach is not possible for all regularly standardisation work as it would delay procedures unacceptably.

5.3 Individual statements expressed in the interviews

Although nearly all standards are European or international, there is a large network of National Standards Organisations. National and European organisations are well integrated. But the question is raised whether the European system as a whole is efficient:

- are such large national structures indeed required?
- does this make the European standardisation system more costly than needed?

Unnecessary costs and complexity may be detrimental to access.

[cf. Recommendation 7]

Some parties believe that the European Commission overestimates their financial contribution to the European standardisation system. Considering all, much less than 5% of the costs would be covered by public money as was demonstrated by a Roland Berger study done in 1999-2000, commissioned by CEN¹.

Several interested parties stress that their budgets don't allow them to participate in the European standardisation process in a proper way. The question of the CEN associate membership fee has for example been mentioned as an obstacle to participation and also as a matter of principle regarding the role public interest stakeholders (can) play in the standardisation process. The fee of about € 10,000 per year is a punitive charge for public interest organisations such as ECOS and ANEC (respectively representing environmental and consumer interests at European level).

Moreover the status of associate membership conveys few rights in the eyes of some stakeholders. The associates sit only as observers in the CEN General Assembly (AG), the Technical Board (BT) and the technical committees of CEN. On the one hand the associates only have limited influence on the strategic direction of CEN or on its key decisions. On the other hand influence on actual standards being developed is rather limited if - in the model of CEN and CENELEC - the voting is done by national delegations (that bring a national vote to the table that has been decided upon before at national level). Associate members at European technical committees can hence do hardly anything to influence the decision making with regard to normative documents at European level.

In several technical committees representation of SMEs is limited or absent, although issues are addressed that are relevant for sectors in which SME operate. However it does not follow that factors within the standardisation system prevent participation, it might also be related to characteristics of the SMEs themselves or their representative organisations. A same line of reasoning applies to other interests such as those of workers, consumers or of the environment.

¹ Future financing for the CEN System, Roland Berger & Partner GmbH – International Management Consultants, December 2000 (Available at: <http://www2.nen.nl/cmsprod/groups/public/documents/bestand/200840.pdf>).

Because the price elasticity of demand for standards is very low (i.e. reducing prices will not substantially increase the numbers sold) reducing the price of standards will reduce the revenues of standards bodies substantially, hence costs can no longer be recovered.

[cf. Recommendation 13]

Having National Standards Bodies selling (EN) standards and having NSBs financially benefiting from this, is a driver to have standards translated into national languages and in this respect improving access to standard documents.

[cf. Recommendation 13]

Some observers state that at European level the system is more open and transparent than in many of the national situations.

Some parties state that serious issues are sometimes broadcasted in a distorted way: the case of the difficulty small producers of gates and doors have to cope with the cluster of standards that they have to follow is as much an illustration of an overload of formal requirements as of a lack of information and guidance of smaller producers from their own trade organisations. Here access might be improved by a better role of for example trade associations and a better cooperation between such organisations and standardisers. (The cluster of standards EN 13241-1, see: video at website <http://www.normapme.com>.)

[cf. Recommendation 3, 8]

In the view of ESOs the system is so open and transparent that it is indeed very hard for one particular party (e.g. certifiers or multinationals) to have a controlling influence.

The price of standards, for example ISO, is sometimes even a bottleneck for the European Commission. A particular staff member may hear from the library of a Directorate General: 'sorry, too expensive / no budget to acquire these standards for the library'.

[cf. Recommendation 13]

NGOs do express the view that there is a gap between the principles of standardisation that are advocated by the standards bodies (open, all interested bodies involved, consensus) and the every day practice: lack of information, large representation of industry who have a lot to gain, for several other stakeholders difficulties in digesting information, lack of resources to participate and obtain standards, not being represented in the delegations (to European level). In some circumstances various types of stakeholders are 'only' observer with different rights in voting, they perceive their own position as second-class citizens.

[cf. Recommendation 4]

The fact that several National Standards Bodies and Organisations are not only active as standardisers (i.e. facilitating the evolvement of standards and distributing existing standard documents) but all have auxiliary commercial activities in for example certification and training is something that needs more reflection. The commercial interest in one area may influence decisions in another area.

[cf. Recommendation 1]

'Lack of resources' is often mentioned as the major bottleneck. However some informants have their doubts. In reality it might be a lack of detailed knowledge with regard to the complexity of the system and its procedures and with regard to the technical issues at hand. [cf. Recommendations 3, 8, 13].

Supported training and information campaigns on standardisation issues would be most welcome. This holds both for groups of stakeholders such as SMEs or consumer associations and for elements in the curricula of regular (vocational) educational and training systems. [cf. Recommendation 6]

Some informants question the legitimacy of several parties that are participating at the European level in standardisation. The activities of such parties are (partly) financed by European public money: who do they represent? [cf. Recommendation 5]

Enterprises have immediate economic benefits from participation, it may positively affect their knowledge on what is going on, reduce production costs or ease access to markets. For many other types of stakeholders there are no immediate economic returns, hence it is much more difficult to make available the resources needed to participate in the process.

Although standards bodies do a lot on informing interested parties by means of websites¹, newsletters, user guides, seminars etc. (also in various languages), it is sometimes difficult to get the type of 'targeted' information that is very important for various stakeholders such as in *which TCs or draft normative documents are important Occupational Health and Safety (OHS) or environmental aspects at stake?*. [cf. Recommendation 8]

There is a demand for better enforcement of regulations and information exchange in several areas of public policy such as food safety. Therefore also market surveillance authorities have a strong interest in standardisation for example concerning the description of testing methods.

The EU research programmes form an important input in the standardisation process. At national level national researchers should be involved in the process; the extent to which this is really happening differs between countries. National Standards Organisations have a role to play (Note that at European level efforts are made to give proper emphasis to the innovation dimension, in a joint effort of CEN and CENELEC the Working Group "Standardisation, Innovation and Research, STAIR has been established to increase the co-operation between the researchers and the standardisers).

ESOs should stimulate that knowledge and experience of the standardisation process is shared between old and new Member States.

Raising awareness about the importance of the standardisation process among business associations (especially those representing SMEs) is one of the best ways to stimulate their participation in the process. [cf. Recommendation 8]

Some argue that the integration of environmental and social aspects in the standardisation process should be done from the start of the process at national level. So although these interests should be guarded both at national and at European level, it is crucial to strengthen national level participation of the different types of NGOs. [cf. Recommendation 4]

¹ See also the dedicated website on the New Approach that has been realised to increase the visibility of New Approach Standardisation in Europe and to provide information on the standardisation process: <http://www.newapproach.org/>

European interest organisations also report that there are situations where there national members complain that no mirror committees are set up at national level. This may have various reasons such as for example a lack of interest with the NSO or an NSO that cannot mobilise sufficient interested parties (with the consequence that the stakeholder that is making enquiries is told that a mirror committee could be set up, but that the requesting party should cover all costs, i.e. € 15,000). [cf. Recommendation 4]

There might be a need to reflect on the link that has been developing between the European Standards Organisations (ESOs) and the European Commission (New Approach directives, mandates, subsidies etc.) as it may at a certain moment in time endanger the position of European standardisation at a global scale. ISO for example does not have a governmental counterpart playing a role in the decision making process, and if the situation in Europe would deviate too much from the other players at global level, this might have an impact on the position of the ESOs within the global system. [cf. Recommendation 2]

6 Views of National Standards Organisations

6.1 Introduction

The Internet survey among National Standards Bodies and Organisations (NSBs and NSOs, hereafter called standards organisations) was implemented in April-May 2008. In Section 6.2 the main findings from this survey are reported¹.

As views expressed in the survey were not always adequately supported by facts and figures, an additional *10 points questionnaire* was distributed in all 30 countries concerned to all NSBs (members of CEN and CENELEC) and to all NSOs co-operating with ETSI in the ICT domain.

The results from the *10 points questionnaire* have been described in a background report in a series of 34 narratives, a kind of case descriptions of 34 different standards organisations. Section 6.3 provides a resume.

6.2 The Internet survey among National Standards Organisations

All the information is provided by 'the response' as characterized in Table 6.1. Facts and perceptions were contributed by staff members of standards organisations in 26 countries in Europe².

Table 6.1 Response Internet survey among standards organisations

	Invited	Completed	Percentage
Number of countries	30	26	86%
Number of organisations	52	34	65%
Number of experts / groups of experts	128	47	37%

Source: Web based survey among standards organisations in 30 countries

In total 47 experts have filled in the on-line questionnaire (almost) completely.

6.2.1 Access to the standardisation process

The participation of 8 groups of stakeholders

Most respondents state that their standards organisation pays special attention to promote access to standardisation for the different types of stakeholders distinguished. For public authorities this is as high as 42 of the 47 respondents or 90%. Table 6.2 shows that even for the category with the lowest score, trade unions, still 57% pay special attention to access issues.

¹ More detailed findings were reported in the interim report.

² Countries that have not responded to this part of the study are the 'old' Member State Greece and the 'new' Member States: Estonia, Slovenia and Hungary.

Table 6.2 Number and percentage of respondents that pay special attention to promoting access to standardisation, by specific groups of stakeholders (n= 47)

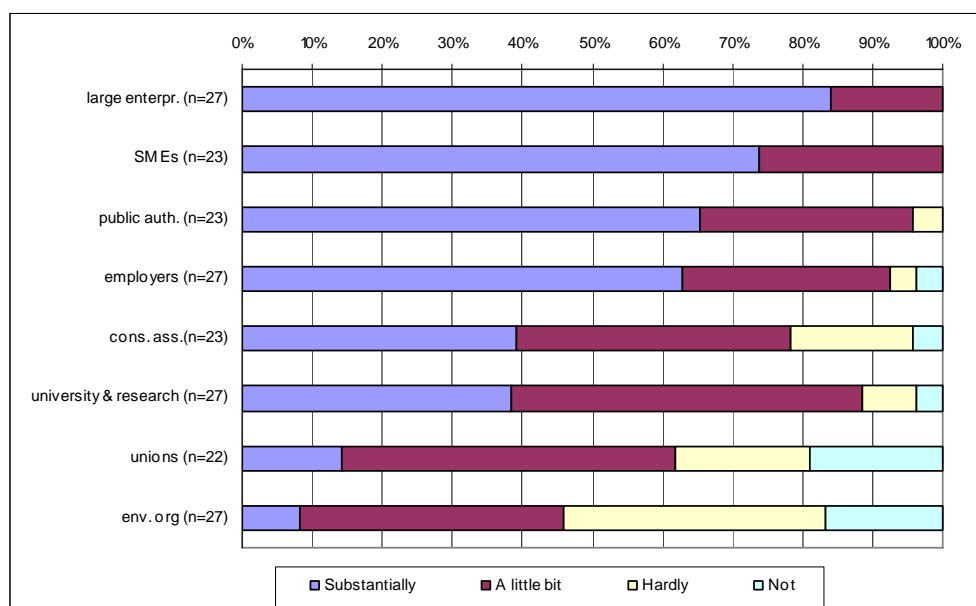
	No.	Percentage.
Public authorities, government departments and government agencies	42	89%
Consumer associations	41	87%
SMEs, i.e. enterprises employing up to 250 workers	41	87%
Universities and research institutes	40	85%
Employers' federations; trade associations	37	79%
Large enterprises, i.e. enterprises with more than 250 workers	34	72%
Environmental organisations	28	60%
Trade unions	27	57%

Source: Web based survey among standards organisations in 30 countries.

In addition to the eight groups defined in the questionnaire, respondents also indicate that they pay special attention to local authorities; organisations for persons with disabilities and the Technical Chamber¹.

Figure 6.1 shows – as expected – that large enterprises are seen to be most active in standardisation².

Figure 6.1 The participation of specific groups of stakeholders in the standardisation process as reported by standards organisations (n= 47)



Source: Web based survey among standards organisations in 30 countries

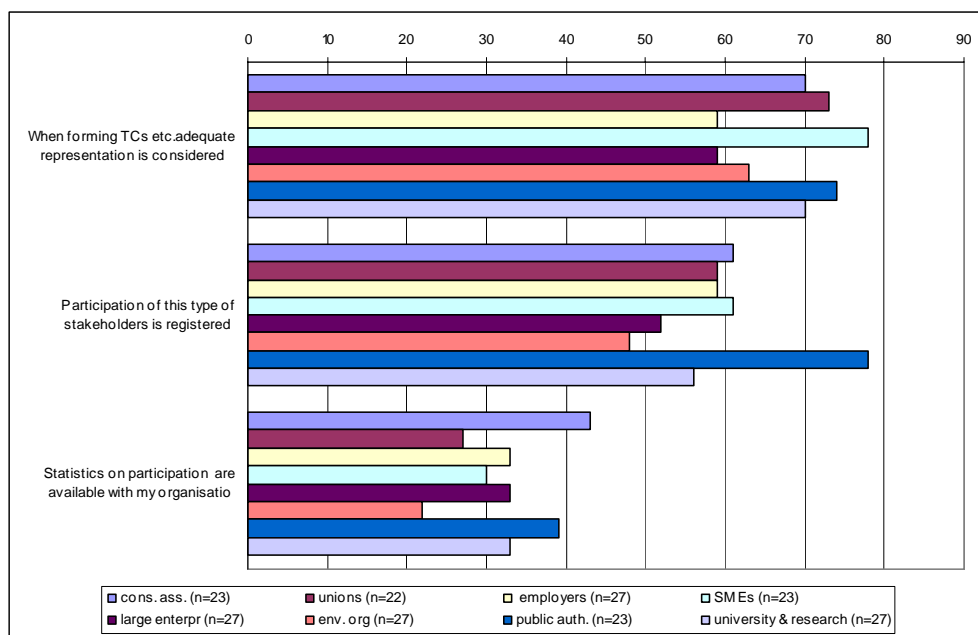
¹ The Technical Chamber of Cyprus (ETEK) is a non-profit organisation that is regulating the Engineering Profession and is acting as the official Technical Advisor to Government and Local Authorities.

² For each of the eight pre-defined groups a number of questions have been answered. In order not to overload the respondents they were only asked to provide answers to four series of questions, therefore these series of questions has only been answered by about 23 respondents rather than 47.

Figure 6.2 shows that – depending of the type of stakeholder - 60 to 75% of the NSOs keep track of the participation of the different type of stakeholders in the technical committees, mirror groups and working groups. Also the actual participation of this type of stakeholders is mostly registered (average 60%). However only a minority have statistics on the participation of the different types of stakeholders available (average just over 30%).

[cf. Recommendation 9]

Figure 6.2 The percentage of National Standards Organisations that monitor the participation of specific groups of stakeholders in the standardisation process (n= 47)

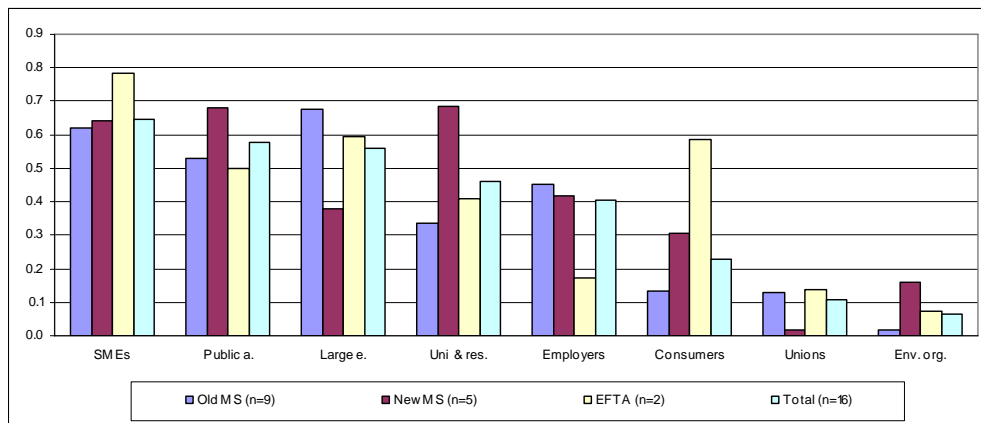


Source: Web based survey among standards organisations in 30 countries

The actual participation of the various types of stakeholders is shown in Figure 6.3 for old and new Member States and EFTA countries separately. The overall picture as stated by NSOs is that:

- SMEs participate in about 65% of all technical committees
- For public authorities and large enterprises this figure is just below 60%
- For consumers, trade unions and environmental organisations the score is really rather low, roughly 10 to 20%.

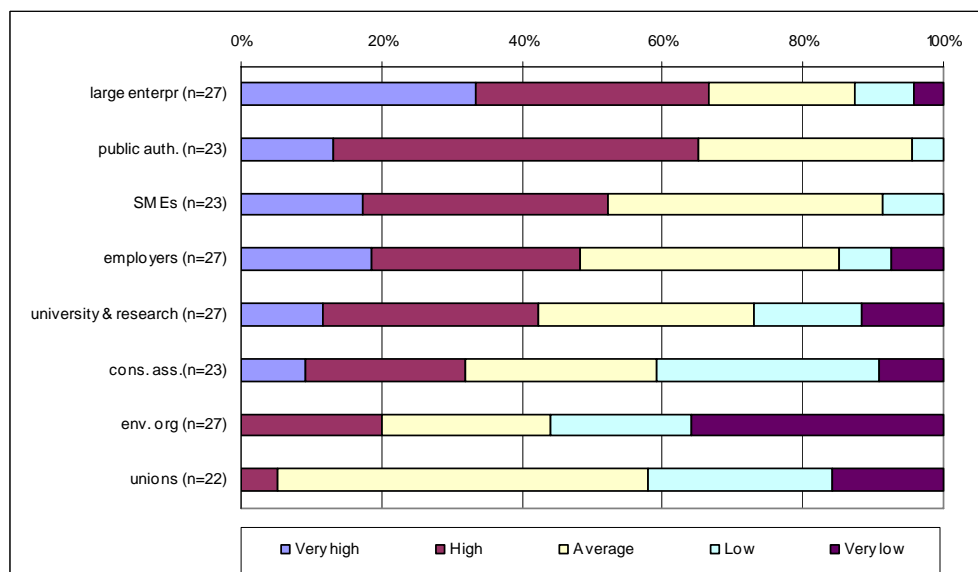
Figure 6.3 Share of TCs etc in which each type of stakeholder participates, as reported by standards organisations (n=47).



Source: Web based survey among standards organisations in 30 countries

If we combine the high and very high commitment to standardisation, Figure 6.4 shows that NSOs rank the different types of stakeholders as follows. The representatives of the business community and public officials highest, and consumer associations, environmental organisations and trade unions lowest.

Figure 6.4 The commitment to standardisation for groups of stakeholders, as reported by National Standards Organisations (n=47).

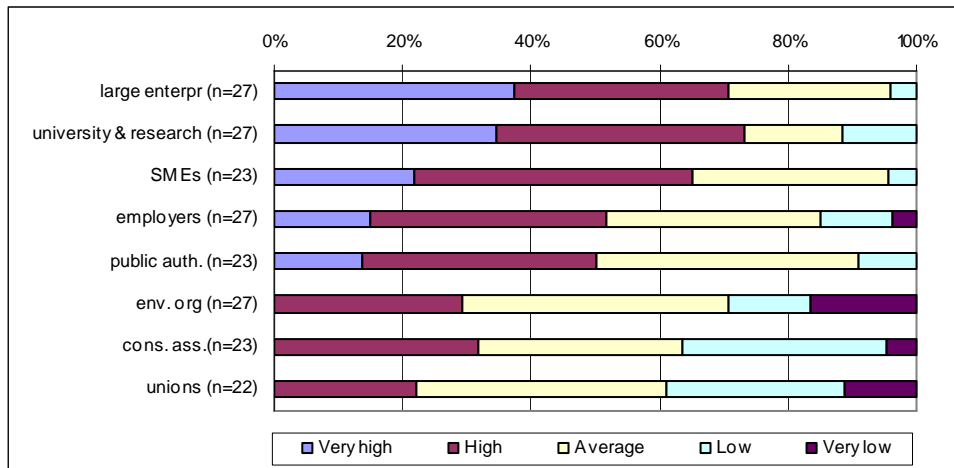


Source: Web based survey among standards organisations in 30 countries

Figure 6.5 indicates that generally, NSOs feel that the knowledge that stakeholders of different types have to participate meaningfully is more or less in line with the commitment shown.

So the rank numbers in Figure 6.5 are generally in line with Figure 6.4 with two major exceptions: universities and research organisations score much higher with relevant knowledge than with commitment; whereas for public authorities the situation is reversed: a high commitment but a relatively low level of relevant knowledge.

Figure 6.5 The knowledge of groups of stakeholders to participate meaningfully, as reported by standards organisations (n=47).

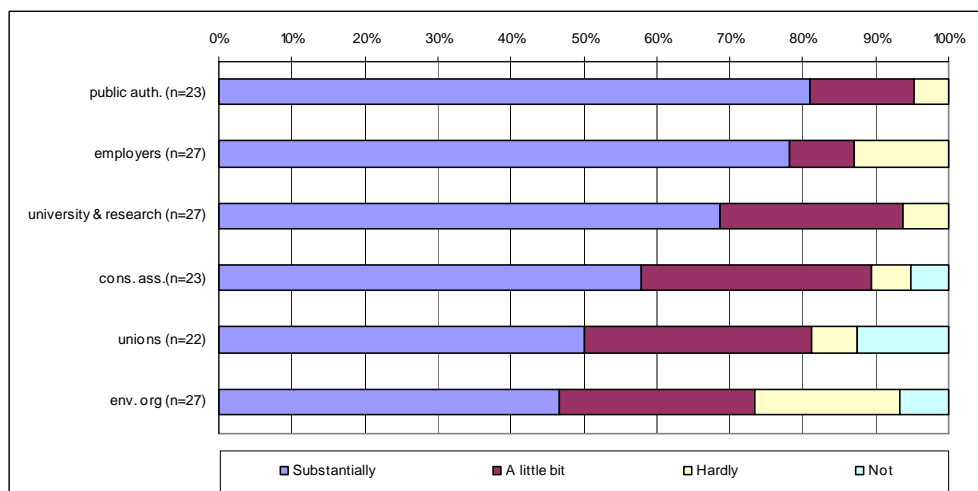


Source: Web based survey among standards organisations in 30 countries

There are also differences with regard to the belief among NSOs that stakeholder representatives, indeed represent the interest they stand for:

- for public authorities, employers associations and universities this is some 70 to 80%;
- for consumer associations; environmental organisations and trade unions this is a bit lower: about 50 to 60%.

Figure 6.6 The extent to which groups of stakeholders indeed represent the interest they stand for, as reported by standards organisations (n=47)



Source: Web based survey among standards organisations in 30 countries

The staff of the standards organisations also expressed their opinion on the most important three barriers for stakeholders to be involved in the development of standards. There are minor differences by type of stakeholders, but the 'overall picture shows' mainly:

- lack of financial resources / not willing to pay the costs involved;
- lack of staff (time);
- failing to properly understand the benefits of standardisation;
- lack of technical expertise.

Some details for specific groups of stakeholders are shown in Table 6.3.

Table 6.3 Detailed barriers for participation for specific groups of stakeholders as mentioned by standardisation organisations.

Stakeholders	Barriers mentioned by standards organisations
Consumer associations	65% of the National Standards Organisations mentioned lack of (financial) resources. Once or twice specific issues were mentioned such as 'having a political agenda' or 'having too much a legislative approach'.
Trade unions	The top issues are lack of interest and the priority for technical subjects (36%). Also lack of comprehension of the importance of standardisation is mentioned (14%).
Employers organisations	Lack of awareness of the benefits of standardisation scores high (33%). Organisations tend to focus more on economic and legal issues.
SMEs	Lack of (financial) resources tops the list (70%). Also time constraints score relatively high. Staff of NSOs made the observation that entrepreneurs (and other staff of SMEs) are generally too much focussed on the every day, immediate job of running the enterprise to be able to find the time or energy to focus on standardisation. These are issues which are for most of them a more distant long term objective, if they see the relevance at all.
Large enterprises	Often 'a lack of comprehension is mentioned', this is however a combination of not knowing 'the rules of the game' and a difference of judgement 'falling to understand the benefits of standardisation'. For large enterprises sometimes the picture emerges of technical staff being adequately equipped to fruitfully participate and seeing the benefits of participation for the firm, but this technical staff is sometimes restrained by higher level (non technical) management that are not sufficiently convinced to provide the necessary resources.
Environmental organisations	Financial resources score highest (44%), this ranges from a general lack of resources, to specific statements such as no budget for travel expenses or 'they tend to overestimate the cost of participation'. There are also specific statements such as 'refuse to participate in a consensus process because they want to be free to oppose some of the resulting texts'. Also here staff of NSOs are of the opinion that stakeholders fail to properly see the benefits of standardisation and are favouring compulsory regulation rather than voluntary standards.
Public authorities	No issues that stand out. Answers are rather evenly distributed among general issues such as lack of awareness, financial resources, priority, and technical expertise
Universities and research org.	Financial resources top the list (59%)

Source: Web based survey among standards organisations in 30 countries (about 25 respondents per item)

General access issues

The respondents have described the information policy of their own NSO towards the various groups of stakeholders on a scale from very passive to very active. All respondents opt for a position average to very active (very active 21%; active 55% and average 23%), none chose passive or very passive.

Also when asked about access to the standardisation process for the various types of stakeholders in their own country compared to other European countries, the respondents express rather positive views. 69% state that ease of access is above average in their country, whereas only 6% opt for less than average. We are inclined to see this as an indication that NSOs tend to overestimate the ease of access to standardisation at their own organisation.

Table 6.4 Comparing national and European standardisation (CEN, CENELEC, ETSI) in terms of ease of access for the various types of stakeholders, views of respondents from standards organisations (n=47)

	Region			Total (n=47)
	Old MS (n=31)	New MS (n=10)	EFTA (n=6)	
percentages				
Much easier for national standardisation	26	0	17	19
Easier for national standardisation	23	40	33	28
About the same	39	50	50	43
Easier for European standardisation	3	10	0	4
Do not know / no answer	10	0	0	6
Total	100	100	100	100

Source: Web based survey among standards organisations in 30 countries

The perception of standards organisations is clearly that easy of access is much higher for national standardisation, 47% (much) easier national vs. 4% easier European (see Table 6.4).

Table 6.5 Comparing European (CEN, CENELEC, ETSI), and international standardisation (ISO, IEC, ITU), in terms of ease of access for the various types of stakeholders, views of respondents from standards organisations (n=47)

	Region			Total (n=47)
	Old MS (n=31)	New MS (n=10)	EFTA (n=6)	
percentages				
Much easier for European standardisation	10	0	0	6
Easier for European standardisation	23	0	17	17
About the same	55	90	83	66
Easier for international standardisation	0	10	0	2
Much easier for international standardisation	3	0	0	2
Do not know / no answer	10	0	0	6
Total	100	100	100	100

Source: Web based survey among standards organisations in 30 countries

Somewhat more remarkable is the perception of standards organisations that ease of access is higher for European standardisation than for international standardisation. European is (much) easier according to 23% of the respondents vs. international (much) easier 4% (see Table 6.5). However, still about two thirds state that it is about the same.

Table 6.6 Conditions that apply for participation of stakeholders in the standardisation process, views of respondents from standards organisations (n=47, more answers possible)

Have to be members of the standards body	14
Are required to pay a financial contribution for the participation in a specific drafting process	17
Are required to pay a lump sum for access (to nearly all committees)	5
Other	26
Do not know / no answer	2

Source: Web based survey among standards organisations in 30 countries

Respondents provided 26 specifications of the other conditions that determine the fee to be paid listed in Table 6.6; to mention only a few:

- access is free (4 times);
- no conditions apply (three times);
- financial contribution is required for industry, laboratories, control;
- free access to standardisation process for consumer and environmental organisation and with some standard organisations also for trade unions and universities;
- participants only have to cover part of their expenses when travelling abroad.

More details on the same issue are provided in Section 6.3.

Table 6.7 Which factors determine the participation fee in technical committees (answers from 17 standards organisations (see Table 6.7), more answers possible)

By type of document being drafted	0
For national, European or international (standard) documents	4
By type of stakeholder (NGO, large enterprise, small enterprise, etc.)	17
Variation depends on other criteria:	6
Do not know / no answer	4

Source: Web based survey among standards organisations in 30 countries

Table 6.7 shows that also other criteria determine the fee to be paid, these are:

- the level of activity and services provided (twice);
- the number of projects within the technical committee and (to a lesser extent) the number of participants. Participation is free for consumer and environmental organisations, trade unions and universities;
- membership of committees;
- number of participants of the national mirror committee and the number of projects in the committee (variations between committees are relatively small);
- 'pay for play': costs are split over participants for total services rendered.

More details again in Section 6.3.

Table 6.8 Availability of financial support for certain categories of stakeholders that lack resources to participate, views of respondents from standards organisations (n=47, more answers possible)

There is support available by national government, e.g. subsidies	21
There is support available by us (standards organisations), e.g. reductions	10
Other	15
Do not know / no answer	10

Source: Web based survey among standards organisations in 30 countries.

The answers given by 'other' (see Table 6.8):

- access is free, only time involvement is required and feedback to interests to be defended;
- contribution to business trips;
- exclusively for trade unions;
- financial support via national government for consumer participation and financial support for travel to overseas meetings;
- government subsidy for consumers participation on European level;
- grants to attend national, European or international standardisation meetings;
- in exceptional cases there is support available for experts;
- standards organisations contribute financially to active members of national TC to participate at meetings of European TCs;
- public authorities have free access;
- support available for consumer representatives.

Table 6.9 Means that are used to facilitate the circulation of information on the standardisation process outside the system, views of respondents from standards organisations (N=47, more answers possible)

Direct dissemination (printed newsletters, journals and/or email bulletins distributed by us)	40
Available on website (passive)	47
Published in magazines of third parties (i.e. trade, sector or professional journals)	35
Regular contacts with external parties, e.g. sector and professional organisations, consumer or environmental interest organisations	34
Regular seminars, workshops, conferences etc.	36
None of the above	0
Do not know / no answer	0

Source: Web based survey among standards organisations in 30 countries

Table 6.10 The main barriers to participation in the standardisation process for the various types of stakeholders as perceived by staff of standards organisations (N=47, more answers possible)

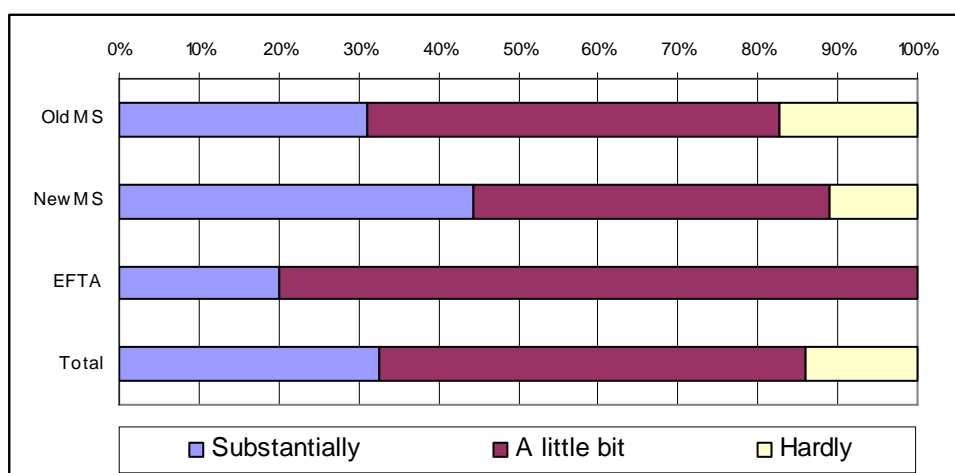
Lack of awareness	36
Lack of understanding of the standardisation process	32
Considering perceived benefits and costs, not willing to make the time available	29
Lack of expertise on the standardisation subject	28
Do not find it important enough	24
Need to master foreign languages / lack of language skills	16
Considering perceived benefits and costs, not willing to pay the required fees	12
In-transparency of the standardisation process	2
Other, specified as travel expenses	1
Do not know / no answer	2

Source: Web based survey among standards organisations in 30 countries

Staff of the National Standards Organisation state that lack of awareness and lack of understanding (of the benefits of standardisation) and expertise are clearly the most important barriers for the participation of the various types of stakeholders. [cf. Recommendation 6]

Time and money spent to travel to meeting places may be a hindrance to the participation in the standardisation process. Figure 6.7 presents the view of respondents from the National Standards Organisations, There is a remarkable difference between old en new Member States: in the old Member States the physical distance is less a barrier than in new Member States. The influence of distance might be reduced by applying more often and more sophisticated ICT tools. [cf. Recommendation 12]

Figure 6.7 The extent to which the physical distance to the meeting place is a barrier to participate in the standardisation process, views of respondents from standards organisations (n=47)



Source: Web based survey among standards organisations in 30 countries

Complaints and suggestions from stakeholders

Staff members of National Standards Organisations have also been asked about any complaints received about the access to the standardisation process. Table 6.11 shows that as much as 70% of the respondents state that no complaints were received from stakeholders regarding the access to the standardisation process. With new Member States this holds for even 9 out of 10 respondents.

Table 6.11 Formal complaints from stakeholders regarding access to the standardisation process in 2007, as reported by respondents from standards organisations (n=47), by region

	Region			Total N=47
	Old MS n=31	New MS n=10	EFTA n=6	
	percentage			
Received	19	0	0	13
Not received	61	90	83	70
Don't know/ no answer	19	10	17	17
Total	100	100	100	100

Source: Web based survey among Standards organisations in 30 countries

Only three of the six respondents that state that complaints were received provide information on the number of complaints received:

- one respondents mention 5 complaints;
- two respondents mention about 40 complaints.

16 of the 47 respondents, i.e. 34%, report that a register of complaints does exist in their country. These registers are maintained by the standards organisations themselves. [cf. Recommendation 9]

Table 6.11 shows that 13 respondents state to have received complaints, only 6 of these report the dominant (type of) complaints:

- lack of awareness of drafts in progress (twice);
- language;
- no information made available;
- the participation fee (because of introducing a new fee system in 2007 more complaints were received);
- they must sometimes pay for access to some standards before being able to comment;
- travel expenses;
- voting not transparent;
- commercial manoeuvres;
- lack of ease in obtaining documentation.

On the other hand 9 of the 47 respondents, i.e. nearly 20%, report that suggestions were received from stakeholders with regard to access issues. About 25% of the respondents state that a register of suggestions is maintained by the National Standards Body (12 out of 47).

The dominant (type of) suggestions received (reported by 12 respondents) were:

1 About fees and participation

- Access of public authorities to the standardisation process; difficulties to pay the participation fees;
- Charge for participation;
- More subsidies to participation (three times).

2 About providing information

- Improving the identification and clarity of standards;
- Improvement in the national standardisation information system;
- More efficient dissemination of information (twice);
- To improve standards organisation's web site;
- More timely dissemination of information;
- Make standardisation documents available in the national language.

3 About training

- To organize more training courses for stakeholders and society;
- Teaching about standards and standardisation;
- Training courses for standardisation officers.

4 About availability/price of standard documents

- In contacts with stakeholders, the need for cheap (or even free) standards was voiced. However the stakeholders also understood that in the present business model the financial contribution by selling standards could not be missed;
- Request of members of national TCs to have access to valid standards free of charge at the web site;
- More discounts to prices of standards;
- More efficient availability of documentation;
- Other issues;
- The government should strengthen the National Standards Organisation by increasing its contribution to standardisation;
- Develop feedback on application of standards.

6.2.2 Access to standard documents

We have asked the National Standards Organisations to what extent the standardisation documents are available in the national languages. The results, presented in Table 6.12 reveal that almost half of the respondents indicate that less than 25% of the standards are available in their language.

Table 6.12 Availability of standardisation documents in the national language, views of respondents from standards organisations (n=47)

	Frequency
None of the standards that have been adopted in this country are available in the national language (0%)	3
1 - 25% are available in national language	21
26 - 50% are available in national language	3
51 - 75% are available in national language	2
76 - 99% are available in national language	9
All standards that have been adopted in this country are available in national language (100%)	8
Do not know / no answer	1
Total	47

Source: Web based survey among standards organisations in 30 countries

Table 6.13 The effect of Internet on the access to standard documents, views of respondents from standards organisations (n=47)

Hardly any effect	1
Made it somewhat easier / more accessible	4
Made it much easier / more accessible	40
Do not know / no answer	2
Total	47

Source: Web based survey among standards organisations in 30 countries

85% of the respondents feel that the Internet has made access to standards documents much easier, for example because:

- information on standards is more easily available;
- hardcopies of standards can be ordered at the website;
- hardcopies of standards can be ordered and paid at the website;
- electronic copies of standards can be bought and paid at the web site;
- electronic copies of standards are freely available at the web site.

It has also been investigated to which extent providing user guides for standards is an appropriate response to the criticisms that the text of standard documents is too complicated and that it contains too many references to other standards. The results are presented in Table 6.14.

Table 6.14 Providing user guides for standards is an appropriate response, as reported by respondents from standards organisations (n=47)

Hardly	5
To some extent	27
To a large extent	11
Do not know / no answer	4
Total	47

Source: Web based survey among standards organisations in 30 countries

The price of standard documents

Table 6.15 shows that in the eyes of standards organisations, the price for buying a standard is only a moderate barrier to the use of standards.

Table 6.15 The price of standards as a barrier to their use, views of respondents from standards organisations (n=47)

	Frequency
Not at all	18
To some extent	22
To a large extent	4
Do not know / no answer	3
Total	47

Source: Web based survey among standards organisations in 30 countries

To the extent that the price of standards may indeed be a barrier, some 33 respondents mention a series of arrangements that are applied by standards organisations to reduce this barrier:

- reduced price for schools and universities (mentioned 7 times);
- discounts for standards organisation's members (three times);
- discounts (twice);
- 20% discount for standards organisation's members;
- 30% discount for TC members;
- 90% discount for students;
- efforts to reduce price of standards if sold in large volumes;
- reduced price for subscriber members (customer web shop);
- subscription collections of standards (four times);
- promotions with rebates;
- special arrangements exist with entities that have overall sectoral needs;
- special conditions are offered to local authorities;
- licence agreements enabling lower prices when using many standards;
- package deals;
- special price for standards supporting laws;
- special prices for public libraries;
- development of special products, e. g. handbooks, collections of standards;
- handbooks for special price for students;
- packages editions (twice);
- collections CDs;
- publications that compile sectoral standards are continuously published;
- PDF-on line access to series of standards;
- series of standards on CD-ROM with reduced price;
- discussions on a case by case basis with any stakeholder;
- standards are sold through a number of resellers to raise competition (twice);
- handbooks / collections of standards to reduce prices (three times).

37 respondents provided an answer with regard to the share of sale of standards in the total revenue of their organisation; the answers range from 0 to 99%. On average a substantial part of the standards organisation's budget is derived from selling standards, generally 30 to 50%. 15 respondents provided information with regard to the sales of harmonised standards only. This source of income constitutes 0 to 30% of all revenues of the standards organisations, with an average of 5 to 10%.

The respondents have also been asked to indicate their view on the possibilities to reduce the price of standard documents substantially. Table 6.16 shows that two thirds of the respondents that provided an answer (n=41) feel this is a bad idea with regard to harmonised standards. On the condition that the revenue losses of standards bodies are compensated, 11 respondents (27%) judge this to be a good idea for harmonised standards.

Table 6.16 Judgement by respondents from standards organisations (n=47) on the idea to reduce the price of harmonised standards (those supporting New Approach directives)

	Frequency
This is a good idea	3
This is a good idea provided the revenue losses of standards bodies are compensated	11
This is a bad idea	27
Do not know / no answer	5
Total	46

Source: Web based survey among standards organisations in 30 countries

If the same question is asked with regard to standards in general, almost an identical picture emerges (Table 6.17).

Table 6.17 Judgement by respondents from standards organisations (n=47) on the idea to reduce the price of other standards

	Frequency
This is a good idea	3
This is a good idea provided the revenue losses of standards bodies are compensated	10
This is a bad idea	28
Do not know / no answer	5
Total	46

Source: Web based survey among standards organisations in 30 countries

About 22 of the 47 respondents made use of the opportunity to provide additional comments. The overall picture is very clear and it could be described as follows:

- The current system is good, further reducing prices of standards will probably jeopardise the functioning of the present system.
- Standard making should be neutral, and its costs should be paid by all interested parties together, therefore it is not an option to have one specific group of stakeholders finance all the operations.
- As a matter of principle, standardisation should continue to be a tool of self-regulation by industry. Therefore, public funding is not an option.

6.3 Additional information from National Standards Organisations

6.3.1 Introduction

The original plan for this study anticipated five major steps:

- Step 1 - View of European Standards Organisations (CEN, CENELEC, ETSI).
- Step 2 - View of European interested parties.
- Step 3 - View of National Standards Bodies and Organisations (NSBs, NSOs).
- Step 4 - View of NSBs and NSOs in 12 selected countries.
- Step 5 - View of national interested parties in selected countries.

These views are whenever possible supported by facts and figures. However, the Internet survey among NSBs and NSOs in Step 3 did not produce all the factual information regarding access and participation issues at national level as required. To remedy this situation, it was decided to develop an additional *10 points questionnaire* and to distribute this to all NSBs, members of CEN and CENELEC, and to all NSOs cooperating with ETSI in all 30 countries concerned. All in all, invitations were sent to some 51 organisations in 30 countries on 17 July 2008¹.

The 51 organisations are presented in Table 6.18 on the next page. Till January 16 2009, 34 responses were received (these are highlighted in the table and represent slightly more organisations, e.g. NEN/NEC and BSO/BEC were covered in one response).

¹ Much more invitations to persons were sent. The number of organisations is a bit arbitrary because of the Electrotechnical Committees at for example NEN, SUTN or BSI. If we include these as separate organisations we arrive at 51 organisations. However often only one response has been received such as for NEN/NEC or BSI/BEC.

Table 6.18 Response from National Standards Bodies (members of CEN and CENELEC) and National Standards Organisations cooperating with ETSI on 10 points questionnaire (highlighted).

	Country (no. of NSBs/NSOs)	CEN members	CENELEC members	ETSI members
1	Austria (2)	Österreichisches Normungsinstitut (ON)	Österreichischer Verband für Elektrotechnik	OVE (acting) & ON
2	Belgium (2)	Bureau de Normalisation/Bureau voor Normalisatie (NBN)	Comité Electrotechnique Belge / Belgisch Elektrotechnisch Comité	Bureau de Normalisation/Bureau voor Normalisatie (NBN)
3	Bulgaria (2)	Bulgarian Institute for Standardisation (BDS)		Communications Regulation Commission
4	Cyprus (1)	Cyprus Organization for Standardisation (CYS)		
5	Czech Rep. (1)	Czech Office for Standards, Metrology and Testing – UNMZ, also known by its English acronym COSMT (since 1-1-2009, before Czech Standards Institute -CNI)		
6	Denmark (2)	Danish Standards (DS)		National IT - and Telecom Agency
7	Estonia (2)	Estonian Centre for Standardisation (EVS)		Estonian Technical Surveillance Authority
8	Finland (3)	Suomen Standardisointiliitto r.y. (SFS)	SESKO Standardization in Finland	Finnish Communications Regulatory Authority
9	France (2)	Association Française de Normalisation (AFNOR)	Union Technique de l'Electricité	Association Française de Normalisation (AFNOR)
10	Germany (2)	Deutsches Institut für Normung e.V. (DIN)	DKE Deutsche Kommission Elektrotechnik Elektronik Informationstechnik im DIN und VDE	
11	Greece (1)	Hellenic Organization for Standardization (ELOT)		
12	Hungary(1)	Hungarian Standards Institution (MSZT)		
13	Iceland (1)	Icelandic Standards (IST)		
14	Ireland (2)	National Standards Authority of Ireland (NSAI)	Electro-Technical Council of Ireland Limited	National Standards Authority of Ireland (NSAI)
15	Italy (3)	Ente Nazionale Italiano di Unificazione (UNI)	Comitato Elettrotecnico Italiano	CEI/CONCIT, CONCIT/ISCTI
16	Latvia (1)	Latvian Standards Ltd (LVS)		
17	Lithuania (1)	Lithuanian Standards Board (LST)		
18	Luxembourg (1)	Organisme Luxembourgeois de Normalisation (ILNAS)		
19	Malta (1)	Malta Standards Authority (MSA)		
20	Netherlands (2)	Nederlands Normalisatie-instituut (NEN)	NEN/ Netherlands Elektrotechnisch Comité	
21	Norway (3)	Standard Norge (SN)	Norsk Elektroteknisk Komite	Norwegian Post & and Telecommunication Authority
22	Poland (1)	Polish Committee for Standardization (PKN)		
23	Portugal (1)	Instituto Português da Qualidade (IPQ)		
24	Romania (1)	Romanian Standards Association (ASRO)		
25	Slovak Rep. (2)	Slovak Standards Institute (SUTN)	Slovak Electrotechnical Committee /Slovak Standards Institute	Slovak Standards Institute (SUTN)
26	Slovenia (1)	Slovenian Institute for Standardization (SIST)		
27	Spain (1)	Asociación Española de Normalización y Certificación (AENOR)		
28	Sweden (3)	Swedish Standards Institute (SIS)	SEK Svensk Elstandard	ITS - Information Technology Standardization
29	Switzerland (3)	Schweizerische Normen-Vereinigung (SNV)	Electrosuisse	Association Suisse des Télécommunications
30	UK (2)	British Standards Institution (BSI)	British Electrotechnical Committee / BSI	British Standards Institution (BSI)
	Total (51)	Responses: 34		

The interim report (summer 2008) contained already 17 'narratives' based on the completed questionnaires received by 8 August 2008 (in addition one organisation returned some information by e-mail). After sending out some reminders¹, 16 additional reports were received up to 16 January 2009. So the following narratives are available and summarised in this report:

- 1 Austria - ON
- 2 Austria - OVE Austrian Electrotechnical Association
- 3 Belgium - BEC
- 4 Belgium - NBN
- 5 Bulgaria - BDS
- 6 Cyprus - Cyprus Organisation for Standardisation (CYS)
- 7 Czech Republic - CNI
- 8 Denmark - DS
- 9 Denmark - NITA
- 10 Estonia - EVS
- 11 Finland - SFS
- 12 Finland - FICORA, Finnish Communications Regulatory Authority
- 13 France - AFNOR
- 14 Germany - DIN
- 15 Germany - VDE
- 16 Iceland - IST
- 17 Ireland - NSAI The National Standards Authority of Ireland
- 18 Latvia - Latvian Standard
- 19 Lithuania - LST
- 20 Luxembourg - ILNAS
- 21 Malta - MSA
- 22 Netherlands - NEC and NEN
- 23 Norway - NEK
- 24 Norway - SN
- 25 Portugal - IPQ Instituto Português da Qualidade
- 26 Romania - ASRO
- 27 Slovakia - SUTN Slovakia
- 28 Spain - AENOR
- 29 Sweden - SEK
- 30 Sweden - SIS
- 31 Switzerland - ASUT
- 32 Switzerland - Electrosuisse/CES
- 33 Switzerland - SNV Swiss Association for Standardisation
- 34 UK - BSI and BEC

Much more details are provided in the Interim report on the *10 points questionnaire* completed by 34 NSOs, submitted by EIM Business & Policy Research to DG Enterprise and Industry, January 2009.

¹ EIM greatly acknowledges the support received from the European Commission, CEN, CENELC and ETSI in sending out a second series of reminders.

6.3.2 Summary of questionnaire used

The 10 questions - that were each accompanied by a number of sub-questions - can be summarised as follows:

- Q1 Conditions for participation by 8 types of stakeholders in your organisation (NSB) in governing bodies and national technical committees and working groups.
- Q2 Membership and fees by 8 types of stakeholders.
- Q3 Fees to be paid for participation in national technical committees, by 8 types of stakeholders.
- Q4 Number of national technical committees and working groups in NSB and participation of 8 types of stakeholders. In addition the participation of consultants and/ or certifiers was raised.
- Q5 Number of experts within the standardisation process of 8 types of stakeholders and the number of consultants and/or certifiers among experts.
- Q6 Number of organisations and/or experts that are addressed and involved in public enquiries and the number of consultants and/or certifiers involved.
- Q7 How do NSBs guarantee that national technical committees and working groups are indeed representative, i.e. that the composition is balanced?
- Q8 How do NSBs build consensus in national technical committees and working groups to make sure that it really represents the consensus of all stakeholders?
- Q9 The rules that exist in NSBs to form national delegations to European technical committees to represent the national position and cast the national vote.
- Q10 Virtual participation. Next to actual participation by being present at meetings of committees etc., are there other forms of participation and consultation of stakeholders, for example by using ICT tools such as web fora etc.

6.3.3 Summary of results

The various case descriptions vary quite substantially, and although a wealth of specific information is available in the 34 case descriptions that cover 70 pages of text, only a limited number of general conclusions can be arrived at.

In this section we summarise some general observations arranged by the topics of the ten major questions.

The type of legal entity

Many different organisational structures do exist. Most standards organisations (21 out of 34 or 62%) are membership organisations on a not for profit basis, but many variations do exist, such as:

- state organisations, e.g. CNI in the Czech Republic; Institut Luxembourgeois de Normalisation ILNAS in Luxembourg is a department under the umbrella of the Minister of Economy and Foreign Trade, the Portuguese Institute for Quality IPQ is a governmental entity under the Ministry of Economy and Innovation and MSA in Malta is a public funded autonomous entity;
- not for profit organisations, but having commercial sub-departments, such as the certification and inspection departments of NSAI in Ireland that make up for deficits in the standardisation area, or AFNOR;

- not for profit organisations without members, such as the foundation NEN in the Netherlands that recovers its costs mainly by charging participants in technical committees and users of standards ('pay for play') or DS in Denmark;
- organisations for which standardisation is only a part of their activities and objectives, e.g. the Austrian Electrotechnical Association OVE;
- the limited liability corporation LVS in Latvia, or a private company with the state as only shareholder in Cyprus (CYS);
- NITA is the Danish National IT and Telecommunication Authority and hence not a not-for-profit organisation and without any members;
- Centralised organisations versus organisations that have most of the standardisation work done with a range of associated organisations, e.g. NBN in Belgium or AFNOR in France.

Membership conditions

With many organisations all interested parties in the country can join as members, e.g. EVS in Estonia or SFS in Finland: consumer associations, trade unions, environmental organisations, universities and research institutes may all be a member of SFS and have the possibility to be elected in the governing bodies. Generally the only condition that varies with the type of stakeholder is membership fees (see next section).

Specific conditions of membership reported:

- Parties that have a declared interest and sign an agreement on rights and duties can join (ON in Austria).
- The conditions for participation in BDS in Bulgaria are stipulated in Article 8.5 of the National Standardisation Act and Article 8 (2) of the BDS statute: "Persons wishing to support national standardisation activities and who agree to comply with the BDS statute and belonging to the following groups can become BDS members: (a) Employer associations, industrial branch chambers, manufacturers and traders; (b) Ministries, agencies, commissions and administrative structures of the Executive established by law or a decree of the Council of Ministers; (c) Scientific organisations, research institutes and universities; (d) Conformity assessment bodies, including inspection bodies, certification bodies, testing and/or calibration laboratories; (e) Associations of insurers, consumer associations, professional organisations and trade unions."
- In Iceland the law determines that membership of IST is open to any kind of stakeholder.
- AENOR in Spain distinguishes five types of members among the total membership of 882 members: (a) 169 corporate members, i.e. employer's federations and trade associations; (b) 539 individual companies; (c) 82 public/non-for-profit institutions such as public administrations, foundations, etc; and (d) 92 others (membership numbers by type of stakeholders are for several NSOs presented in Table 6.19).

Membership fees for eight types of stakeholders

Also here, the situation in each country and for each standards organisation has its specific features, for example:

- With ON in Austria enterprises pay an annual membership fee that ranges from € 185 (up to 10 employees) to € 12,650 (more than 42,000 employees), whereas the annual subscription fee for associations, federations and institutes is decided upon by the board and is at least € 990.
- BEC in Belgium have a category A membership for associations of enterprises (at least € 30,000 per year) and a category B membership of € 1,350 (consumer associations, trade unions, SMEs and large enterprises (or covered by

- cat. A membership of their organisation); environmental organisations and universities. Public authorities do not pay a fee.
- BDS in Bulgaria has just over 400 members that pay on average about € 275 annually, bringing their joint contribution to € 112,000. But different fees apply to different categories: consumer associations: € 150; trade unions: € 100; employers' federations, trade associations: € 100; micro enterprises: € 100; small enterprises: € 150; medium-sized enterprises: € 200; large enterprises: € 250; environmental organisations: € 100; public authorities € 100; universities and research institutes: € 150; associations of insurance companies and banks: € 250; conformity assessment bodies, including inspection bodies, certification bodies, testing and/or calibration laboratories: € 150; corporate members: € 150.
 - At CYS in Cyprus there are 85 members of different categories and they all pay an annual fee of about € 185.
 - The membership fee for SFS in Finland varies from € 800 to 12,700 for the different employers federations according to the size of the organisation. All ministries and one university are also member but they do not pay an annual membership fee.
 - For AFNOR in France the structure of fees is as follows: (a) consumer associations, environmental organisations and trade unions, no obligation to become member, but if they want membership fees are 166 euro; (b) employers' federations, trade associations € 775; (c) for enterprises, the membership fee depends on their turnover; (d) for public authorities, universities and research institutes there is no membership fee.
 - The membership fees of DIN are based on the number of employees a business or organisation had in the previous year. Included in the fee is a license to copy standards for in-house use and to store standards electronically for use in internal networks. Those not wishing to make use of this license pay a reduced fee. To fee varies from about € 800 for 1 - 100 employees to almost € 13,000 for 9,000 -10,000 employees.
 - For IST in Iceland there are three levels of membership fees. (a) The highest annual fees, 100,000 ISK (nearly € 600, 1 January 2009) are paid by ministries, public institutions with more than 50 employees, private companies with more than 1,000 million ISK turnover (nearly € 6 million), and sector organisations with more than 100 million ISK turnover (nearly € 600,000). (b) an annual fee of currently 70,000 ISK (about € 410) is paid by public institutions with between 20 and 50 employees, private companies with a turnover between 100 million ISK (€ 600,000) and 1,000 million ISK (€ 6 million), sector organisations with a turnover of less than 100 million ISK (€ 600,000), and associations of individuals with more than 500 members. (c) The lowest annual fees, currently 50,000 ISK (nearly € 300), are paid by public institutions with less than 20 employees, private companies with less than 100 million ISK turnover (€ 600,000), and associations of individuals with fewer than 500 members. (d) In addition, the Board of IST can exempt a member from paying an annual fee. This has only been done for the Consumers' Association of Iceland (since the establishment of IST).
 - NEK in Norway has no members among consumer associations, trade unions, individual SMEs, environmental organisations or universities and research institutes. Three employers' federations or trade associations; 4 individual large enterprises and 5 government departments are member each paying an annual subscription fee of € 12,500.
 - With SN Standards Norway the membership fees depend on the size of the organisation or company. The maximum fee in July 2008 was € 5,000 for large

organisations having more than 1,000 members or employees. A typical Norwegian SME was paying € 650.

- ASRO in Romania has slightly different fees for different types of stakeholders, but non profit organisations pay less than € 100 euro per year.
- The membership fee of AENOR varies depending on the type of institution and its market volume and/or annual budget, ranging from € 1,900 per year for federations representing a market volume of less than € 300 million to € 7,500 per year for national federations that represent a market volume of over € 900 million. For individual entities, whether companies or not-for-profit organisations, the fee ranges from € 190 per year for entities with an annual budget lower than € 0.6 million to € 750 per year for those with an annual budget above € 6 million Euro.
- SEK in Sweden is a non-for profit membership organisation with a membership fee of € 210 for all members (i.e. no distinction by type of stakeholder or size);
- The membership fee for SIS in Sweden is the same for all members with one exception: members with an annual turnover of less than € 2 million pay half the membership fee.
- The overall membership fee of Electrosuisse/CES is € 1 million contributed by 1,779 members (average about € 560). The approximate annual membership fees are: (a) consumer associations € 200; trade unions € 200; employers' federations, trade associations € 200; SME € 350; large enterprises € 2,650; environmental organisations € 500; public authorities € 1,000; universities and research institutes € 420;
- The fees for being a BSI member in UK depend on the number of employees and turnover of the organisations, rather than the type of organisation: Consumer associations, € 175; trade unions, employers' federations; trade associations, environmental organisations, SME, € 175 – € 1,187; large enterprises, € 418 – € 1,187; public authorities € 231 – € 1,187, universities and research institutes, € 175.

Fees to be paid for participation in national technical committees

Again, also with regard to Q3 on fees, the situation varies quite a lot from one organisation to the other. However with nearly half of the organisations there are no (additional) fees required to participate in technical committees. This applies to at least 15 organisations:

ON and OVE, Austria ¹	IST, Iceland	IPQ, Portugal
CYS, Cyprus	LVS, Latvia	SUTN, Slovakia
CNI, Czech Republic	LST, Lithuania,	Electrosuisse, Switzerland
EVS, Estonia	ILNAS, Luxembourg	BSI, UK
FICORA, Finland	MSA, Malta	

- A second group, amongst which NEN in the Netherlands, applies the 'Pay for Play' principle. NEN acts as a facilitator and the stakeholders have to pay these costs. The distribution among them (all paying, or some exempted) is decided by the TC itself. SN in Norway uses a system in which the participants bear the costs of their 'own' committee either in cash or in kind. Also with

¹ New members have to pay an entrance fee however, that includes a one day workshop to introduce new participants to the standardisation system.

AENOR in Spain and with SIS in Sweden the TCs decide themselves on the fee structure used to finance their activities.

- At OVE or ON in Austria one has to pay an entrance fee of € 380 that includes a one day workshop to introduce new participants to the procedures involved (paid only once per person).
- At BEC in Belgium one has to pay € 650 per expert per domain to participate in technical committees.
- At NBN in Belgium a contribution *might* be required to cover the operational costs of that TC (maximum € 2,000 per year).
- At BDS in Bulgaria the fee to participate in TCs generally varies from € 50 to € 100. For associations of insurance companies and banks this will be somewhat higher, up to € 250 per year.
- At DS in Denmark the annual fee for TCs is either € 1,600 or € 2,400 depending on the activity level of the TC (There is a discount for SMEs, their fees are respectively € 1,335 and € 1,600 (so a reduction by 17 to 34%).
- At SFS in Finland there is a fee of € 1,200 for national technical committees and € 800 for mirror committees.
- AFNOR distinguished two types of participants. Consumer associations, environmental organisations, trade unions and universities and research institutes pay nothing; employers' federations; trade associations, small and large enterprises, public authorities, government departments and government agencies pay a fee depending of the program and the project.
- Also DIN in Germany charges a fee to participate in TCs, in 2008 this was fixed at € 950 excl. VAT per person and per committee. DKE in Germany follows almost all rules and regulations of DIN, however at DKE no fees apply for TCs.
- At NEK Norway a contribution of € 375 per member per year is due.
- With ASRO in Romania the fee to participate in a TC is € 60 for each representative in each TC.
- With SEK in Sweden the fee varies with the number of work items dealt with in a TC from about € 200 to € 750.
- With SNV in Switzerland, the fee to participate in one technical committee is included in the general membership fee. Additional committees are charged with € 300 per annum.

The number of members of the standard organisations is presented by type of stakeholder for several National Standards Organisations in Table 6.19. This table already suggests that participation of especially environmental organisations and trade unions is rather limited. The number of SMEs in the six standards organisations that provided these detailed data (many standards organisations do not have members as described above) is not very worrying: the number of SME members is much larger than the number of large enterprises. However SMEs are still underrepresented, as there are about 500 times more SMEs than large enterprises in Europe. More details are presented – for much more standards organisations – in Table 6.20, which provides details of the participation of stakeholder organisations and experts in technical committees.

Table 6.20, in which information from 21 standard organisations is summarized provides two types of information:

- the number of TCs in which stakeholders organisations participate;
- the number of experts that participate in the standardisation work on behalf of these stakeholder categories.

All this information is provided by the standards organisations in the *10 points questionnaire*.

For several standards organisations only the number of individual enterprises among their members is known, without a distinction by size of enterprise. For those that have these statistics available, the number of SMEs and larger enterprises is often of the same order of magnitude. Obvious exceptions are:

- CNI, Czech Republic, reports 15 to 20 times more participation by large enterprises as by SMEs;
- LVS, Latvia, reports only a small numbers, however 5 times more SMEs than large enterprises;
- With IPQ in Portugal, there are nearly 1.5 more SMEs active than large enterprises, however the number of experts from SMEs is nearly 8 times higher than for large enterprises (remarkable fact is that SMEs send on average just over 4 experts per organisation, and larger enterprises less than 3);
- ASRO, Romania, about twice as much participation from SMES than from large enterprises.

If we take the participation from the business community as a yardstick, the following observations with regard to the other stakeholder categories can be made:

- Consumers: in many countries participation is reported to be rather low or even zero, with major exceptions: Cyprus, Czech Republic, France, Lithuania;
- Environmental organisations: even lower than consumers, with exception Latvia with 40 experts;
- Trade unions: generally very low except with DS in Denmark and to some extent with AENOR in Spain and SNV in Switzerland;
- Public authorities: in nearly all countries a sizeable participation;
- Universities and research institutes: in most countries a sizeable participation;
- A general observation with regard to consultants, certifiers and laboratories is more difficult as this category was not distinguished in many cases.

[cf. Recommendation 3, 9]

Table 6.19 Number of members of National Standards Organisations by type of stakeholder, some illustrations

	<i>AENOR</i> Spain	CYS Cyprus	BDS Bulgaria	<i>SEK</i> Sweden	<i>Electro- suisse/CES</i> Switzerland	<i>SNV</i> Switzerland
SMEs	307	49	157	7	1,442	450
Large enterprises	232	16	52		150	80
Employers' federations	169	1	49	4	5	3
Consumer associations		0	1	0	5	10
Environmental organisations		0	0	0	2	4
Trade unions		0	0	0	5	3
Public authorities	82 (incl. not for profit org.)	15	41	7	50	50
Universities and research institutes		4	46	0	120	30
Consultants, certifiers, laboratories			29	2		-
Others	92		31	2		20

Table 6.20 Participation in the number of technical committees by type of stakeholder and number of experts participating, some illustrations (table part A)

	Nmber of experts ON Austria	Participation in TCs - number of experts BEC Belgium	Participation in TCs - number of experts BDS Bulgaria	Participation in TCs - number of experts CYS Cyprus	Participation in TCs - number of experts CNI CZ Rep.	Participation in TCs - number of experts DS Denmark	Participation in TCs - number of experts EVS Estonia	Participation in TCs - number of experts SFS Finland
SMEs	3019	143 - 172	69 - 429	29 - 30	5 - 15	245 - 1261	31-175	10 - 23
Large enterprises			60 - 315	29 - 20	100 - 235			8 - 28
Employers' federations		83 - 244	37 - 72	29 - 50	0 - 98	71 - 98	31 (incl. trade unions) - 53	9 - 33
Consumer associations	335 (incl. other NGOs)	0	1 - 5	29 - 2	15-15	20 - 21	1 -1	2 - 4
Environmental organisations		0	0 - 0	2 - 5	2 - 0	1- 2	0-0	0 - 0
Trade unions		0	0 - 0	0	0 - 0	15 - 17		1 - 1
Public authorities	1,062	68 - 14	65 - 154	29 - 80	42 - 126	136 - 364	23-50	9 - 26
Universities and re-research institutes	950	70 - 32		29 - 20	70 - 132	120 - 264	27-40	6 - 11
Consultants, certifiers, laboratories			65 - 69		25 - 235		6-9	
Others	224		2 - 12	29 - 15	55 - 712	80 - 149	-	

Table 6.20 Participation in the number of technical committees by type of stakeholder and number of experts participating, some illustrations (table part B)

	Participation in TCs - number of experts FICORA <i>Finland</i>	Participation in TCs: number of organisations* and number of experts, AFNOR <i>France</i>	Participation in TCs - number of experts LVS <i>Latvia</i>	Participation in TCs - number of experts LST <i>Lithuania</i>	Participation in TCs - number of experts ILNAS <i>Luxembourg</i>	Participation in TCs - number of experts MSA <i>Malta</i>	Participation in TCs, three categories (%) NEN <i>Netherlands</i>	Participation in TCs - number of experts IPQ <i>Portugal</i>
SMEs	-	5,000 - -	15 - 150	68 - 438	27 - 27	0 - 0	63%	144 - 1,058
Large enterprises	35 -		3 - 30	61 - 197	34 - 49	0 - 0		99 - 249
Employers' federations	4 - 5		many	0 - 0	33 - 52	2 - 2		8 - 6
Consumer associations	1 - 5	80 - 130	0 - 0	36 - 36		1 - 0	24% (all others, incl. universities & research)	1 - 1
Environmental organisations	0 - 0	not determined	4 - 40	7 - 7		2 - 3		1 - 8
Trade unions	0 - 0	many	0 - 0	2 - 2		0 - 0		2 -
Public authorities	40	600 - 1,700	15 - 150	67 - 164	4 - 4	8 - 8	13%	89 - 331
Universities and research institutes	5 - 10	not determined	11 - 110	66 - 219	11 - 11	6 - 9		97 - 517
Consultants, certifiers, laboratories			(11 incl. in the 150 experts from SMEs)					
Others						1 - 4		- - 610 (individual experts)

* Not number of TCs as reported in other columns!

Table 6.20 Participation in the number of technical committees by type of stakeholder and number of experts participating, some illustrations (table part C)

	Participation in TCs - number of experts <i>ASRO Romania</i>	Participation in TCs <i>SUTN Slovakia</i>	Participation in TCs* - number of experts** <i>AENOR Spain</i>	Participation in TCs - number of experts <i>SEK Sweden</i>	Percentage of TCs in which they participate - number of experts <i>SNV Switzerland</i>	Number of experts <i>Electro-suisse-CES Switzerland</i>
SMEs	134- 158	81	169 - 2475	88 - 493	80% - 600	250
Large enterprises	60 - 88	42	169 - 2899		90% - 720	200
Employers' federations	35 - 17	26	169 - 1567	6 - 6	5% - 5	5
Consumer associations	8 - 5	5	19 - **	0 - 0	15% - 15	5
Environmental organisations	2 - 2	6	not known - **	0 - 0	10% - 20	5
Trade unions	0 - 0	0	8 - **	3 - 4	8% - 5	5
Public authorities	142 - 125	95	194 - **	43 - 76	50% - 80	50
Universities and research institutes	192 - 406	92	180 - **	15 - 15	30% - 40	100
Consultants, certifiers, laboratories				- - 32		
Others	22 - 126			14 - 16	5% - 20	

*) In total there are 194 TCs at AENOR.

***) On behalf of other participants (consumers, NGOs, academia, testing, public authorities) there are 2474 experts active with AENOR.

With regard to the establishment of technical committees and what efforts standards organisations make to guarantee that technical committees are representative (question Q7), not much specific information became available. The general principles of aiming at balanced committees and inviting all interested parties is well adhered to, procedures used to identify and invites stakeholders concerned are generally described in a similar way stating that all relevant parties are invited.

The description provided by BSI from UK is particular exemplary:

The main principles and procedures for participation in standardisation are laid down in the British Standards rules: *'The composition of technical committees and subcommittees shall be organizations representative of the interests in the standardization of products (including services) or processes within the committee's terms of reference. BSI shall endeavour to carry out an analysis of all those it considers might have substantial interest in, or who might be significantly affected by, a particular standards project with a view to encouraging their representation. As far as possible, BSI shall ensure that its committees are representative of the interests concerned. The composition of a technical committee or subcommittee should be a standing item on every meeting agenda. The primary means of representing business interests shall be through trade associations or their equivalent organizations. Exceptionally, representation from individual companies shall be permitted when BSI deems that the scope of the technical committee or subcommittee requires this in order to undertake its work. BSI shall endeavour to ensure that the balance of representation between trade associations and individual companies meets the requirements of fairness of representation.'*

It should be noted that in these BSI rules, a choice has been made with regard to the preferred way of representing business interests; not by participation of individual enterprises whether small or large but preferably by their trade associations or their equivalent organisations. [cf. Recommendation 3, 4, 5, 8]

Also with regard to question Q6 that considers the way parties are selected and addressed for public enquiries the rules and general principles are generally adhered to. Most National Standards Organisations (NSO) described the procedure in a similar way stating that all relevant parties are informed and that information is in addition made public to give all those that are interested the chance to express their opinion.

However there is one clear exception ("Only members of national technical committees are involved in the development and (public) enquiries on European and international standards ") and quite many descriptions that suggest that in practice the 'public enquiries' might be too much focussed on incumbents.

[cf. Recommendation 10]

To illustrate a dozen replies to the *10 points questionnaire* completed by 34 NSOs is presented here:

- 1 There is a specific procedure for developing the national comments in public enquiries. So called IEC/CENELEC-experts (a special kind of national committee member) are nominated by the national TCs. These experts are coordinating the national consultation and are responsible to provide NSO with the national comments.
- 2 European and international public enquiries are addressed to all known members. For national standardisation enquiries a formal public enquiry is published in the Official Government Journal.
- 3 For international and European enquiries, the enquiry is sent to the interested identified stakeholders having a subscription as a member of the national electrotechnical committee or an annual subscription to the information service of the national electrotechnical committee.
- 4 The NSOs' internal system with mirror committees is operating electronically with the continuous, systematic and effective involvement of the NSOs officers. The management of the organisation is responsible to approve any changes to the list of members of mirror committees. Mirror committees are periodically assessed and revised accordingly. This system is also used for the public inquiry procedure.
- 5 Public enquiries are announced on the web page of the NSO and in the official journal of the organisation. Organisations that are interested have the possibility to be actively involved. In general, organisations outside the national technical committees are not explicitly addressed for public enquiries.
- 6 There are different procedures in the various standard writing bodies. In most cases the public enquiries will be launched either via LiveLink and/or via email. Additionally the enquiries will be listed in the newsletters. The distribution of the enquiries will be as wide as reasonably possible taking into account that all the relevant parties will receive the information on the enquiries.
- 7 About 40 organisations are on the mailing list for public enquiries: Also for public enquiries, consultants or certifiers are presently not invited."
- 8 Those who have expressed interest in specific areas, either directly or as a result of our solicitations, are invited to comment at the stage of public enquiries. The procedure and the number of organisations/people involved vary somewhat with the type of standards involved (national/European/international; Harmonized European standards vs. other type of standards).
- 9 Some 100 experts active at NSO In public enquiries mainly the organisations/experts mentioned above are invited to provide feedback.
- 10 For public enquiries, the members of the national TC prepare comments on the draft.
- 11 The regulatory authorities, in normal circumstances, do the public enquiry. However, the technical committees decide who should be invited for comments
- 12 For public enquiry all interested parties have the possibility to provide their comments. However in most of the cases the sources of comments are the technical committees.

To be fair it should be emphasized that in the majority of cases the procedure seems to be fine:

- 1 The procedure for public enquiry is announced on the NSO's website and published in the official bulletin of the NSO. The draft national standards are notified to the competent authorities in accordance with the NSO's notification procedure under EC Directive 98/34."
- 2 Enquiries are publicly announced and all organisations and experts do have the possibility to comment during the enquiry phase as a matter of principle.
- 3 All experts participating in technical committees are involved in public enquiries. Additionally, all enquiries are announced in the Official State Bulletin, the NSO's monthly bulletin and targeted specialized media. As a consequence nearly anyone can potentially be involved in public enquiries."

Also with regard to Q8 on consensus building in technical committees and to Q9 on forming national delegations to European technical committees such a situation exists. The general objectives and principles (as described in ISO are quoted and adhered to:

"Decisions are in principle made by consensus defined in accordance with ISO rules. This implies that no important part of the stakeholders persists in its opposition and that efforts are made to accommodate views of all stakeholders and to reconcile the different viewpoints. So consensus does not necessarily mean that all fully agree (ISO/IEC Guide 2:2004)".

Virtual participation

With most National Standards Organisations, physical participation in meeting of committees is (still?) the general procedure, supported by ways and means to facilitate occasional virtual participation, using web fora, e-mails or LiveLink.

[cf. Recommendation 12]

7 Views of stakeholders in 12 selected countries

7.1 Introduction

The five main steps in which this study project was implemented were portrayed in Figure 1.1 and comprised the following five major steps:

Step 1 - View of European Standard Organisations (ESOs: CEN, CENELEC, ESTI).

Step 2 - View of European interested parties.

Step 3 - View of National Standards Bodies and Organisations (NSBs, NSOs).

Step 4 - View of NSB and NSOs in 12 selected countries.

Step 5 - View of national interested parties in selected countries.

At the third meeting of the Steering Group, the selection of 12 countries in which Steps 4 and Step 5 are implemented was made (see Table 7.1).

Table 7.1 12 countries selected for Steps 4 and 5

	Old Member States		New Member States		Total
	Small	Large	Small	Large	
North	Denmark Sweden		Estonia		3
Central	Netherlands	France Germany UK	Czech Republic	Poland	6
South		Italy Spain	Cyprus		3
Total	3	5	3	1	12

This chapter provides a summary of the second Internet survey among stakeholders in the 12 selected countries. The survey was implemented in December 2008 and about 1,500 people in these 12 countries were invited to complete the questionnaire on line. In addition an open survey was hosted on line. Before results are presented in Section 7.3, an overview of the face-to-face interviews made in the 12 countries is presented in Section 7.2.

7.2 Face-to-face interviews in 12 countries

The face-to-face interviews implemented by EIM's partners in the selected countries confirmed to a large extent the overall ideas as expressed in the internet surveys among standard organisations and stakeholders.

Because the data from internet survey are based on a larger number of responses, these are reported more in detail in Section 7.3. Selected results from the face-to-face interviews are reported here only if they provide additional information or illustrate more general findings with concrete examples.

Findings from both the Internet survey and the face-to-face interviews have been considered when drafting the conclusions and recommendations in Chapter 3.

The results from the interviews in Estonia have already been presented at length in Annex 1 of this report. To give an idea of the other information collected some items are described in this section in more detail.

Dissemination of information

AENOR (Spain) is very active with informing stakeholders about developments in standardisation. During the time of interview, only 2006 data were available: 75 different publications were made available in that year. In addition CD's are distributed and information made available at the website.

In Poland the understanding by several respondents (both from the educational sector and the business community) is that the National Standards Organisation in Poland rarely informs organisations directly on standardisation. Information has to be collected through conferences, specialised publications and the internet. So, improving distribution of information (on process, business models, participating teams etc) is seen as a priority, especially sector bulletins to inform stakeholders on new developments in standardisation and standards would be welcome.

Still, PKN seems to be relatively active. PKN has its publication PKN News and other ways of spreading information free of charge, but it seems this does not reach all stakeholders sufficiently. PKN operates three standards-reading-rooms (in Warsaw, Katowice, Łódź) and 15 standardisation information points across Poland (at libraries, universities, institute of welding, etc.).

Fees and other costs

In Denmark, large participants like the Danish Safety Technology Authority may spend about € 1 million a year on standardisation. This sum is based on a negotiated deal with the NSB. However other types of participants such as consumers and universities pay lower or even a zero rate like the Danish Consumer Council. Experience shows that many stakeholders are even shocked by the idea that they have to pay in order to participate in standardisation.

Some stakeholders report that there has been a cut in resources being made available from the public budget and hence the costs for stakeholders to participate have been increasing.

Whatever the position on the fees, parties seem to agree that the hours spent amount to the largest share of annual cost to participate in standardisation. There seems to be a tradition in Denmark that trade associations reimburse the fee if individual member enterprises are participating in a technical committee.

Another example of a stakeholder wondering why its members would have to pay to participate in standardisation is the Dutch VNI (installers' branch): "They contribute their knowledge and time and moreover have to bring money!"

If you ask BSI in the UK (like other NSBs) about membership fees they talk about the different fee rates to be paid depending on "...the size of the company in terms of employees and turnover". This still very much reflects the situation of a private enterprise driven standardisation and less the situation of the last twenty years of harmonised standards that are being developed to support government policy to bring about public goals such as public safety of sustainable production. [cf. Recommendation 2, 13]

For electrotechnical standardisation work at Svensk Elstandard, participation is free for universities, research organisations, trade unions and consumer organisations.

With Denmark some parties make efforts to reduce the out of pocket expenses as much as possible. For example NITA, the Danish National IT and Telecommunication Authority that is the 'ETSI NSO', makes sure all exchange of views is done by e-mail to eliminate travel costs.

Again the most important cost item mentioned are the wage costs of the experts of the stakeholders or the opportunity costs of time spent by entrepreneurs in standardisation. As a result participating in a European meeting abroad may already take about € 1,650, whereas the costs for travel and subsistence of an overseas meeting may more than € 3,500.

Participation of stakeholders

In general not many barriers in the Danish system have been identified. Most of the issues raised deal with knowledge and awareness of the stakeholders. However entering already existing technical committees might be difficult. The interviewed stakeholders of different categories interviewed in Denmark believe that there are no major impediments and in theory all different stakeholders can and should be represented in the development of a standard, however in practice this is seldom the case. This is mainly related to a lack of motivation with stakeholders to put in the time and energy required and hence brings us back to education and awareness rising. [cf. Recommendation 6]

This is also the case in other countries. For example, the National Consumer Institute in Spain that promotes the consumer interest is part of the state administration and participates in standardisation work at AENOR. However due to difficulties in finding qualified staff and limited other resources, private consumer associations do not participate. [cf. Recommendation 4]

Also in Sweden, the consumer interest is mainly represented in standardisation by the Swedish Consumer Agency, a public authority.

Representatives of the business community report easy access to standardisation processes, both for trade associations and individual SMEs. But – although AENOR already reports serious information dissemination efforts – stakeholders feel that AENOR should enhance its 'marketing strategies' to make more people aware of the benefits of standards and participation in the standardisation processes.

In Poland stakeholders generally speak positively about access and the chance to be represented in technical committees and the balanced composition of TCs. Asked about suggestions for improving access, only additional financial support was mentioned to allow more active participation of Polish experts in standards applied on the Single Market.

Also interviews in the Netherlands illustrated that actual access to and participation in standardisation depends very much on the awareness with the stakeholders and the efforts a stakeholder is ready to make. From associations of SMEs quite different opinions could be noted about access to standardisation work at NEN. Some associations make a serious efforts to inform and organize their members (for example sharing costs with the member that is ready to actually participate in a technical committee), other organisations start from the assumption that standardisation is for large corporations and that it is not possible for SMEs to participate meaningfully. This subsequently proves to be a self-fulfilling prophecy. [cf. Recommendation 3, 8]

Consumer and environmental organisations find it – just as trade unions – very difficult to make available the required resources (manpower) to participate meaningfully. On the other hand they express the need to be involved, but do so on a relatively limited scale. [cf. Recommendation 4]

Cases were reported in which the interest that a respondent represents was not present in the technical committee, e.g. trade unions in cases on defining labour conditions at the workplace.

Public authorities, e.g. those responsible for market surveillance and hygienic conditions in a range of institutions such as nursing homes, find it important to participate in standardisation especially to be involved when measuring methods (e.g. to ascertain concentration values of specific substances) are being described.

The Cyprus Consumer Association is convinced that it is valuable to participate in standardisation to introduce aspects that have not been suggested by other stakeholders. They feel it is worth the efforts, and are satisfied with the possibilities to join. All in all, stakeholders interviewed in Cyprus (a.o. a consumer association, trade federation, ports authority, chamber, technical university) are rather positive about the way the standardisation system is functioning in Cyprus, about the information they receive and about the possibilities to join and to contribute.

In the interviews in Germany, again the principle of open standardisation, guaranteed by the rules at DIN (Standardisation principles DIN 820) is confronted with practice: limited resources in terms of time, money and experts with the interested stakeholders may prevent them from participating. Specific organisational structures have been established; see for example the notes on DIN Consumer Council and the coordinating unit for environmental organisations below. Still one is not entirely satisfied with the democratic representation of valid interests. For example in April 2008 a two days seminar 'Success factor Standardisation' was organised by DIN in cooperation with the Federal Ministry of Economic Affairs to better integrate medium-sized companies by raising their awareness on the benefits to be gained. (In this respect also the DIN study 'Economic benefits of Standardisation, 2000 as referred to in Chapter 2 is important).

Large stakeholder organisations, like associations representing the building sector, have described their own objectives as 'damage control'. Standards, especially bad compromises that may result from merging conflicting interests, may place a heavy burden on enterprises by being unpractical, ineffective and sometimes even unsuitable. Sometimes also academic findings find their way into standards (academics leaving their footprints) that should foremost be guides for practical work in a business setting.

In Germany there exist KNU, the coordinating unit for environmental organisations' work on standardisation. KNU is a joint project by the German League for Nature Conservation and Environmental Protection, the German Association of Environmental Protection Action Groups and the German branch of Friends of the Earth (BUND). Since 1996 KNU works to increase environmental organisations' influence on standardisation and to see that better consideration is given to environmental aspects. Representatives from environmental protection organisations are active in various committees of the German standards institute DIN and in DKE, the German organisation responsible for the elaboration of standards in

electrical engineering and electronics. The representatives concentrate on standards bodies of relevance for the environment (e.g. standards for thermal insulation, sustainable construction, environmental management, solid recovered fuels and nanotechnology). Interviewees pointed out that where DIN charges fees and does not reimburse travel costs etc, KNU might reimburse travel costs to volunteer experts of environmental organisations and under special conditions can also pay an expert fee. KNU is partly financed by the Federal Ministry for the Environment.

An environmental NGO in Germany stated: "As a matter of principle, paying a fee is inappropriate for public interest stakeholders, i.e. organisations without any commercial interest in standardisation". [cf. Recommendation 13].

With DIN in Germany organisations such as the BAM Federal Institute for Materials Research and Testing, which is a scientific and technical federal institute with responsibility to the Federal Ministry of Economics and Technology, plays an important role in standardisation. The mission of BAM is to ensure ongoing safety in technology and chemistry through R&D, testing, certification and consultancy within its objective of promoting German industrial development. Standardisation works should be seen in this perspective making BAM to send every year 400 to 500 experts into technical committees of DIN and its international partner organisations. Only the large industrial enterprises participate with more experts in the system of standardisation. BAM has the chairmanship of various technical committees. Furthermore, the president of BAM acts as Vice-President of DIN. The fee BAM has to pay to DIN (a few thousand euros) is nothing compared to the labour costs of hours spend on standardisation (millions of Euro's a year). BAM reports no difficulties in access to standardisation; its major concern is the speeding up the process. In the context of rapidly evolving and changing markets, standardisation work would benefit - at least in some areas - from faster working procedures.

The general idea emerging from the interviews in France is that access to standardisation remains fairly difficult for organisations outside the system, especially when the organisation is small. Barriers that may hamper access to standardisation for stakeholders:

- the high costs;
- the difficulty of the language;
- the difficulty of distinguishing between 'compulsory' and optional standards;
- most interested parties would like more specific information for their subject/sector.

However, national bodies consider access to standardisation as a means to express their opinion. They know the role of AFNOR in the process of standardisation and they are informed about new developments by electronic newsletters. Parties recognize that progress was made to improve access, e.g. to the academics and the researchers who benefited from subsidies to participate in the committees of normalisation.

Several stakeholders state that there is no barrier in the rules and regulations to participate. All who have the required expertise and time available may participate, however substantial costs (fees, travel, and accommodation) are involved.

Influence in governing bodies

At CYS in Cyprus, stakeholders may indeed participate in the debate on the agenda for standardisation work in the next period. However, it is not guaranteed that the suggested standardisation work will indeed be approved by the Board of CYS.

DS in Denmark states that the different type of stakeholders have fair and good possibilities to influence the strategic choices. But although everyone has the opportunity to participate, some types of organisations such as environmental organisations could be better represented.

Subsidies and other support

To participate in European technical committees there is a subsidy of 30% of costs in the Czech Republic, still several stakeholders complain about the high costs for travel and subsistence involved.

In Cyprus, experts from the private sector get a € 600 subsidy per trip if they go to European meetings as a representative of Cyprus.

In Sweden, the Swedish Standards Council (SSR), the responsible authority for the three standard organisations in Sweden (SIS, SEK and ITS) provide funds to environmental organisations, trade unions and consumer organisations (not for profit organisations) and this may cover both membership fees, travel expenses and seminars, courses and material for these courses. However SMEs and large enterprises have to pay for their own expenses. This might have stopped SMEs from participation.

In addition, other support systems do exist for various types of organisations. For example, the Swedish Association of Local Authorities and Regions (SALAR) pays a large annual fee to the standardisation organisations and then all hospitals in Sweden are covered (no need to pay additional fees to participate in technical committees). In addition the procedure that the hospital had to pay for its own expert has been abolished. SALAR has recently signed an agreement stating that all delegations are paid for if they represent the interest of the healthcare sector as a whole.

The fees that have to be paid by participants in the standardisation work at DIN have been described in Section 6.3.3. However for consumer representatives nominated by the DIN Consumer Council (an entity established in 1974 within DIN to represent consumer interest in standardisation¹) are exempt from contributing to the costs of the standardisation activities in which they are involved. Also their travel expenses are paid by the DIN Consumer Council that is mainly funded by public funds.

The funding of the standardisation work is largely borne by industry, with state funding for certain public interest projects.

¹ <http://www.din.de/cmd;jsessionid=688E11D7D4BCE6E8CBBE2409164416C6.2?level=tpl-unter-rubrik&menuid=47564&cmsareaid=47564&cmsrubid=57765&menurubricid=57765&cmssubrubid=57782&menubrubid=57782&languageid=en>

Cooperation with other organisations

Several organisations in Cyprus facilitate the work of CYS by co-operating, for example:

- The technical chamber webpage hosts prENs.
- The Consumer Association regularly publishes information about standards.
- The Ministry of Commerce, Industry and Tourism publishes information on its webpage on standards and promotes quality through standards.
- Trade associations co-operate and sponsor CYS events.
- Large organizations like the Telecommunications Authority, the Electricity Authority, banks and others sponsor standardisation events.
- The Human Resource Development Authority sponsors training events for standardization.
- The Cyprus Employers and Industrialists Federation hosts and promotes events on standardisation.

Package services

CYS runs a subscribers' service. Subscribers enjoy several services:

- A discount on the purchase of ISO, IEC, CEN, CENELEC, ELOT (Greece National standardization Institute) and BSI standards.
- National standards (CYS) can be purchased at 50% discount.
- Regular free updating on all news concerning the European, international and national standards.

On request, AENOR publishes specific sets of standards on CD-rom or paper. Such a tailor made set is much appreciated by enterprises in the sector concerned.

A lot of stakeholders would appreciate to have user guides for standards to assist in better understanding the issues covered by the standards.

The availability of specific sets of standards, for example those relevant to specific sector of the economy, would also be welcomed by stakeholders.

Translations

Obviously translation of standards is not a main issue in the UK.

However even in Cyprus where English is widely spoken, wider availability of standards in the Greek language would be highly appreciated and is expected to have a positive effect on the use of standards.

Overall about 60% of European standards are available in Czech language. For CEN and CENELEC harmonised standards this is even about 90%, but for ETSI harmonized standards only about 10%. Stakeholders clearly express that experience shows that having translations available is very important for a better penetration of standards.

Importance given to standards in national language seems to be rather low among stakeholders in Denmark. But it is also noted that the desirability of a translation very much depends on the issues being covered by the standard.

Also in Sweden standards in national language are welcomed. Unfortunately people are not really ready to pay for such translations. This might be partly explained that in technical sectors people are generally rather fluent in English. However as one spokesman pointed out, harmonised standards really need to be available in national language, as they are to be used in conjunction with the relevant legislation in the country (in national language).

With Svensk Elstandard in Sweden there is a policy for the translation of electro-technical standards: the principle is that the closer the standard is related to the end consumer, the greater is the reason to translate it. However it is reported that less than 5% of European standards are indeed translated (Svensk Elstandard 3%, SIS 5%)

AENOR claims that as much as 95% of all European standards are available in Spanish and this is highly appreciated by stakeholders. However for some sectors such as telecommunications, English is the main working language anyway so it is stated that one believes that translation into Spanish does not really make sense.

Several stakeholders feel that information and texts of standards in the national language certainly help. PKN reports that 55% of European standards and 72% of harmonised European standards are already available in Polish.

The importance of having standards available in French is stressed by stakeholders, although also in France it is said to depend on the sector (for example in the oil industry, English is the common language anyway).

Also in Germany the translation of standard documents is an issue, although German is one of the three official languages used by the ESOs and most of the standards become available in German. However, in the development process, when the course of things might be influenced, drafts are generally not available in German. Point made by both NGOs and business representatives.

Public enquiries

Stakeholders note that organisations outside the national technical committees are not explicitly addressed by CNI for public enquiries.

[cf. Recommendation 10]

With AENOR the public consultation phase is really public – as in several other Member States but not all – as references to all draft documents (number, title, and deadline for comments) are published in the Boletín Oficial del Estado, or the Official State Bulletin so everybody can have a say.

A specific note on the public hearing: “It is not really public as one needs an invitation to participate in the meeting”.

Sales of standards

Next to electronic access to selected standards, the sale of standards by CNI in 2007 amounted to:

- 225,000 printed copies
- 125,000 standards and amendments in PDF format.

In 2007, CYS sold 1,685 standards, of which 81% were CYS EN, 7% ISO and 6% ELOT. The remaining are a.o. IEC and CYS standards.

Manipulations

Several stakeholders report about cases where large companies manipulate the course of things in order to accumulate more votes in technical committees at European level (e.g. being represented in various national delegations). One of the suggestions made is to promote standardisation as a more prominent subject

in education as this will increase the understanding of standardisation and its merits in general. The general idea being that the better the merits and the characteristics of the system are understood in society at large, the more difficult it will be for a few players to abuse the system for their own particular interests. [cf. Recommendation 6]

Training

In Poland the need is expressed to have a set of standards being made available to educational institutions and centres of professional training. Also in Germany it is suggested to improve access of educational institutions (teachers, students) to standards documents as this would improve awareness of the importance of standardisation. [cf. Recommendation 6]

BSI belongs to the minority of standards organisations that does not resort to voting if different views persist. BSI really operates on the principle of a consensus based approach and makes every effort to seek consensus and agreement where different views exist. In order to make this possible a lot of efforts are put in training for the chairs.

Asked about different standardisation models, if anything stakeholders praise the higher speed of alternative models often at the cost of not being based on a wide consensus (less democratic legitimacy). It should however be noted - as mentioned in the Introduction - that this report focuses on formal European standardisation and hence the experience of the respondent selected is mainly with this system rather than with the domain of private consortia in the ICT business for example.

7.3 Internet survey among stakeholders

The initial invitation for the survey among stakeholders in the 12 countries (Step 5) was dispatched on 4 December 2008. The survey was closed on 31 December 2008 after two reminders were sent.

In addition to the people invited individually by EIM, the questionnaire was placed on line to allow additional parties being informed by the stakeholders as represented in the Steering Group to complete the questionnaire on line.

In total 619 people had visited the survey on line when it was closed on 31 December 2008; however the number of useful responses is considerably smaller. Only about 50% completed the entire questionnaire successfully. The remaining half can again be distributed in two groups:

- those who stopped almost immediately;
- those who still answered a considerable part of the questions.

All in all there are 417 respondents that have seriously answered part of the question (and hence it was accepted for analysis) and from which we know the type of stakeholder they represent. Their information is considered in this section. Tables 7.2 summarises the details.

Table 7.2 Response Internet survey among stakeholders

	Invited	Gross response (percentage)	Questionnaires accepted (percentage)
Countries invited survey	12	12	
Persons invited survey	1,570	449 (29%)	358 (23%)
Persons open survey	-	170	59
Total	-	619	417

Source: Web based survey among stakeholders, December 2008

Of these 417 respondents, 300 did complete the entire questionnaire (72%), approximately the same proportion for the survey by invitation and the open survey.

The results of the various sections of the questionnaire are presented in the following sections of this chapter:

- 7.3.1 Basic characteristics respondents
- 7.3.2 Awareness about and being informed on standardisation
- 7.3.3 Actual involvement in standardisation and benefits seen
- 7.3.4 Barriers for participating in standards development and suggestions for improvement
- 7.3.5 Actual usage of standards and benefits seen
- 7.3.6 Barriers for using standards and suggestions for improvement

7.3.1 Basic characteristics respondents

The type of stakeholder, i.e. organisation or enterprise, to which the respondents belong, is shown in Table 7.3 by type of survey.

Table 7.3 Type of stakeholder, for each type of survey

	Survey type		Total
	open	invitation	
1 Consumer organisations	4	13	17
2 Trade unions	3	12	15
3 Employers' federations, trade associations	27	52	79
4 SMEs	2	83	85
5 Large enterprises	5	58	63
6 Environmental organisations	7	11	18
7 Public authorities, government departments	1	23	24
8 Universities and research institutes	4	40	44
9 Consultants, laboratories, certifiers	3	38	41
10 Other	3	28	31
Total	59	358	417

Source: Web based survey among stakeholders, December 2008

For many type of stakeholders some additional information was collected. This information is presented in the remaining of this section (e.g. Table 7.4) to get some better understanding of the background of the response group before we turn to the subject matter of the survey in the next subsections.

Table 7.4 Detailed characteristics of response group (n=417)

Stakeholder category	Detailed characteristics
17 consumer organisations	<ul style="list-style-type: none"> - 14 describe themselves as a private NGO (4 responses originate from the open survey. 10 have been invited, of which 6 state to have individuals as members; ranging from 29 to 700,000). - There are 3 organisations that have other organisations as members (2 open, 1 invited; 10 to 28 members). - One organisation describes itself as public, e.g. a consumer authority.
18 environmental organisations	<ul style="list-style-type: none"> - 14 are a private NGO (6 responses originate from the open survey. 8 have been invited, of which 5 state to have individuals as members. In addition 3 respondents from the open survey 3 have individual members (so in total 8). - The number of members for these 8 organisation range from 30 to 450,000. - There are 10 organisations that have other organisations as members (4 open, 6 invited; range from only 2 organisations to 3000 organisations as members). - Not one of these organisations describes itself as a public organisation.
15 trade unions	<ul style="list-style-type: none"> - 8 are an umbrella organisation, 7 are unions for specific sectors, e.g. transport, business services, graduates from university working in different sectors, trade, business administration etc.
79 employers' federations or trade associations, of these:	<ul style="list-style-type: none"> - 34 indicate to be an umbrella organisation, 43 are active for a specific sector (mining, manufacturing, construction, hotels, transport, other business services, lift manufacturers, bakery, consulting, energy, female enterprises, informatics, landscape architecture, electronic materials, orthopaedic, packaging, social care, etc.). - 27 originate from the open survey, 50 were invited to join the survey. - 76 of the 79 respondents provide information on the size of enterprises they represent: <ul style="list-style-type: none"> - All members are SMEs 26 - Most members are SMEs 24 - Both small and large enterprises 5 - All members are large enterprises 1
85 SMEs and 63 large enterprises, or 148 individual enterprises	<ul style="list-style-type: none"> - Manufacturing,75 - Construction,15 - Wholesale Trade,1 - Retail Trade,3 - Repair,1 - Transport and communications,6 - Other business services,12 - Personal Services,1 - Other ,34

... continued on next page

Table 7.4 ... continued from previous page

24 public sector representatives	<ul style="list-style-type: none"> - ministries or part thereof (13). - consumer organisation (1) - environmental organisation (1) - health and safety organisation (1) - inspection bodies (5) - local authority (1) - national metrology institute (1) - a regulatory and educational body (1) - one semi governmental organisation (1).
44 universities and research institutes	<ul style="list-style-type: none"> - More answers possible: - - technical university or high school 12 - - different university or high school 4 - - technical test laboratories 5 - - other research organisation 31
41 consultants, laboratories, certifiers	<ul style="list-style-type: none"> - 31 consultancies, - 18 certifiers, - 18 (test) laboratories
31 stakeholder category 'others'	<ul style="list-style-type: none"> - academy of technical sciences; - association for regional development and entrepreneurship, a non governmental, non-profit organisation; - our main goal is to support local development in Poland by means of promoting entrepreneurship (including entrepreneurship on the part of people, companies, local authorities and NGOs) and increasing the flexibility of the employment market (through cooperation with various partners: public, social, private etc.); - educational charity/NGO; - an organisation aiming to change attitudes to disability and to serve disabled people (a large voluntary sector provider of care and support services for disabled people); - consultancy services for energy efficiency; - organisation of engineers; - statistical offices; - organisation for occupational health and safety; - association of users of standards; - a water supply company.

Source: Web based survey among stakeholders, December 2008

7.3.2 Awareness about and being informed on standardisation

Table 7.5 shows that 75% of the stakeholders feel to be (very much) aware of what standardisation is, only 3% not at all, and only 8% slightly (score 2). Obviously this describes the respondents to the survey rather than the potential stakeholders in general. Results for the open and the invited survey are almost identical.

Table 7.5 Awareness of standardisation (what it actually is)

	Numbers	Percentage
1 Not at all	11	3
2 ...	33	8
3 ...	57	14
4 ...	100	25
5 Very much.	198	50
Sub-total	399	100
6 don't know / no answer	4	-
Total	403	-

Source: Web based survey among stakeholders, December 2008

To summarise this information the average score was calculated on this scale from 1 to 5. The resulting average score for any given group of respondents is higher if these respondents are generally more aware. For all respondents combined the average is 4.1.

Such averages allow an easy comparison of the position for each of the different type of stakeholders distinguished in this study in Table 7.6.

Table 7.6 Average score awareness standardisation (what it actually is) by type of stakeholder (scale 1 not at all to 5 very much)

	Score	N
1 Consumer organisations	3.8	17
2 Trade unions	3.0	14
3 Employers' federations, trade associations	4.1	72
4 SMEs	4.0	82
5 Large enterprises	4.0	62
6 Environmental organisations	3.4	16
7 Public authorities	4.7	23
8 Universities and research institutes	4.5	43
9 Consultants, laboratories, certifiers	4.6	41
10 Others	4.1	28
Total	4.1	398

Source: Web based survey among stakeholders, December 2008

The most important observation is the consistently high scores in Table 7.6 across nearly all types of stakeholders. This high average is obtained in two steps:

- people that were approached to participate are more than averagely involved;
- the non-response is most probably responsible for a further selection bias.

Looking at the various subgroups, the differences are not very surprising:

- lowest scores with trade unions and environmental organisations. For consumer organisations the score is already similar to that of representatives of the business community.
- highest scores with public authorities and consultants, laboratories, certifiers.

The three groups of representatives from the business community score consistently high at around 4. It is known from a large scale representative survey among European SMEs that knowledge and awareness is generally lower¹. Subsequently the present survey addressed the awareness about what standardisation might do for the own organisation. This follow up question was only asked to those who reported some general awareness on the subject in the previous question; as a result 386 respondents remain.

¹ The 2002 ENSR Enterprise Survey implemented in the framework of the Observatory of European SMEs, paid attention to standardisation. The majority of the SMEs (60%) consider standards to be very important. However only 39% of the SMEs receive relevant information on standards and standardisation, 55% did not. This result is mainly based on the lack of information of micro enterprises: 37% of medium-sized enterprises; 47% of small enterprises and 56% of micro enterprises state that they did not receive such information. See 'Highlights from the 2002 Survey', Chapter 6: Technology and Standardisation, http://ec.europa.eu/enterprise/enterprise_policy/analysis/observatory_en.htm.

Table 7.7 Awareness of what standardisation may do for the organisation or its objectives, by type of stakeholder (scale 1 not at all to 5 very much)

	Average Score	N
1 Consumer organisations	4.1	14
2 Trade unions	2.9	14
3 Employers' federations, trade associations	3.7	72
4 SMEs	3.7	78
5 Large enterprises	3.9	59
6 Environmental organisations	2.9	16
7 Public authorities	4.4	23
8 Universities and research institutes	4.3	41
9 Consultants, laboratories, certifiers	4.3	41
10 Other	3.8	28
Total	3.9	386

Source: Web based survey among stakeholders, December 2008

Table 7.7 shows that the lowest awareness about what standardisation might do for the objectives of the organisation is among trade unions and environmental organisations. Among consumer organisations, the awareness of what standardisation might achieve is relatively high, even higher than with representatives of the business community. Table 7.8 shows that on a scale from 1 to 5, 75% of the respondents ascribe a 4 or 5 to the importance of standardisation for their organisation, in other words very high. This results in an average of just over 4.

Table 7.8 The importance of standardisation for the own organisation or enterprise

	Frequency	Percentage
1 Not at all	7	2
2 ...	29	8
3 ...	58	16
4 ...	132	36
5 Very much	145	39
Total	371	101

Source: Web based survey among stakeholders, December 2008

Table 7.9 The importance of standardisation for the own organisation or enterprise, by type of stakeholder

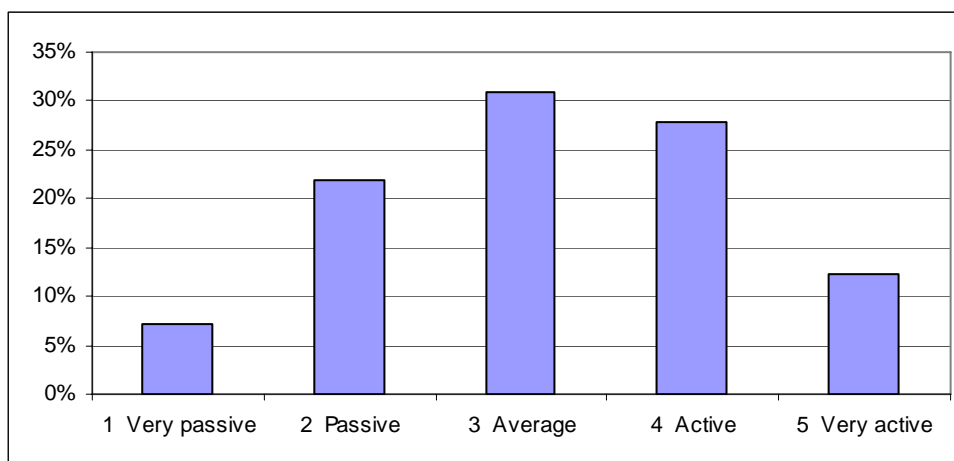
	Average score	N
Consumer organisations	3.7	14
Trade unions	3.0	12
Employers' federations, trade associations	3.8	67
SMEs	4.1	75
Large enterprises	4.3	57
Environmental organisations	3.1	15
Public authorities, government departments and government agencies,	4.0	23
Universities and research institutes	4.1	41
Consultants, laboratories, certifiers	4.4	41
Other	4.2	25
Total	4.0	370

Source: Web based survey among stakeholders, December 2008

Consistent with information provided above, trade unions and environmental organisations ascribe the lowest importance to standardisation for their organisation (about 3, see Table 7.9).

The opinion of the total group of responding stakeholders on the information policy of the National Standards Body in their own country is shown in Figure 7.1

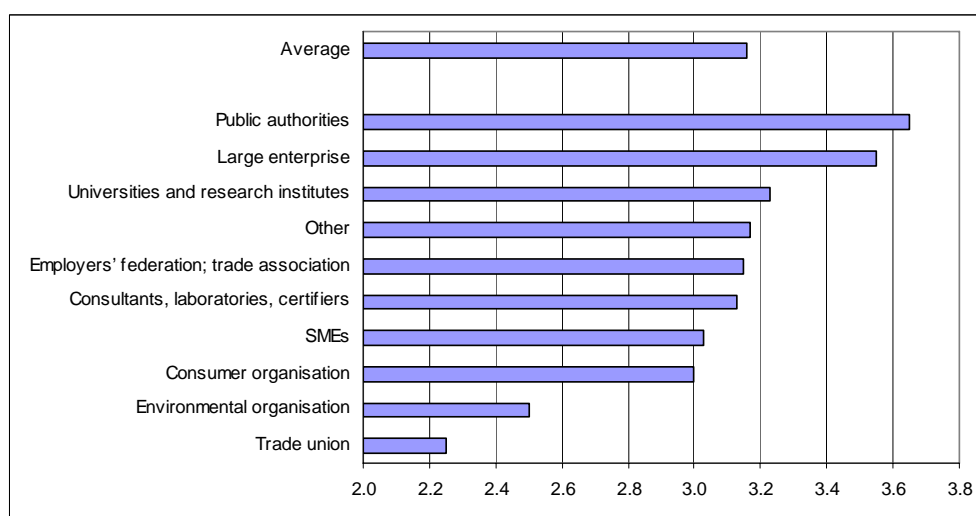
Figure 7.1 Assessment of the information policy of the NSB in own country



Source: Web based survey among stakeholders, December 2008

By type of respondent the results are shown in Figure 7.2. The more organisations are aware, and the more importance they feel standardisation is, the more active they feel the information policy of the NSB is. This association may be explained in several ways.

Figure 7.2 Assessment of the information policy of the NSB in own country: score on a scale from 1 very passive to 5 very active.



Source: Web based survey among stakeholders, December 2008

The more active the information policy is (towards that specific group of stakeholders), the more aware these stakeholders are about the relevance and importance of standardisation. But alternatively: the more aware organisations are, they more receptive they will be for information from the standardisation organisation. Organisation that may not be aware at all, are more likely to oversee or neglect information provided.

According to Table 7.10 one third of the respondents do not provide an answer (do not know) to the question whether the information policy of the NSB is specially targeted as specific groups such as consumers or SMEs.

From the remaining answers, 73% are of the opinion that such targeted approach does exist. The percentage of respondents that are of the opinion that this is the case varies substantially by type of stakeholder, even within the business community. All large enterprise answering the question (N=27) say yes, whereas the employers' federations/trade associations have the lowest score of all: just below 50%

Table 7.10 The percentage of stakeholders that are of the opinion that the information policy of the NSB is specially targeted at specific groups, by type of stakeholder

	Percentage	N
Large enterprises	100%	27
Consumer organisations	92%	12
Public authorities, government departments and government	87%	15
Universities and research institutes	86%	28
SMEs	68%	41
Consultants, laboratories, certifiers	68%	22
Trade unions	67%	3
Other	67%	15
Environmental organisations	64%	11
Employers' federations, trade associations	49%	47
Average	73%	221

Source: Web based survey among stakeholders, December 2008

7.3.3 Actual involvement in standardisation and benefits seen

Respondents were asked to what extent (on a scale from 1. not at all to 5. very much) the own organisation participates in standardisation (Table 7.11; 7.12). Table 7.11 shows that over a quarter (27%) of the 347 respondents that provide information on their involvement in standardisation are not involved at all; another quarter is very much involved (26%). On the scale from 1 to 5 the average score is 3.0; this score is higher for the open survey (3.4).

Table 7.11 The extent to which organisation and enterprises are participating in the development of standards (not just using standards)

	Frequency	Percentage
1 Not at all	93	27
2 ...	60	17
3 ...	48	14
4 ...	57	16
5 Very much	89	26
Total	347	100

Source: Web based survey among stakeholders, December 2008

By stakeholder, the average indicating the extent of participation is shown in Table 7.12.

Table 7.12 Participation in standardisation by type of stakeholder (average score on scale from 1 not at all to 5 very much).

	Average score	N
Universities and research institutes	3.8	40
Public authorities	3.8	21
Employers' federations, trade associations	3.4	66
Consultants, laboratories, certifiers	3.2	38
Consumer organisations	3.2	12
Large enterprises	2.7	54
Environmental organisations	2.6	14
Other	2.5	24
Trade unions	2.5	10
SMEs	2.2	67
Average	73%	346

Source: Web based survey among stakeholders, December 2008

There are 199 respondents that provide information on the number of technical committees in which they actually participated in during the last 5 years (See: Table 7.13).

Table 7.13 Number of technical committees in which enterprise or organisation participated during the last 5 years

Number of TCs (range)	Number of respondents	Percentage
0	15	8%
1 - 4	95	48%
5 - 9	31	16%
10 - 19	25	13%
20 - 49	19	10%
50 - 99	6	3%
100 - 600	8	4%
Total	199	100%

Source: Web based survey among stakeholders, December 2008

The frequencies as presented in Table 7.13 result in an average number of 20 technical committees (34 for the open survey, 19 for the survey by invitation). Obviously this average is highly influenced by the 8 very large players (large multi national companies) that participate each in 100 to 600 technical committees. In Table 7.14 the number of technical committees in which the different type of stakeholders participated during the last 5 years is pictured.

Table 7.14 The number of technical committees in which the enterprise or organisation stated to participated during the last 5 years.

	Average	N
1 Consumer organisations	10	9
2 Trade unions	4	5
3 Employers' federations, trade associations	29	48
4 SMEs, i.e. enterprises employing up to 250 workers	5	29
5 Large enterprises, i.e. enterprises with more than 250 workers	24	23
6 Environmental organisations	6	8
7 Public authorities	26	12
8 Universities and research institutes	6	29
9 Consultants, laboratories, certifiers	29	25
Total*	18	188

* Note: the various heterogeneous category of others have been omitted

Source: Web based survey among stakeholders, December 2008

The 11 stakeholders categorized as 'others' report a very high participation. As mentioned before, this category consists of a very heterogeneous group respondent.

Respondents have also been asked how many times they did participate in public enquiries. Results are presented in Tables 7.15 and 7.16.

Table 7.15 The number times the enterprise or organisation stated to have participated in a public enquiry

	Number	Percentage
0	25	14
1- 4	40	23
5 - 9	23	13
10 - 19	28	16
20 - 49	28	16
50 - 99	11	6
100 - 999	16	9
1000 - 2500	3	2
Total	174	100

Source: Web based survey among stakeholders, December 2008

On average stakeholders report to have submitted some fifty times feedback in a public enquiry. By type of stakeholder the averages as presented in Table 7.16 emerge.

Table 7.16 Number of times organisations and enterprises participate in public enquires (averages by type of stakeholder).

Type of stakeholder	Average	N
1 Consumer organisations	36	6
2 Trade unions	1	3
3 Employers' federations, trade associations	105	42
4 SMEs	17	27
5 Large enterprises	38	20
6 Environmental organisations	114	10
7 Public authorities	14	9
8 Universities and research institutes	42	26
9 Consultants, laboratories, certifiers	22	20
10 Other	28	11
Total	51	174

Source: Web based survey among stakeholders, December 2008

For various items it has been studied whether these are a motivation to be involved in standardisation. Hence a series of results as shown in Table 7.17 for the item 'be informed on on-going developments' are available.

Table 7.17 Importance of 'be informed on on-going developments' as a motivation to participate in standardisation.

	Frequency	Percent
1 Not at all	12	4
2...	35	11
3...	54	17
4...	83	26
5 Very important	134	42
Total	318	100

Source: Web based survey among stakeholders, December 2008

The results from Table 7.17 can also be expressed as an average score on a scale from 1 to 5: 3.9. In this way we can compare the various alternative motives evaluated in the survey (see Table 7.18).

Table 7.18 Importance of various motives to participate in standardisation (average score on scale from 1 not at all, to 5 very important).

Networking (getting to know people)	3.3
Make sure that standards are developed in domains where they are needed	3.7
Be informed at an early stage	3.9
Be informed on on-going developments	3.9
Contribute to better formulated standards with our knowledge and experience	3.9
See to it that potentially harmful issues are not incorporated in standards	4.0
Make sure that things that are important to us are properly incorporated in standards	4.1

Note: N = ranging from 314, to 320, on average 316

Source: Web based survey among stakeholders, December 2008

The most important motives are all related to actually influencing the contents of standards being developed. This alternative is considered very important by as much 50% of the respondents.

Table 7.19 Importance of motive 'Make sure that things that are important to us are properly incorporated in standards' to participate in standardisation

	Frequency	Percent
1 Not at all	12	4
2...	22	7
3...	41	13
4...	82	26
5 Very important	161	51
Total	318	100

Source: Web based survey among stakeholders, December 2008

In Table 7.19, the most important benefits that form a reason to participate in the standardisation process are listed for each type of stakeholders (for the employers' federation there are three reasons with the same average score on fourth position).

Scores above 4, indicate a very high percentage of respondents indicating very important. To illustrate:

- environmental organisations have a score 4.3 for 'make sure harmful issues are not incorporated', because 8 out of 12 respondents select 'very important' and another 2 go for important (score 4);
- trade unions obtain an average of 4.3 for 'make sure harmful issues are not incorporated', because 5 of the 7 trade unions select 'very important' and one opts for important (score 4).

Table 7.20 Importance of various motives to participate in standardisation (average score on scale from 1 (not at all) to 5 (very important), by type of stakeholder

Consumer organisations (N=11)	contribute to better formulated standards	4.5
	make sure important issues are incorporated	4.1
	be informed on on-going developments	3.9
	make sure harmful issues are not incorporated	3.9
Trade unions (N =7)	make sure harmful issues are not incorporated	4.3
	make sure important issues are incorporated	3.9
	make sure standards are developed where needed	3
	be informed on on-going developments / at early stage; contribute to better formulated standards	2.9
Employers' federations, trade associations (N=61)	make sure important issues are incorporated	4.5
	make sure harmful issues are not incorporated	4.3
	contribute to better formulated standards	4.2
	make sure standards are developed where needed	4.1
SME (N = 64)	make sure important issues are incorporated	4
	make sure harmful issues are not incorporated	3.9
	be informed on on-going developments	3.7
	be informed at earl stage	3.6
Large enterprise (N=48)	be informed on on-going developments	3.9
	make sure important issues are incorporated	3.9
	make sure harmful issues are not incorporated	3.8
	be informed at earl stage	3.7
Environmental organisation (N=13)	make sure harmful issues are not incorporated	4.3
	make sure important issues are incorporated	4.3
	contribute to better formulated standards	3.7
	be informed on on-going developments	3.5

... continued next page

Table 7.20 ... continued from previous page

Public authorities (N=18)	make sure important issues are incorporated	4.7
	make sure standards are developed where needed	4.5
	contribute to better formulated standards	4.5
	make sure harmful issues are not incorporated	4.4
Universities and research institutes (N=37)	be informed at earl stage	4.3
	be informed on on-going developments	4.2
	contribute to better formulated standards	4.2
	make sure important issues are incorporated	4.2
Consultants, laboratories, certifiers (N=35)	be informed on on-going developments	4.2
	be informed at earl stage	4.1
	make sure important issues are incorporated	4
	contribute to better formulated standards	4
Other (N=23)	make sure standards are developed where needed	3.8
	be informed on on-going developments	3.7
	make sure important issues are incorporated	3.7
	be informed at earl stage	3.7

Source: Web based survey among stakeholders, December 2008

7.3.4 Barriers for participating in standards development and suggestions for improvement

Also Section 4 has been answered by – after correcting for do not know, no answer – by some 315 respondents.

Table 7.21 Existence of barriers for the organisation or firm to participate in standardisation

	Frequency	Percentage
1. Not at all	53	17
2.	62	20
3.	83	26
4.	79	25
5. Very much	38	12
Total	315	100

Source: Web based survey among stakeholders, December 2008

So the overall picture is that – starting from the assumption that 3 is the middle position on the scale – that some 37% state to face barriers much and 37% hardly any. This results in an average score on a scale from 1 to 5 of 3.0 (3.3 for open survey type N= 44, and 2.9 for survey by invitation N=271; total N= 315). This average score of 3.0 is used a benchmark to assess the position stated by the various types of stakeholders in Table 7.22.

Table 7.22 Extent to which barriers exist for the organisation or enterprise to participate in standardisation (average score on scale 1 not at all to 5 very important 5), ranked

	Average score	N
Public authorities	2.5	20
Large enterprises	2.6	47
Other	2.7	18
SMEs	2.8	65
Consultants, laboratories, certifiers	3.0	33
Employers' federations, trade associations	3.1	63
Universities and research institutes	3.1	36
Trade unions	3.4	7
Consumer organisations	3.5	13
Environmental organisations	3.9	13
Total	3.0	315

Source: Web based survey among stakeholders, December 2008

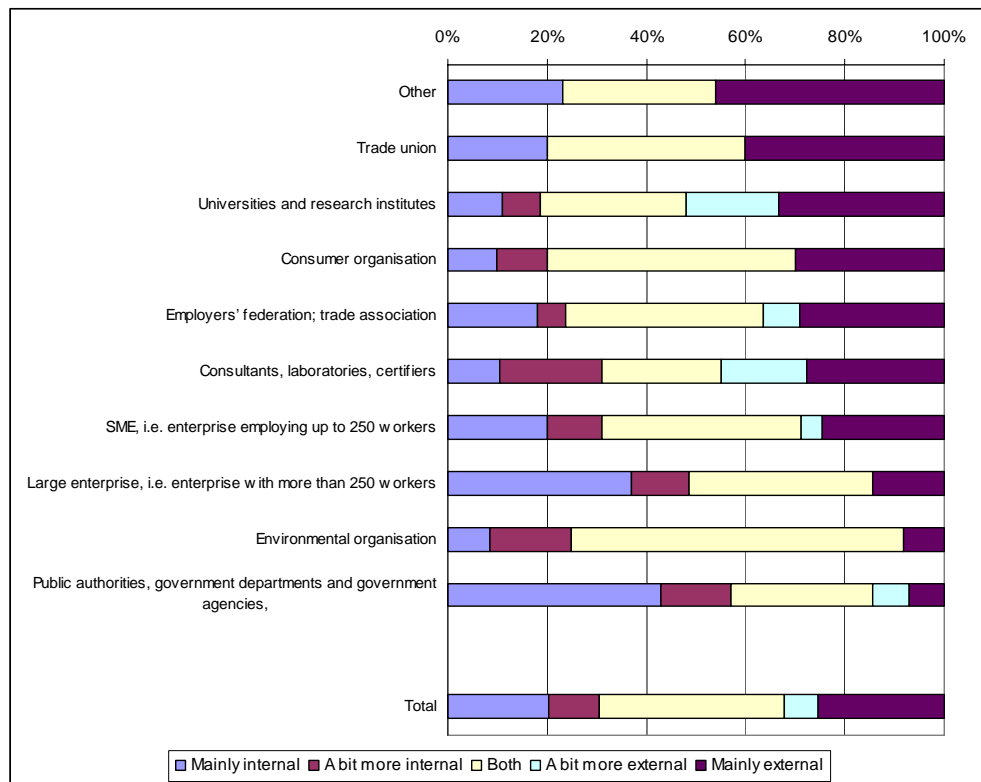
Subsequently it has been assessed whether respondents feel that these barriers are mainly related to the characteristics of the own organisation (internal) or more related to the characteristics and procedures of the standards bodies (external). This question has only been asked to those respondents that express any barriers, i.e. a score 2, 3, 4 or 5 with the previous question. 261 respondents remain.

Table 7.23 The extent to which barriers are internal or external

	Frequency	Percent
Mainly internal	50	20
A bit more internal	25	10
Both	91	37
A bit more external	17	7
Mainly external	62	25
Sub-total	245	100
Do not know / no answer	16	
Total	261	

Source: Web based survey among stakeholders, December 2008

In Figure 7.3 Extent to which barriers are considered to be internal or external



Note: number of respondents: Consumer organisation 10; Trade union 5; Employers' federation; trade association 55; SME 45; Large enterprise 12; Public authorities government departments and government agencies 14; Universities and research institutes 27; Consultants laboratories certifiers 29; Other 13; total 245

Source: Web based survey among stakeholders, December 2008

The categories others, trade unions and universities consider barriers mainly to be external (roughly 40 to 50%). Enterprises are the categories that mainly feel barriers are internal, i.e. related to characteristics of their own enterprise. It should be noted that this is even more so with large enterprises (nearly 50%) than with smaller enterprises (just over 30%). Environmental organisations take a different point of view, among these organisations two third of the respondents opt for 'both internal and external', much higher as with all other categories.

Finally 10 specific barriers were assessed by the respondents. These questions were answered by 339 respondents, of which – for the 11 specific items – on average 27 respondents answered don't know (8%), so on average some 312 respondents gave an indication of the importance of the barrier on a scale from 1 (not at all) ... to ... 5 . very important

The full frequency table for the first item is again provided as an illustration in Table 7.24.

Table 7.24 The extent to which lack of awareness (information on what standardisation is, how it works) is a barrier

	Frequency	Percent
1. Not at all	114	35
2. ...	79	24
3. ...	59	18
4. ...	41	13
5. Very important	31	10
Sub-total	324	100
No answer	15	
Total	339	

Source: Web based survey among stakeholders, December 2008

The survey results as presented in Table 2.24 – more than 50% of the respondents state that this is (hardly) any problem – results in an average score of 2.4. The average score for all 11 specific items is provided in Table 7.25 (ranked).

Table 7.25 Average score (higher is more important) of barriers (ranked).

Issue	N	Average score
Amount of time required	319	3.9
Travel and subsistence costs	305	3.4
The cost of participating in technical committees (fee)	293	3.4
The cost of becoming a member of standards body (fee)	289	3.2
Bureaucracy of the process	307	3.1
Perceived benefits for the organisation or enterprise itself are low	318	2.8
The process is too complicated, too technical	316	2.7
Not enough technical expertise or experts within our type of organisation	316	2.6
Lack of awareness (information on what standardisation is, how it works)	324	2.4
The language used in formulating the standards is too complicated & technical	319	2.3
Use of foreign languages	321	2.2

Source: Web based survey among stakeholders, December 2008

There is a substantial difference between the various potential barriers, as averages range from only 2.2 for use of foreign language to 3.9 for the amount of time required. To mark the large differences, the actual data collected is shown in Table 7.26 and 7.27. 'Amount of time required' is (very) important for 67% of the respondents, whereas foreign languages are not or hardly important for 65% of the respondents (This may be related to use of local language or use of foreign language without problem).

Table 7.26 The extent to which 'amount of time required' forms a barrier

	Frequency	Percentage
1. Not at all	15	5
2. ...	34	11
3. ...	57	18
4. ...	89	28
5. Very important	124	39
Total	319	100

Source: Web based survey among stakeholders, December 2008

Table 7.27 The extent to which 'the Use of foreign languages' forms a barrier

	Frequency	Percentage
1. Not at all	139	43
2. ...	72	22
3. ...	48	15
4. ...	35	11
5. Very important	27	8
Total	321	100

Source: Web based survey among stakeholders, December 2008

7.3.5 Actual usage of standards and benefits seen

Up to this point (section 5 of the questionnaire) we focussed on the standardisation process, reasons to participate etc. Now we will focus on using the standards.

312 respondents answer the questions in Section 5. Of these 312, eight do not provide (do not know) to which extent their organisation uses standards. For the remaining 304 the position is shown as in Table 7.28.

Table 7.28 The extent to which standards are used by the organisation

	Frequency	Percentage
1. Not at all	24	8
2. ...	34	11
3. ...	41	14
4. ...	70	23
5. ...very much	135	44
Total	304	100

Source: Web based survey among stakeholders, December 2008

In total 192 respondents provide information on the number of standards that the organisation or enterprise did acquire over the last five years.

The responses are summarized in Table 7.29.

Table 7.29 Number of standards acquired last 5 years

Number of standards acquired last 5 years	Percentage of respondents (N=192)
0	10%
1 - 9	17%
10 - 29	17%
30 - 99	17%
100 - 199	13%
200 - 499	12%
500 - 999	6%
1,000 - 9,999	6%
10,000 - 30,000	2%
0 - 30,000	100%

Source: Web based survey among stakeholders, December 2008

The number of standards acquired (average per organisation for 192 respondents) is as high as 600:

- open survey (N=18) 1,739
- survey by invitation (N=174) 483

However these results are strongly influenced by the 16 respondents with a very high number of acquired standards as shown in Table 7.30

Table 7.30 Number of standards acquired during last five years (top 16 organisations)

	Number of organisations	Number of standards acquired last 5 years
Employers' federation; trade association	2	1,000
Large enterprise	1	
Consultants, laboratories, certifiers	1	
Other	1	
Universities and research institutes	2	
SMEs	1	1,500
Public authorities, government departments and government agencies,	1	1,500
Large enterprise,	2	2,000
Large enterprise,	1	4,000
Consultants, laboratories, certifiers	1	10,000
Consultants, laboratories, certifiers	1	15,000
Large enterprise	1	25,000
Large enterprise	1	30,000
Total	16	-

Source: Web based survey among stakeholders, December 2008

For the remaining 176 respondents the average is still 98:

- open survey (N=16) 19
- survey by invitation (N=160) 106

Combining the information from Tables 7.28 and 7.29, the picture as shown in Table 7.31 emerges.

Table 7.31 The number of standards acquired by the organisation during the last five years.

Score on scale 1 (not at all using standards) to 5 (using standards very much)	Average	N
	Score 2	4
Score 3	47	26
Score 4	360	43
Score 5	929	106
Total	600	192

Source: Web based survey among stakeholders, December 2008

The respondents have indicate on a scale from 1 to 5 whether a series of specific benefits are (or would be) important for using standards. For example for the item 'complying with (European) legislation' is considered to be (very) important by 205 of the 269 respondents, or 77% as shown in Table 7.32.

The average score for 'complying with European legislation for these 269 respondents is as high as 4.1.

Table 7.32 Importance of complying with (European) legislation as reason for using standards.

	Frequency	Percentage
1 Not at all.	20	7
2 .	14	5
3 .	30	11
4 .	61	23
5 Very important.	144	54
Total	269	100

Source: Web based survey among stakeholders, December 2008

The average score for the respondents (number answering ranging from 214 to 269, average 252) for the fourteen reasons specified are listed in Table 7.33.

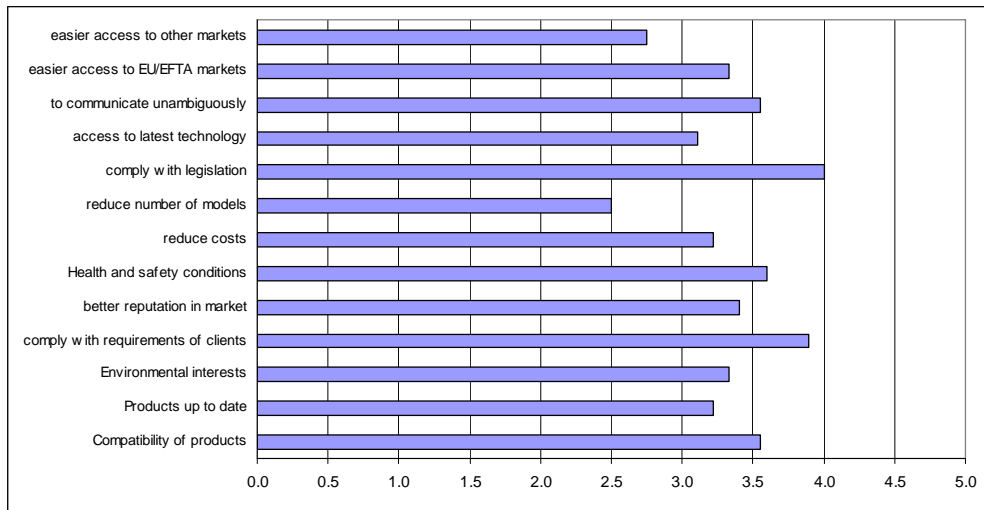
Table 7.33 Average Importance of (potential) benefits of using standards

Issue	N	Average score
Complying with (European) legislation	269	4.1
Complying with requirements of customers	256	4.1
Products and services are up to date	263	4.0
To be in a position to communicate clearly and unambiguously with relevant parties in the market place	264	3.9
Compatibility of our products with other products is assured	244	3.8
Environmental interests are covered	267	3.8
Gives our products and services a better reputation in the market place	258	3.8
Improve Health and safety conditions at the work place	269	3.6
Easier access to markets in other countries of the EU/EFTA	241	3.4
Access to latest technology	246	3.4
Access to other markets outside the EU/EFTA	232	3.1
Reduce our costs	251	2.9
Reduce the number of models, different products in stock or being produced (variety reduction)	214	2.6
Average	252	3.6

Source: Web based survey among stakeholders, December 2008

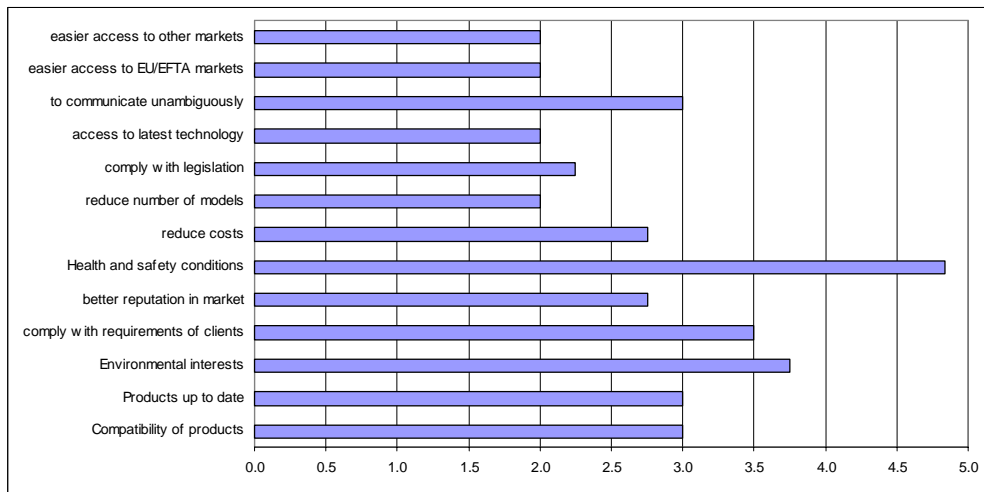
Some of these benefits only apply a particular type of stakeholder such as 'access to markets' to respondents from the business community. Therefore these results are shown for each type of stakeholder separately in a series of bar charts.

Figure 7.4 Average importance of (potential) benefits of using standards for Consumer organisation



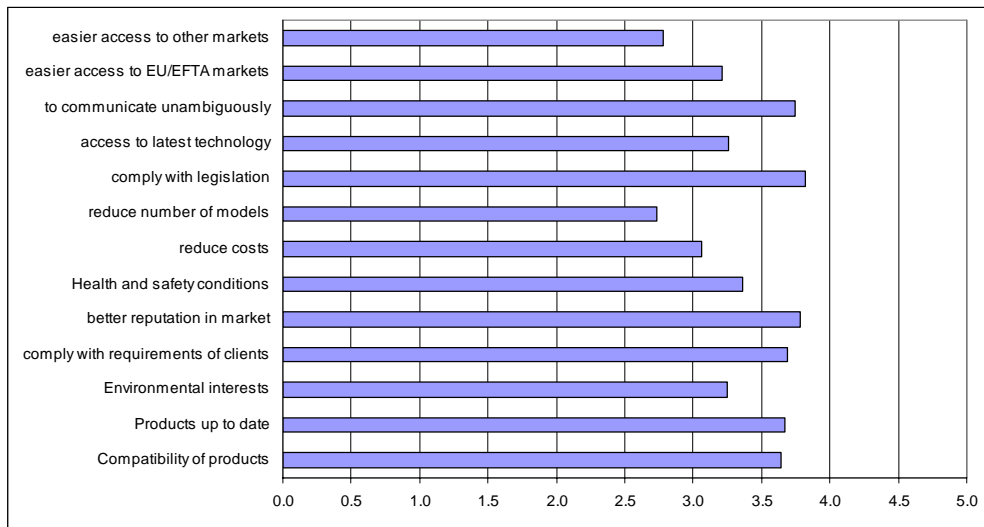
Source: Web based survey among stakeholders, December 2008

Figure 7.5 Average importance of (potential) benefits of using standards for Trade union



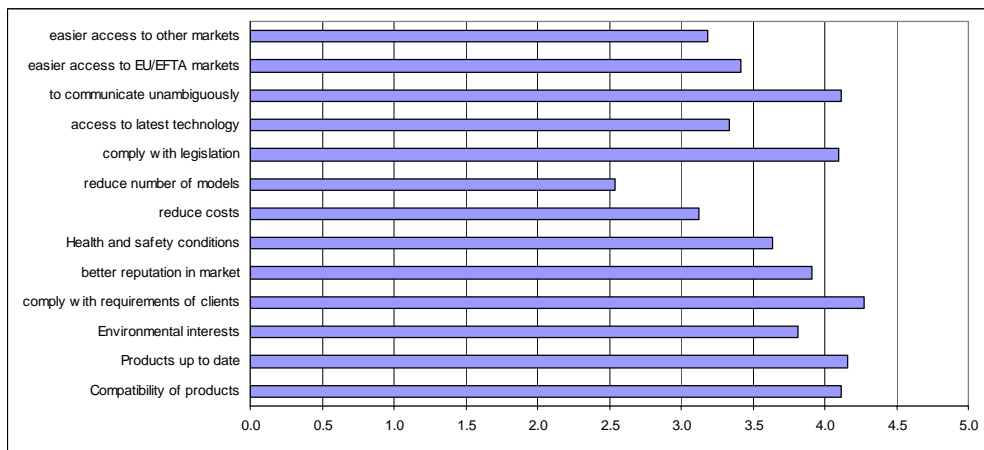
Source: Web based survey among stakeholders, December 2008

Figure 7.6 Average importance of (potential) benefits of using standards for Employers' federation; trade association



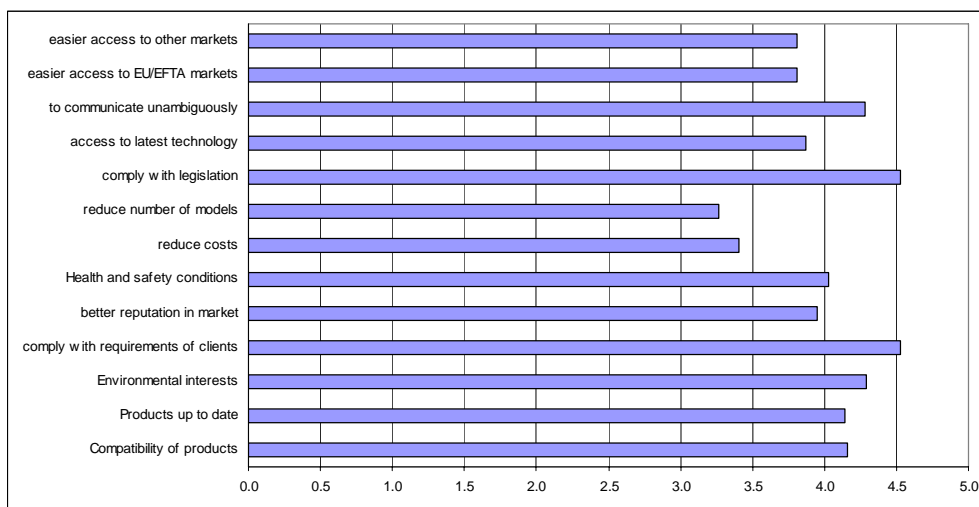
Source: Web based survey among stakeholders, December 2008

Figure 7.7 Average importance of (potential) benefits of using standards for SME



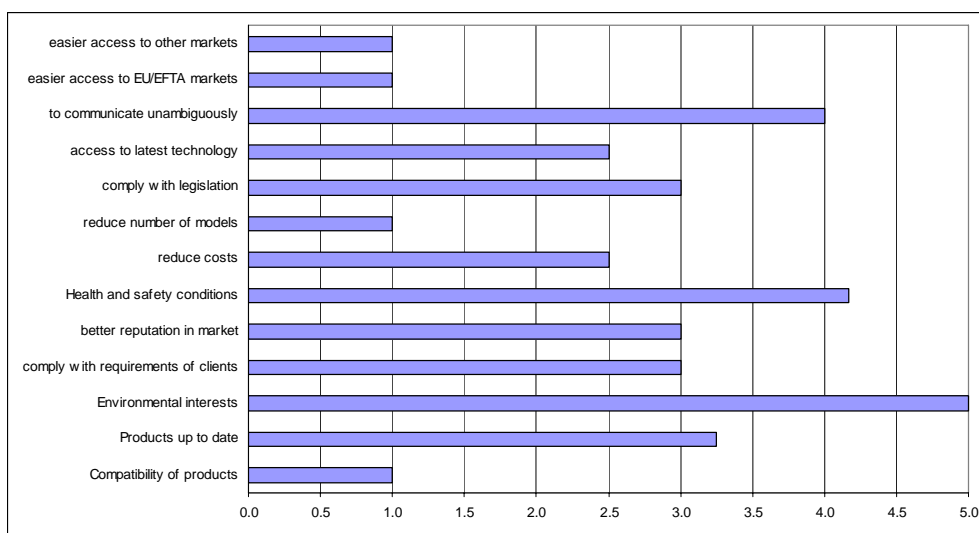
Source: Web based survey among stakeholders, December 2008

Figure 7.8 Average importance of (potential) benefits of using standards for large enterprise



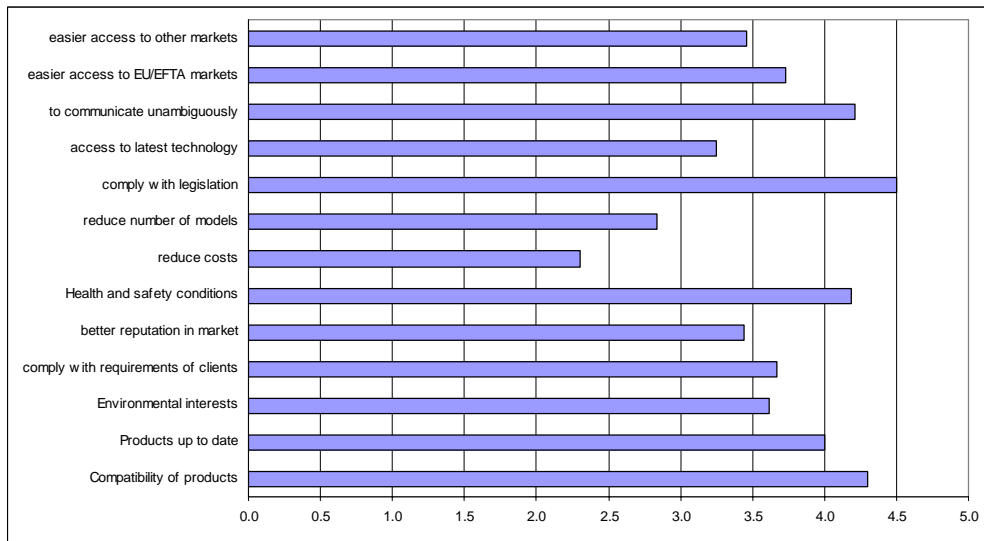
Source: Web based survey among stakeholders, December 2008

Figure 7.9 Average importance of (potential) benefits of using standards for Environmental organisation



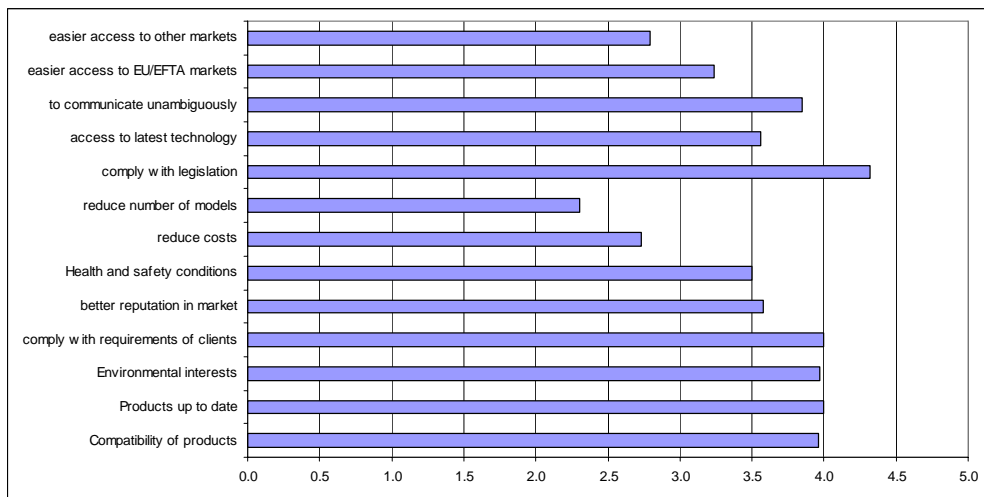
Source: Web based survey among stakeholders, December 2008

Figure 7.10 Average importance of (potential) benefits of using standards for Public authorities, government departments and government agencies,



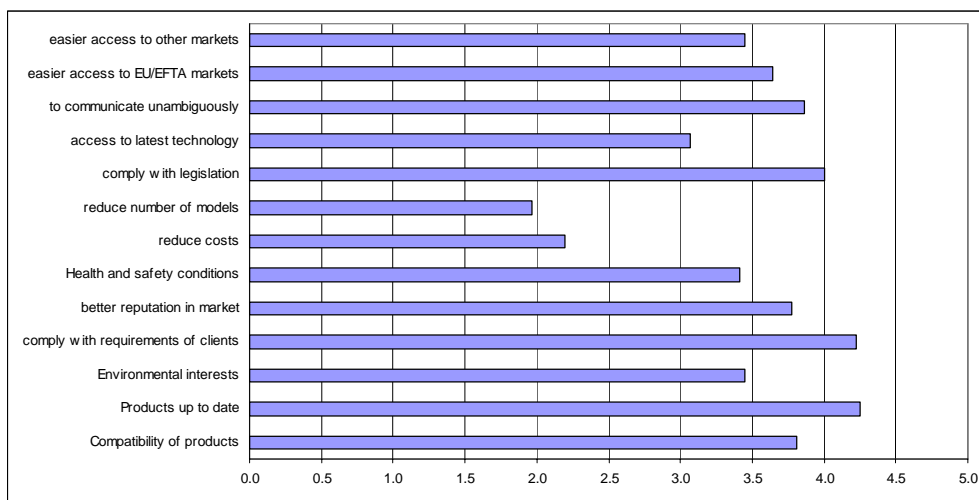
Source: Web based survey among stakeholders, December 2008

Figure 7.11 Average importance of (potential) benefits of using standards for Universities and research institutes



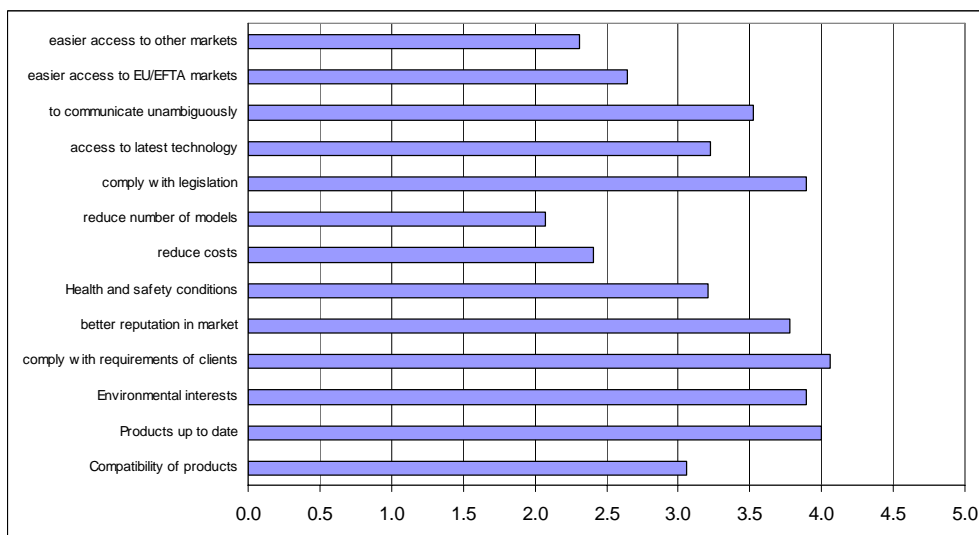
Source: Web based survey among stakeholders, December 2008

Figure 7.12 Average importance of (potential) benefits of using standards, for Consultants, laboratories, certifiers



Source: Web based survey among stakeholders, December 2008

Figure 7.13 Average importance of (potential) benefits of using standards for category other



Source: Web based survey among stakeholders, December 2008

7.3.6 Barriers for using standards and suggestions for improvement

For several issues it has been established to which extent they are a barrier for using standards. For example the 'lack of information on which standards are relevant for the organisation or enterprise' is not at all relevant as a barrier for one third of the respondents, whereas - on a scale from 1 to 5 - 11% state this to be an important barrier (4) and 17% even a very important barrier. For the 276 respondents that provide an assessment (here 28 opt for do not know / no answer), the average score on the scale from 1 to 5 is 2.6. Table 7.35 shows that this is an average score for the 9 items investigated. The score of 2.6 results from 53% scoring a 1 (not at all) or 2 versus 28 scoring a 4 or 5 (very important) as shown in Table 7.34.

Table 7.34 Lack of information on which standards are relevant for the organisation or enterprise

	Frequency	Percentage
1 Not at all.	90	33
2	54	20
3	55	20
4	29	11
5 very important	48	17
Total	276	100

Source: Web based survey among stakeholders, December 2008

The top 3 barriers for access to standards are:

- price of standards
- cost of implementing the standards
- the number of cross references in the standards

The price of standards is considered to be an important barrier by 18% of the respondents (score 4) and even 34% are of the opinion that this is a very important barrier (score 5), together 52% of all respondents.

Table 7.35 The importance of various barriers for acquiring standards (average score on a scale 1 not at all to 5 very important)

Barriers	N	Score
Price of standards	272	3.4
Cost of implementation the standards in our organisation is too high	247	2.9
Number of references in text (to other standards etc.) is too high	262	2.7
Lack of information on which standards are relevant for the organisation	276	2.6
Lack of guidance on how to implement standards	261	2.6
Text of standards just too long	272	2.4
Text of standard is too complicated, language too technical	274	2.3
Text of standards is in foreign language	272	2.3
We do not know where to obtain standards	276	1.6
Average	268	2.5

Source: Web based survey among stakeholders, December 2008

The situation with regard to availability of standards in the national language - for those standards that are relevant for the own organisation - is considered rather positively by respondents. 23% state that less than 50% of those standards are available in the own language, but 59% report that 75% or more of those standards are available in the national language.

Table 7.36 Availability of standards in the national language

Percentage of standards	Frequency	Percentage
none	5	2
1 - 25%	25	12
26 - 50%	18	9
51- 75%	39	18
76 - 99%	74	35
all (100%)	50	24
	211	100

Source: Web based survey among stakeholders, December 2008

For the open survey, the percentage of respondents that report a high percentage of standards to be available in the national language is somewhat lower.

Finally, these stakeholders have been asked whether the fact that some standards are only available in a foreign language poses a problem for their enterprise or organisation. The answers on a scale from 1 (not at all) to 5 (very much) given are shown in Table 7.37.

Table 7.37 That some standards are only available in a foreign language poses a problem for the enterprise or organisation.

	Percentage
1 Not at all.	32
2 ...	29
3 ...	18
4 ...	12
5 very much	10
Total	100

Source: Web based survey among stakeholders, December 2008

Annex 1 Standardisation in Estonia

Introduction

Chapter 2 provided an overview of European standardisation to serve as a framework. However to illustrate that the European system is not a homogeneous structure in which only well known large organisations such as DIN and BSI operate, two cases have been selected to be described in an Annex:

- This Annex 1: The overall situation with regard to standardisation in Estonia;
- Annex 2 - The recent changes in the organisational structure in the Czech Republic towards a more directly state controlled standardisation system.

General background of standardisation in Estonia

In order to fully understand access to standardisation and standards in Estonia two important issues have to be considered. First, the historical background makes the situation in Estonia special compared to EU Member States without a Soviet history. As standards were mandatory documents in the Soviet Union used to regulate production and other processes there is still a considerable amount of people in Estonia not familiar with international standardisation principles. Standards are therefore sometimes considered to be the “matter of the state” and the business model of the National Standards Organisation remains unclear. A historical background of standardisation is briefly given in this section. Second important factor is the smallness of the country. There are about 40,000 active companies in Estonia, the majority of them belonging to the service sector. Even industrial companies are mostly subcontractors and therefore (wrongly?) not directly interested in participation in the standardisation processes. Access to standardisation and technical committees is more a problem to the National Standards Body (EVS) than to interested parties. Interested parties do not find it difficult to participate; rather it is difficult for EVS to inform and attract stakeholders to participate to have balanced TCs.

[cf. Recommendation 3, 6, 8, 10]

Another peculiarity originating from the smallness of the country is the relatively active role of the state in the standardisation process. Despite of having only the third of ownership of EVS the state is by far the biggest financier of standardisation in Estonia covering about 70% of the activity costs and membership fees of international organisations. An overview of the institutional framework of standardisation and of state financing is also provided for in this section.

The paragraphs on access to the standardisation process and access to the standards documents are based on interviews with stakeholders in Estonia. Interviews were conducted with representatives of the following organisations¹:

- Estonian Centre for Standardisation (EVS) – National Standards Body;
- Estonian Chamber of Commerce and Industry (EKTK) – the biggest and most representative union of enterprises;
- Ministry of Economic Affairs and Communications (MKM) – the ministry responsible for coordination of standardisation activities in Estonia;
- Estonian Technical Surveillance Authority (TJA) – coordinator of ETSI standardisation, member of ETSI;
- Metrosert Ltd - National Metrology Institute;

¹ More than 40 stakeholders’ organisations were listed in order to select the candidates for interviews.

- Estonian Environmental Research Centre;
- Estonian Association of Construction Material Producers (EETL);
- Estonian Association of Architectural and Consulting Engineering Companies (EPBL).

Historical background

Estonia has quite a long history of mandatory standards due to the Soviet occupation that lasted until 1991. GOST standards were issued by the Committee of Standards, Measurements and Measuring Instruments which was under direct coordination of the Council of Ministers of the Soviet Union. GOST standards were mandatory documents and their legal power was similar to legal acts. Market surveillance was carried out by a governmental organisation which was at the same time involved in verification of measuring instruments and certification of testing laboratories. After re-establishing the Republic of Estonia in 1991 the Estonian Standardisation Board was introduced which is now responsible for standardisation, legal metrology and accreditation.

During the period of Estonian integration into the European Union that lasted until 2004 international and European principles of standardisation were introduced. According to the Technical Regulations and Standards Act which came into force on April 1, 1999, the right to act as the Estonian National Standards Body was prescribed to a non-profit non-governmental organisation – the Estonian Centre for Standardisation¹. This organisation had to take over the functions of the Estonian Standards Board, which was a governmental institution, by 1st April 2000. The other functions of the Estonian Standards Board - legal metrology and accreditation - were assigned to the Estonian Technical Surveillance Authority (legal metrology) and to an independent accreditation organisation, the Estonian Accreditation Centre. The Estonian Centre for Standardisation became a full member of CEN and CENELEC on January 1, 2004.

Legal framework

The Technical Regulations and Standards Act provides among other the relationship between technical regulations, standards and technical specifications and the bases for the organisation of standardisation in Estonia.

The Act defines a technical specification, a technical regulation and a standard by using the definitions provided for in the Directive 98/34/EC of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations. The Act lays down also the conditions of making references to a standard in a legal act. According to the Act a technical regulation may refer to a standard. A reference to a standard shall be provided for as compulsory or recommended. Upon provision of a standard as compulsory in a technical regulation, the standard shall be an Estonian standard fully published in Estonian language.

In principle, standards are therefore voluntary documents. Although it is possible to make a standard or a part thereof compulsory by making a compulsory reference to it in a legal act, this practice is strongly not recommended by the Estonian Centre for Standardisation as it is not in line with the principles of standardisation – standards should not be compulsory to follow. In addition, the state has made all legal acts available for free on the Internet².

¹ Web-page of the Estonian Standardisation Centre: www.evs.ee

² Electronic State Gazette www.riigiteataja.ee

As a referred standard becomes a part of legislation it might create confusion among the subjects of the law as the referred standards are not available for free despite the fact that they are mandatory to follow.

Institutional framework

According to the Technical Regulations and Standards Act the Estonian National Standards body is a non-profit association. The interests of the state in the Estonian National Standards body shall be represented by a government agency as a member. The right to act as the Estonian National Standards Body is granted by the Government to one standardisation body – the Estonian Centre for Standardisation. The right to act as the Estonian National Standards Body has been prescribed in a contract under public law between the Government of the Republic and the Estonian Centre for Standardisation in which the rights and obligations of the parties have been determined. The term of the contract may be up to ten years.

Founders of the Estonian Standardisation Centre (EVS) are the state (representative: Ministry of Economic Affairs and Communications), the Estonian Chamber of Commerce and Industry and the Estonian Employers' Confederation. Presently, the founders are the only three members of the EVS. The highest body of the EVS is the general meeting of its members. The management board of the EVS consists of the representatives of its members. Every member has one representative. The Director General, who is responsible for everyday management of the EVS, is appointed by the management board.

EVS has also an advisory council which consists of representatives of the stakeholders who are interested and willing to participate in development of the EVS. The council, however, has no legal or administrative power.

Standardisation work is done by EVS technical committees and project committees. EVS has currently 33 technical committees and 2 project committees¹.

Standardisation procedures have been laid down in EVS guidelines:

- the procedure of drafting an Estonian standard;
- adoption of international and European standards in Estonian standards;
- establishment and working procedures of a standardisation technical committee and project committee;
- structure, formulation and presentation of standards.

The Estonian Centre for Standardisation is a full member of CEN and CENELEC, correspondent member of ISO and associated member of the IEC. The average number of employees in 2007 was 18.

State financing

The Estonian Standardisation Centre is funded from the state budget, membership fees, international co-operation projects and income obtained through providing services related to standardisation (including sale of standards).

According to the agreement between the Government and EVS the state is entitled to cover expenses of EVS related to:

- membership fees of international organisations;
- information services commissioned by the state, including the costs related to WTO enquiry point and standards library as well as the costs related to publishing the official journal of the EVS and other information intended for public use;

¹ The detailed list of the committees is available at <http://www.evs.ee/index.php3?lk=30>

- elaboration and publishing costs of standards included in national standardisation scheme or otherwise ordered by governmental organisations;
- proceeding of harmonised standards.

According to the Technical Regulations and Standards Act, the Minister of Economic Affairs and Communications has formed a standardisation committee which has among others the task of compiling every year the national standardisation scheme. The national standardisation scheme is a document which comprises a list of standards the preparation or transposition of which into Estonian standards is deemed essential by government agencies. Each appropriate ministry is represented as a member in the committee. The representatives of the ministries submit to the committee written proposals regarding the inclusion of Estonian standards into the standardisation scheme. The committee submits its proposals to the Minister of Economic Affairs and Communications. The standardisation scheme shall be approved by the Minister by December, 1 every year.

State financing constitutes approximately 70% of the total turnover of the EVS (5.9 million EEK in 2007). The rest comes from sales of standards (ca 29%) and from additional services including training (1%).

Access to the standardisation process

Information about standardisation

The Estonian Centre for Standardisation makes information available on request on their website (www.evs.ee) and by monthly newsletters. EVS publishes every month a standardisation programme where interested parties can find information about all standardisation projects and their status. The website has the following structure:

- information about standardisation organisations (EVS, European and international);
- products and services (trainings, WTO enquiry point, standards catalogue, official journal, publications, campaigns etc);
- information about standardisation (objectives, principles, structure, processes, technical committees, national standardisation scheme, terminology etc);
- e-shop with a search engine.

The newsletter is published monthly and available for free on the website¹. The content of the newsletter includes information about harmonised standards, WTO notifications, new Estonian standards, translations of standards for public consultations, European and national standards for comments, etc.

As regards active information policy, EVS offers to any interested person an opportunity to join an e-mail list called "information service". In the framework of this information service the clients receive every month an e-mail with the information published in EVS official newsletter. EVS has currently about 3 600 information service clients.

Members of the technical committees get additional information relevant for their field of activity from the EVS standardisation coordinator. This information covers recent developments in the field. Members of the technical committees are also informed about draft standards relevant to their field, documents for voting, etc.

For EVS it is a problem to find enough interested parties to whom they could give information. EVS seems to be very open to all interested parties and it tries to

¹ <http://www.evs.ee/index.php3?lk=159>

use every opportunity to raise awareness about standardisation within the limits of the budget available for these activities.

The stakeholders considered can be allocated in three groups. The first group consists of partners who participate very actively in the standardisation process or in general in the coordination of standardisation. They are therefore well-informed about standardisation and activities of the EVS. Those partners are the Ministry of Economic Affairs and Communications (MKM), the Estonian Technical Surveillance Authority (TJA), the Association of Construction Material Producers (EETL) and the Estonian Chamber of Commerce and Industry (EKTK). MKM as being responsible for the coordination of standardisation in Estonia receives its information mainly from direct contacts with the EVS. The representative of the Ministry is also a member of the board of EVS. The ministry is also well-informed about the opportunities to request and search standardisation information and they are also involved in raising awareness about standardisation by participating as lecturers in training organised by EVS. The same can be said about EKTK whose representative is head of the board of EVS. TJA and EETL are involved in the work on the technical committees and are therefore regularly informed about new and draft standards. EETL has emphasised that there is sometimes more information provided by EVS that a technical committee can handle.

The second group is formed by the Estonian Environmental Research Centre and Metrosert whose specialists are involved in the work of technical committees, but in general are more end-users of standards. Both organisations are aware of the role and activities of EVS, however they find it not necessary to participate in the standardisation process directly. They use the web-page in case they need information or standards and are in general satisfied with the information provided.

The Estonian Association of Architectural and Consulting Engineering Companies (EPBL) forms a unique category due to their understanding of the standardisation process. EPBL is of the opinion that as standardisation is heavily supported by the state budget in Estonia, standards should be available for free on the Internet. According to the information available to MKM and EVS there are no other organised stakeholders who share the opinion of EPBL.

Expenses to be paid by stakeholders to participate in standardisation

There are three member organisations of the EVS (founders): the state, the Estonian Chamber of Commerce and Industry and the Estonian Employers' Confederation. The Ministry and the Chamber are more involved in every-day activities of the EVS. The Employers' Confederation is an umbrella organisation of trade associations and these are the unions who are more active in standardisation.

The membership fee has been 767 Euros per year equal to all members since the establishment of the EVS and there are no plans to change it. There are also no plans to enlarge the number of EVS members and there have not been any requests to become a member.

Although it is possible to become a member of the EVS and the membership fee is not high, there are no direct benefits of the membership. It can be a reason why the number of the members still equals the number of the founders. Another reason can be awareness - EVS is still quite often considered to be a governmental organisation due to the historical reasons explained before and financing provided by the state. Government is also the biggest commissioner of standardisation work.

Most of the stakeholders who were not directly involved in management were not aware of the legal status of the EVS or about the opportunity to become a member.

As regards participation in technical committees, EVS does not charge anything for this. On the opposite, it is very much encouraged and EVS faces sometimes difficulties to attract stakeholders to participate. TCs can introduce participation fees internally and some TCs have done it. This decision is made independently from EVS and fees are therefore agreed between members of a TC. According to the information received from EETL their TC7 (concrete works) and TC9 (infilling materials) were more active in starting their work and the members have paid both an establishment fee and a participation fee. The amounts have been € 200 – 1,000. EETL covers also some activity cost from its budget.

Participation in European mirror committees is organised differently. There is no general support scheme provided by EVS. EVS has occasionally supported participation in some very important fields by covering direct expenses (accommodation and travel), but this has been more an exception than a rule. The smallness of the country, limited human and financial resources of the TCs and separate enterprises have resulted in the fact that Estonia hardly participates in European standardisation. Another problem is that EETL does not receive information from CEN TCs via e-mail. It takes several months to get an answer to a question. Physical participation in the work would probably ease the problem, but CEN TCs should use Internet much more. [cf. Recommendation 12]

There are also examples where the costs to participate in European TCs is covered by the state. E.g. the Ministry of Environment covers the costs of the participants from EKK (Estonian Radiation Protection Centre) and in case of TJA the costs of the experts or employers of the TJA are covered from the budget of TJA. TJA is member of ETSI. The practice of TJA and the Ministry of Environment is however not widespread. The other relevant ministries (MKM as well as Ministry of Social Affairs) do not cover the costs of participation.

Other conditions to participate in standardisation

In order to participate in the elaboration of a standard a person has preferably to be a member of a technical committee or a project committee or have a cooperation agreement with EVS. The procedures related to these committees are identical to everyone¹. In principle, any legal person established in Estonia can become a member of TCs. The only condition is the acceptance by the other members of the TC. A TC can introduce a membership fee if the members of the TC decide so. Participation in TCs is very much encouraged by EVS. However, trade associations and other stakeholders are invited to comment draft standards even if they are not members of the TC concerned. Draft standards can be studied for free in the premises of EVS. It is also possible to buy draft standards.

In order to participate in the work of a European technical committee, authorisation has to be received from the EVS. EVS in turn asks the opinion of the national mirror committee. In case there is no national mirror committee EVS uses its own experts for evaluation. EVS charges no fees from the experts.

The stakeholders did not bring out any obstacles to participate in the standardisation process in Estonia; the process was estimated to be adequate and relevant. The only problem that was mentioned several times was the lack of human and financial resources. That applies both to participation in Estonia and in the European standardisation process.

¹ See: EVS Guideline number 6.

Benefits for stakeholders to participate in standardisation

An employee of EVS did research in the framework of her master studies about satisfaction and interests of the participants in the standardisation process in 2006. Although the research did not differentiate stakeholders groups or cover direct estimations of the benefits it can be concluded that the most important benefit was the information advantage and better access to standardisation information.

Information advantage was also the most important benefit mentioned by the stakeholders. EETL has made an appropriate conclusion by saying that considering the smallness of the country Estonian stakeholders' opportunity to influence European standardisation is close to nothing (Estonia is a small economy and weighting of votes is applied in European procedures). This is in correlation with the input of Estonian entrepreneurs to European standardisation.

Other benefits mentioned are the usefulness of the standards that are produced during the participation process (EPBL) and the opportunity to translate some European standards into Estonian and to use them for regulatory purposes (TJA). As the vast majority of Estonian standards are international or European standards (ca 97%), the most important benefit brought about by EPBL is devaluated in Estonia. Most of the enterprises (including producers) are end-users of standards. Even the largest manufacturing enterprises are more involved in subcontracting and the standards used in the production process are prescribed by the main contractor. The construction sector and especially construction materials is the biggest exception in this model and also the most capable sector as regards participation in European standardisation. Enterprises involved in other sectors can be considered as end-users of standards.

MKM as the overall coordinator sees its benefit also in information advantage, but from a different point of view. Participating in the process gives them an opportunity to look at the processes as an insider. The information is used to improve the overall coordination and functioning of standardisation in Estonia.

Possibilities offered to interested parties to participate in strategic choices

Two most important organisations of enterprises are represented in the administrative board of the EVS. The third party is the state. In principle it would be possible to broaden the administrative board by adding more representatives of the stakeholders to the board¹. However, as already described before there has been no request from the stakeholders to participate in the administrative board. Moreover, both EETL and EPBL who are members of the Estonian Employers' Confederation expressed its satisfaction with the representation through the Confederation.

EVS does not have a technical board. EVS has an advisory council which consists of representatives of the stakeholders. The council does not have any legal or administrative power.

General assemblies are usually organised in writing as it consists of only 3 members and one of them being the Minister of Economic Affairs and Communications. It can be said that the general assembly is hardly involved in strategic choices of EVS. All the members of the general assembly have delegated this function to their representatives in the administrative board.

¹ See Statute of EVS.

Strategic choices about the standardisation agenda are made in cooperation with the interested stakeholders. As described before, standardisation in Estonia is quite heavily supported by the state. Therefore the debate about the standardisation agenda in the next period is mainly related to the debate about the national standardisation scheme funded by the state. All the interested parties are welcomed to make proposals to the scheme either to EVS or to the relevant ministry. The standardisation committee, formed by the Minister of Economic Affairs and Communications and consisting of the representatives of the relevant ministries (Ministry of Culture, Ministry of Agriculture, Ministry of Internal Affairs and Ministry of Social Affairs) is responsible for the final composition of the national standardisation scheme.

In addition to national standardisation schemes there are also some projects financed from the resources of EVS. Those projects are decided by the board of EVS. Again, all interested parties are welcomed to make suggestions.

All the stakeholders interviewed are aware of their possibilities to make suggestions in the national standardisation scheme and everybody (except from EPBL) is also satisfied with the possibilities offered to participate in strategic choices made by EVS. EVS is considered to be a competent organisation open to discussions. It has been emphasised by many stakeholders that participation in standardisation in Estonia is a matter of interest. Those parties who are interested have all the opportunities and procedures available.

Processes, procedures and support tools to promote access to standardisation

As has been described in the previous sections, in the case of Estonia the issue is not so much related to guaranteeing fair access to standardisation process, but rather to attract the relevant stakeholders to participate in standardisation at all. Therefore participation has been promoted by EVS and made free to everybody. Any legal person established in Estonia can become a member of a technical committee, read draft standards and comment on them for free. EVS participation guidelines can also be downloaded for free from the Internet.

There are no different strategies for different types of stakeholders, everybody is treated equally. It is easier for larger SMEs and for government-funded research organisations or laboratories to participate in standardisation due to the availability of more resources and competent personnel. The state supports standardisation through the Ministry of Economic Affairs and Communications by covering ca 70% of the activity costs of EVS as well as the fees to participate in the work of international and European organisations. This funding makes it possible to talk about standardisation in such a small country like Estonia at all. The relevant rules and procedures are described by the Technical Regulations and Standards Act and the agreements between EVS and MKM. Other ministries or agencies such as the Ministry of Environment, TJA or Estonian Rescue Board¹ support elaboration or translation of some standards occasionally. There are no other stakeholders who would be willing to financially contribute to standardisation (except from some enterprises participating in technical committees).

It would be worth to consider the fact that EVS devotes only ca 2.5% of its budget to awareness raising campaigns and trainings. Taking into account the

¹ The Rescue Board is a government agency operating within the Ministry of Internal Affairs, which has a directing function in planning emergency preparedness, operational management of rescue services and in exercising state supervision.

structure of the Estonian economy where the majority of the companies are committed to subcontracting allocation of more funds to awareness raising would probably not increase participation in standardisation; however, it could have some effect on the sales of standards.

Rules and procedures of the development of a standard

The EVS Guideline on operation of technical committees¹ establishes operational procedures of technical committees. It is suggested that all technical committees should consist of the relevant stakeholders – producers, consumers, education and research organisations, public authorities etc. According to EVS Guideline 2 – Procedures for developing Estonian standards - a standard will only be adopted as Estonian standard in case the relevant technical committee or working group that has elaborated the standard has built consensus on the standard. The methods of how to build consensus have not been specified in the guideline and the technical committee can therefore also use voting.

EVS does not have a special procedure for composing national delegations to European technical committees. In order to participate in the work of a European technical committee, authorisation has to be received from the EVS. EVS in turn asks the opinion of the national mirror committee. In case there is no national mirror committee EVS uses its own experts for evaluation. The ability of the representative to cooperate with different stakeholders is considered during the evaluation process as well as whether the person represents a sufficiently wide range of stakeholders. EVS does not usually authorise a single enterprise without the support of the relevant technical committee or interest group.

Public consultations are organised for the adoption of every Estonian standard. In case of elaboration an original national standard an information note is published in order to give an opportunity to all the interested parties to join the process. When the draft standard is ready EVS informs stakeholders about the draft standard and invites everybody to comment on it. The public opinion poll would last for 2 months. In case a European standard is planned to be adopted as Estonian standard the public poll lasts also 2 months. In case an Estonian standard is translated into Estonian the draft translation is also put on the public opinion poll that lasts 1 month. Information about new public consultations is published every month in the EVS newsletter as well as on the website. All drafts are available in electronic format and the comments are accepted via e-mail. There are no different procedures for harmonised standards.

In general the stakeholders were satisfied with the process of standards development². Most of them do not follow standardisation information on a daily basis (except from TJA and EETL). The general trust in EVS is good and the stakeholders believe that in case there is some important issue on which they have to comment, EVS will inform them separately.

Differences in the standardisation process

Awareness of different models that exist in standardisation is very low. Stakeholders are in general aware of the existence of different standardisation organi-

¹ See: EVS Guideline 6

² Unfortunately EPBL did not agree to comment on standardisation procedure as according to their opinion the whole process of standardisation should be nationalised or privatised. They are not satisfied with the situation where government participates in private organisation which is also committed to "standards business" (sale of standards). According to their estimation standardisation should be either a 100% public or 100% private activity with the requirement that standards are made available for free.

sations at international and European level, but not about their internal procedures. No stakeholder could list any other standardisation model. As regards consortia standardisation, the question is not relevant in Estonia as there are no companies that are large enough to be committed to consortia standardisation. EVS has no difficulties with different procedures for areas of CEN, CENELEC and ETSI. They are not able to comment on standardisation in private consortia because of a lack of information.

MKM is of the opinion that different organisations at international and European level make the system extremely expensive for a small country. Estonia would therefore prefer to have one single standardisation organisation at least in Europe to minimise membership fees and the costs related to administration and human resources. [cf. Recommendation 7]

According to the position of EETL, Estonia should not be committed to international standardisation and should concentrate only on European standardisation because of the limited resources.

Examples of less satisfactory functioning of the standardisation system

It seems that the standardisation system works properly in Estonia. EVS has no information that consensus could not be reached due to or in relation with conditions of access to the standardisation process. There have been very few examples of misusing the standardisation process, but EVS does not want to describe the details.

The rest of the stakeholders interviewed could not think of any negative experience or examples.

Actions to improve access to standardisation

EVS has the following ideas and plans to improve standardisation:

- EVS could cover the participation costs of experts who would like to participate in European standardisation. This has already been done in very few cases and the stakeholders are very interested in this service. The only problem is that it would demand resources either from the state budget or from EVS which in turn would result in price increase of standards, introduction of a fee to technical committees etc.
- EVS could spread more information about the benefits and opportunities stemming from participation in standardisation. The main target group would be entrepreneurs' associations. EVS acknowledges the importance of including consumer associations to the process of standardisation. However, so far the efforts have not been fruitful – the consumers do not have enough resources or interest.

According to the view of EVS the stakeholders should organise themselves more in order to participate in standardisation. It is very difficult for individual companies to find the necessary resources for participation. There are still stakeholders who are not aware of the international principles of standardisation and seem to live in Soviet times. Standardisation for them is a government-organised procedure and EVS is seen as an organisation with the only obligation to sell standards. It is necessary to raise awareness of the stakeholders and introduce the whole process of standardisation.

The majority of the stakeholders are satisfied with the access to standardisation and have no suggestions to improve it. The only suggestions received concerned the use of the Internet. EVS is currently in the process of improving its information systems and web-based access to standards is one outcome of this development.

MKM would centralise the overall coordination of standardisation even more. This concerns mainly the state budget. Every ministry is currently responsible for financing standardisation projects from its own budget. That has created a situation where some ministries are much more involved in standardisation than others. The proposal of the MKM is to concentrate these funds under the responsibility of MKM in order to guarantee more equal access to all stakeholders and better coordination of standardisation work.

From time to time there are complaints that standards are too expensive and if they were cheaper they would be used more. EETL doubts that and is of the opinion that the role of the price of standards is overestimated. For them the will to use standards is much more relevant. [cf. Recommendation 13]

EETL is much more concerned about the matters of construction materials and standardisation in this field. There is hardly any common system as regards to the Construction Products Directive and the standards related to this. Every member state has created its own system and the same should be done in Estonia. Coordination needs to be established in terminology, the level of details etc. EPBL however is of the opinion that price is the most important factor why standards are not enough used. According to their estimation there would be considerable increase in the use of standards if they were available for free on the Internet.

Access to standards and other standard documents

Conditions to obtain standards and other standard documents

There are equal conditions for members and non-members of EVS to obtain standards. The only preferred group are the members of technical committees who have free access to working documents. Also the members who participate in drafting a standard get a free copy of the standard. There are no differences as regards to different groups of stakeholders.

EVS uses some price reduction for students, university libraries and schools. It is also possible to get a discount while buying larger quantities. There are no specific arrangements to offer a tailor-made selection of documents for specific target groups.

EVS cannot provide statistics as regards to different stakeholders or target groups. The 5 most sold standards are original Estonian standards mainly in the field of construction. EETL who is the major stakeholder in the construction industry considers it very important that EVS has compiled several sets of series of testing standards related to construction products. Those have proven to be very useful for EETL both content and price-wise. It is not important for EETL to have other tailor-made selection of documents.

Most of the stakeholders are aware of the price reductions and special conditions for the technical committees. Better access to standards and other standard documents is suggested to be realised by better usage of the Internet. European standards organisations were suggested to use much more the Internet and e-mail than they currently do.

Standards and other standard documents available in national language

The decision whether to translate a European standard into the national language is made on the basis of whether there is an interested party who would be willing to finance the translation. There are no obstacles from EVS side to organise translation work. Whether translations will be financed by the state is decided by the standardisation committee in the framework of compiling the national standardisation scheme. Translations financed by the resources of EVS have to be very well justified. It means that the number of final beneficiaries, the importance of the standard and the translation costs are analysed prior to the decision.

Considering the smallness of the country only 5% of the standards stock is in Estonian (the only official language in Estonia). 4.1% of European harmonised standards are available in the national language.

The stakeholders have different opinions about the language issue. Some of them would estimate that if standards were available in Estonian, it would increase the use of them (EETL, ETKK, EPBL, TJA). Other organisations are of the opinion that the language does not matter as the persons using standards are usually experts in their field and therefore capable to use standards in other languages. Moreover, translations are never perfect and create therefore situations where standards in different languages could lead to different interpretations. Translating standards also causes delays in implementing them (EKK, Metrosert, MKM).

It seems that whether a standard is available in the national language is dependent on the sector – it is obviously more important in the construction sector where original standards are more used and less important for laboratories that are used to work with documents in English. Standards to which a mandatory reference has been made in a legal act form an independent category as such standards have become part of legislation and have to be in Estonian.

Information on availability of standards and other standard documents

EVS has made available a catalogue of standards on their website and in order to easily find a standard a search engine can be used in the web-shop. In addition, EVS publishes its official newsletter every month with the following information: information about harmonised standards, WTO notifications, new Estonian standards, translations of standards for public consultations, European and national standards for comments, etc. Stakeholders wishing to receive standardisation news as an e-mail are welcomed to join EVS information service.

In general the stakeholders are happy with information availability. The only exception is EPBL that supports the idea of having all the standards available for free on the Internet. All stakeholders use Internet and are aware of the opportunities provided by web-shop. Those participating in the work of technical committees, get information also via these committees. Most stakeholders are also aware of the information service and some of them are using it. Others consider it as too much and claim that they don't need such detailed and updated information (e.g. MKM).

EKK has proposed to update the information service and provide an opportunity to select some lists of standards and to get automatic notice in case there is new information about those standards. It could be very useful for accredited laboratories that have to use the latest versions of standards.

Use of the Internet

EVS offers an opportunity to receive information about standards available on-line and to order standards on-line (distribution by e-mail or by post). Other opportunities to use the Internet have been described in the previous sections. It is possible to have free access to draft standards in the premises of the EVS. Otherwise they should be bought. Comments on draft standards via e-mail are accepted by EVS. As regards to people with disabilities, their needs have unfortunately not been considered when developing the website.

All stakeholders interviewed are aware of the opportunities available on the webpage of EVS. Most of them are also aware that members of TCs receive draft standards for free. It is of utmost importance for stakeholders to have an opportunity to get information, comment on it and buy standards via the Internet.

[cf. Recommendation 12]

Other distribution channels

EVS has some cooperation agreements to sell standards, but these have not been effective. Considering the smallness of the Estonian economy and the sales numbers it is far too expensive to open a separate shop and as the price of standards in Estonia is among the lowest in Europe selling in commercial shops is not profitable.

The most reasonable and expected development in the field of distribution is improving the website of the EVS in order to make the search more effective and enable also downloads. Another objective of EVS is to make the complete set of standards accessible via the Internet. That would create considerably cooperation opportunities with trade associations, libraries and regions.

Most of the stakeholders are satisfied with the current situation and do not see the need for other distribution channels (EETL, EKTK, TJA, Metrosert, MKM). However, these organisations are situated in Tallinn (the capital of Estonia) and therefore the location is the same as EVS. If municipalities or organisations situated in other parts of the country would have been interviewed, the answers would probably have been more critical. Currently the only way to have a free opportunity to read standards exists only in the premises of EVS and in the largest libraries as the information system of EVS does not allow on-line access to EVS' database. However, as already said earlier, the web-based access is under development and starts operating in 2009.

User guides for standards

EVS has issued very few user guides due to the very limited market in Estonia and it is therefore not possible to estimate whether the guides are considered to be an appropriate response to the criticism concerning the complexity of the text of standards. The stakeholders are not very enthusiastic about the user guides. Some consider them to be helpful, others find them confusing. The major problem with user guides is however financing. In case there are not enough funds available to translate standards the state cannot afford to support elaboration of user guides. To finance them from the budget of EVS they would have to be financially profitable.

EVS has a client service offering information about standards and general standardisation issues. They do not provide assistance on how to implement a standard and they do not explain the content of standards. There are few consultancy organisations that are able to advice about the implementation of stan

dards (mostly quality management series). EETL provides regularly a small overview about standardisation to its members. The overview is concentrated on construction products and explains the requirements of the construction products directive. EPBL offers its members also consultations about standardisation and the use of standards.

Collection of standards

According to the information received from EVS nobody has ever wanted to get a complete collection of standards. There have been requests to have access to the collection of standards. In principle it would be possible to provide collections of standards, but not as a separate product. For this the rules and conditions are not in place. The full collection of ETSI standards is available both in EVS and TJA as TJA is a member of ETSI. TJA uses the full collection of ETSI standards. As regards to targeted collections, they have been introduced in few areas such as construction and electricity. EVS has plans to develop in the future such specific sets of standards. Trade associations such as EETL would appreciate if specific sets of standards would be available and they would use them. The same applies to TJA who would appreciate the set of IEC CISPR standards that could be used for market surveillance purposes. EKK as a laboratory could also use a set of standards in case a new field is introduced in their laboratory. An opportunity to have the full set of standards could ease the introduction.

Availability of other documents than approved standards

It is possible to buy technical specifications and workshop agreements from EVS. The bases of availability are the same as in case of approved standards. It means that the members of technical committees have usually free access to these documents and other interested stakeholders have an opportunity to get acquainted with the documents in the premises of EVS or to buy them.

Annex 2 Organisational changes in the Czech Republic

Introduction

Chapter 2 provided an overview of European standardisation to serve as a framework. However to illustrate that the European system is not a homogeneous structure in which only well known large organisations such as DIN and BSI operate, two cases have been selected to be described in an annex:

- Annex 1: The overall situation with regard to standardisation in Estonia;
- This Annex 2 - The recent changes in the organisational structure in the Czech Republic towards a more directly state controlled standardisation system.

Organisational change in the Czech Republic

The Czech Standards Institute (CNI) stopped being an independent organisation on December 31, 2008 and became part of the Czech Office for Standards, Metrology and Testing (COSMT, in Czech language: UNMZ¹). COSMT is a budgetary organisation subordinated to the Ministry of Industry and Trade. COSMT's mission is to perform tasks set out in Czech legislation on technical standardisation, metrology and testing and tasks related to the harmonisation of Czech technical regulations and standards with the technical regulations of the European Union.

Until now, CNI acted as independent institution that cooperated with COSMT on issuing technical standards. CNI was responsible for the development of standards according to the needs of interested parties. It used contracted parties for standards development.

The aim of this transformation is to improve access to standards by the technical community and all other stakeholders. The idea is that standards should be more comprehensive and cheaper to obtain. Printed standards will cost about 50% of the current price and IT will be used more broadly and effectively. It will allow a user in one technical field to have easier access to quoted standards in other fields. State institutions as well as industry including SMEs will be more involved to improve tuning the state economic policy to entrepreneurial needs of industry and SMEs.

It will also be easier to harmonize standards development on national, European and international levels already in the initial phases. This system will prefer those developers of standards that can cover wider and more complex technical areas to improve consistency and comprehensiveness of standards. It will be easier to better coordinate technical terminology and forms how standards are presented. These important developers will be marked as 'Centres of Technical Standardization' (CTS).

National standards committees² (TCs) will keep their role as advisory bodies for the National Standards Body. Their task is a complex assessment of standards development in the field of their technical competence and suggesting to the National Standards Body adequate solutions. The activity of TCs is based on integrating interests of different stakeholders to achieve effective solutions in tech-

¹ COSMT was established by the Czech National Council Act No. 20/1993 Coll. as the Organisation of the State Administration in the Field of Standards, Metrology and Testing.

² The official name in the Czech Republic is Technical Standards Committee (TSC).

nical standards. All interested parties can nominate members to TCs. In relation to the above mentioned new approach to standards development tasks, it will be necessary to assess individual TCs from the viewpoint of their abilities to adopt new methods, harmonize needs of all stakeholders and achieve set goals.

As concerns the development of standards, only 10% are original Czech standards in areas where European or international standards do not exist. About 90% are adopted European or international standards from which about 60% are translated into the Czech language.

To summarize changes in the standards development system and their goals, it can be said that it should combine advantages of centralized coordination with the creative potential of independent interested parties. It is expressed in the following points.

- In the new system IT should dominate in development as well as in the distribution of standards.
- This is the main tool for attaining lower prices and to make technical standards as well as standard development process better accessible especially for SMEs, research fellows and their teams, technical schools and universities.
- Standards development should better coordinate needs and contributions of all interested parties and make the system of standards more effective, coherent and comprehensible.
- It should create a new impulse for broader usage of technical standards. While standards are based on new results of science, research and practical skills, they can effectively force technical and economic development.

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<p>Smith, Adam, An Enquiry into the nature and causes of the Wealth of Nations, 1776</p> <p>In this economists’ classic an important issue is the division of labour. It marks the beginning of the value chain. No longer one craftsman that controls the entire process from the raw material up to the final product, but production broken down into a series of linked activities. Standards obvious play an important role in making this possible.</p>

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ANNEX A4



Brussels, 22.11.2018
COM(2018) 764 final

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE**

**Harmonised standards: Enhancing transparency and legal certainty for a fully
functioning Single Market**

The Commission has presented today a first response to the request of the European Council in March 2018 to assess the state-of-play, as well as the remaining barriers and opportunities for a fully functioning Single Market.¹

Standardisation plays an important role in this assessment considering, in particular, its role in eliminating technical barriers to trade. Standards help to ensure that complementary products and services are interoperable, facilitate the introduction of innovative products and ultimately build trust of European consumers in the quality of products and services offered in the Union. In the context of rapidly evolving technological developments, the digitisation of the European economy and newly emerging economic trends and growth models, standardisation plays a key role in ensuring that the development of the Single Market is future-proof and that European consumers and businesses reap the benefits from such changes².

European standards replace potentially conflicting national standards in all Member States of the Union and so, facilitate market access for those that use them. In this way, standards contribute to a continuous deepening of the Single Market. By promoting a close alignment of European and international standards, the European Union promotes best practices and increases synergies in global value chains. This enhances trade flows and opportunities for European businesses to scale up their activities.

A European standardisation system that functions well contributes to overall economic growth, supports innovation and global competitiveness of the European industry. It also helps to ensure that the levels of safety, health and consumer and environmental protection set out in Union legislation are met in practice³. European industry is transforming rapidly through the adoption of a wide range of innovative solutions and digital technologies. Traditional sectors of the economy are also concerned by this trend. All have needs that require standardisation responses, supported by advanced European standards and developed by a modern and agile European standardisation system.

This Communication provides an overview of the functioning of the European standardisation system and takes stock of the initiatives launched in recent years to support the implementation of the Standardisation Regulation, also in the light of the relevant case law of the Court of Justice of the European Union. The Communication explains the actions taken recently by the Commission to further improve the system and also includes specific actions that the Commission will take in the immediate future in order to enhance the efficiency, transparency and legal certainty for the actors involved in the development of harmonised standards. This Communication is relevant in the context of harmonised standards, that is, European standards adopted on a basis of a request made by the Commission for the application of Union harmonisation legislation.⁴

The European standardisation system is based on a public-private-partnership between the Commission and the standardisation community. Its uniqueness lies in the use of harmonised standards. These standards become part of Union law and, when used, provide manufacturers across the Single Market with a presumption of conformity with the requirements of Union

¹ COM(2018) 772.

² For instance, further development of the circular economy in the Union requires the setting up of high quality standards for secondary raw materials such as plastics or waste-based fertilisers.

³ Harmonised standards also cover social inclusion issues, such as accessibility. The European Accessibility Act uses standards to provide presumption of conformity.

⁴ It is not applicable to other types of standards, i.e. international standards, European (non-harmonised) standards, national standards, technical specifications etc.

legislation. This provides important legal certainty to users of harmonised standards and is particularly important for small and medium-sized enterprises as it allows them to place products in compliance with Union legislation on the market without additional costs. The so-called ‘New Legislative Framework’ has been designed as a flexible and market-driven system built around consensus by industry, small and medium-sized enterprises and other key stakeholders, while ensuring that products conforming with harmonised standards comply with Union legislation.

The use of harmonised standards offers legal certainty and stability to users, which reduces costs for manufacturers. This in turn is important for investors but it also creates increased public responsibility on the regulators, who must oversee these harmonised standards appropriately.

Since it entered into force in 2013, Regulation 1025/2012 (hereafter ‘the Standardisation Regulation’)⁵ has provided the main legal framework for the European standardisation system including the division of responsibilities and obligations of the actors involved. Certain improvements to the practical implementation of this framework need to be made swiftly, notably in light of the case of law of the Court of Justice of the European Union.

1. FUNCTIONING OF THE EUROPEAN STANDARDISATION SYSTEM

Harmonised standards are developed by one of the three European Standardisation Organisations⁶ on the basis of an official request from the Commission (‘standardisation request’), in order to support the implementation of Union legislation. These standardisation requests define what is expected from the European Standardisation Organisations. In particular, they specify which harmonised standards need to be produced, and by when. The Commission develops the standardisation requests in an inclusive and transparent process together with Member States.

The Commission and the European Standardisation Organisations ensure that the process of developing harmonised standards is based on consensus and is transparent and inclusive. In particular, the Commission closely monitors whether the input of small and medium-sized enterprises and stakeholders representing all parts of society, such as consumers, workers and environmental interests, is taken into account in the process as their contribution enhances the quality of the standards. Once the European Standardisation Organisations have developed a harmonised standard, the Commission assesses whether it complies with the requirements of corresponding Union legislation and the original standardisation request. If the Commission concludes that the standard is in compliance with the request and Union legislation, it will decide to publish its reference in the Official Journal of the European Union. As a result, and following a Commission decision to publish the reference in the Official Journal, the standard will produce legal effects under the relevant Union legislation.

Products manufactured in compliance with harmonised standards benefit from a presumption of conformity with the corresponding legislative requirements⁷. By using the harmonised

⁵ OJ L 316, 14.11.2012, p. 12–33.

⁶ The European Committee for Standardisation (CEN), the European Committee for Electrotechnical Standardisation (CENELEC), and the European Telecommunications Standards Institute (ETSI).

⁷ There are many other acts of Union legislation that mirror the system laid down in Regulation (EU) 1025/2012 such as Regulation (EU) 305/2011 (Construction Products Regulation), Directive 2001/95/EC (General Product Safety Directive). For ease of reference, they are not examined separately in this Communication. However, the general considerations addressed in this Communication also apply to these acts.

standards, the manufacturer may benefit from a simplified conformity assessment process. In this way, harmonised standards reduce the financial and administrative burden for manufacturers, particularly small and medium-sized enterprises, and increase legal certainty as regards the compliance of products with the Union legislation. That legal effect and certainty are crucial for small and medium-sized enterprises as it allows them to manufacture state-of-the-art products in a competitive way⁸.

The Commission must therefore pay particular attention to the content of the harmonised standards. The Court of Justice of the European Union has further reinforced this requirement in its recent case law, in particular by the Case C-613/14 'James Elliott Construction Limited vs. Irish Asphalt Limited'⁹. Through this judgment, the Court clarified the role and legal status of harmonised standards by concluding that harmonised standards 'form part of EU law', even though they are developed by independent private organisations and their use remains voluntary.

In addition, the Court reiterated the Commission's responsibility in the process of initiating, managing and monitoring of harmonised standards. The Commission has thus the obligation to follow the development process of harmonised standards thoroughly and to assess whether they comply with the requirements set out in harmonised Union legislation and/or standardisation requests in order to ensure that harmonised standards fully comply with the applicable legislation. This does not only include the technical aspects of standards but also other elements of the European Standardisation Regulation, such as whether their development process has been inclusive. It is the Commission's intention to fulfil these obligations in a manner which is as swift and efficient as possible.

2. IMPLEMENTING THE STANDARDISATION REGULATION AND THE RELEVANT CASE LAW

Following the entry into force of the Standardisation Regulation in 2013¹⁰ and several judgments of the Court of Justice of the European Union, the Commission has launched a number of initiatives to support the implementation of the legal framework and to improve how the European standardisation system functions in practice.

In accordance with the Standardisation Regulation¹¹, the Commission has adopted Annual Union Work Programmes for European standardisation, highlighting the importance of harmonised standards, their legal effect (presumption of conformity), and their quality and timeliness. In addition to planning the work on the development of harmonised standards, these programmes have also put forward specific proposals to improve the governance of the European standardisation system, such as prioritising the European Union financial contribution to the European Standardisation Organisations on direct technical support to the development of harmonised standards. Moreover, the Commission has also given clear directions to the European Standardisation Organisations in the Annual Union Work Programmes, to strengthen the involvement of small and medium-sized enterprises and societal stakeholders in the European standardisation process.

The Commission has also taken several initiatives to make its standardisation policy more transparent and accessible. To ensure that the Standardisation Regulation is implemented correctly, the Commission's services have provided guidance on the role, development,

⁸ The construction product sector is subject to important deviations from general practices in standardisation.

⁹ See also e.g. case T-474/15 Global Garden Products and C-630/16 Anstar.

¹⁰ Replacing the standardisation provisions of Directive 98/34/EEC.

¹¹ Article 8 of Regulation (EU) 1025/2012

adoption and execution of standardisation requests in a 2015 'Vademecum on European standardisation'¹². This document was prepared in full partnership and cooperation with the European Standardisation Organisations, small and medium-sized enterprises and societal stakeholders, together with Member States and industry. The Commission has also developed a common template for publishing the references of harmonised standards in the Official Journal of the European Union as well as a 2016 guidance document on the 'Verification of conditions for the publication of references of harmonised standards in the Official Journal'¹³.

In line with the 2015 Single Market Strategy¹⁴ and the Standardisation Package¹⁵ adopted on 1 June 2016, the Commission has set out a shared vision for European standardisation in its Joint Initiative on Standardisation (the "Joint Initiative"), supported by a broad range of stakeholders and all Member States. The aim of the Joint Initiative is to ensure the Union's sustained efforts to modernise the European standardisation system so as to maintain its attractiveness, to keep pace with developments, such as digitisation, within an agile, flexible, and inclusive framework and to speed up and better prioritise standard setting to respond in a timely way to market and users' needs. Specific actions of the Joint Initiative are dedicated to raise awareness and to improve the development and implementation of harmonised standards. The Joint Initiative also looks at the role of standards in addressing the challenges of the digital transformation of the economy. This digital transformation of the economy creates the need to accelerate the transformation of the European standardisation to make it fit for current and future challenges, in particular in an area such as Internet of Things, big data, advanced manufacturing, robotics, 3D printing, blockchain technologies and artificial intelligence. A modern, agile and inclusive European standardisation system which can react quickly to new developments will help to speed up the diffusion of these new technologies.

In 2017, the Commission and the European Standardisation Organisations reached an agreement on a joint Action Plan to address the issue of harmonised standards which are not cited in the Official Journal following a negative assessment by the Commission. This issue was raised by the REFIT Platform¹⁶ and by several stakeholders, as it impacts the sound functioning of the European standardisation system. To respond to this concern, the Commission has prioritised the rapid decrease of the backlog of such harmonised standards, in cooperation with the European Standardisation Organisations. Dealing with the remaining backlog remains a priority for the Commission.

First Action: *The Commission will use its best endeavours to eliminate the remaining backlog as rapidly as possible.*

To ensure the timeliness and the efficiency of the citation of compliant harmonised standards in the Official Journal, it is useful to identify emerging issues as early as possible in the development process. The Commission has set up a framework of consultants for such purposes. The consultants provide Commission services with technical assistance in assessing draft harmonised standards, thereby contributing to strengthening further the Commission control of the consistency of harmonised standards with the relevant legislation.

To enhance coordination within the public-private standardisation partnership, the Commission and the European Standardisation Organisations have held regular structural

¹²SWD(2015)205 final of 27.10.2015, http://ec.europa.eu/growth/single-market/european-standards/vademecum_en

¹³ <http://www.cc.cec/Ares/ext/documentInfoDetails.do?documentId=080166e5ae43cdde>

¹⁴ COM(2015) 550 final

¹⁵ COM(2016) 358 final

¹⁶ REFIT Platform opinion XXII.2.b.

dialogues. These dialogues have focused on technical and policy aspects of European standardisation, including on matters related to the quality of harmonised standards and the impact they have on businesses, markets and consumers.

To promote a stronger involvement of co-legislators in the process of priority-setting for European standardisation, the Commission organised in June 2018 an inter-institutional dialogue. The dialogue included high-level representatives of European Union institutions, standardisation organisations, businesses (including small and medium-sized enterprises) and other relevant stakeholders, such as consumers, workers and environmental organisations. It focused on priority issues relevant to the process of developing harmonised standards and future priorities in this area, such as the digitisation and the booming collaborative economy.

The inter-institutional dialogue and the discussions with the key actors in the European standardisation system have highlighted the need to further enhance legal certainty to ensure that the Union legislative framework for standardisation is interpreted uniformly, in particular in light of the Standardisation Regulation, the case law of the Court of Justice of the European Union and the guidance documents.

3. FURTHER ACTIONS TO ENHANCE TRANSPARENCY, REINFORCE LEGAL CERTAINTY AND SPEED OF ADOPTION

While significant progress has been made, the Commission recognises that the efforts to improve the functioning of the European standardisation system need to be sustained. To this end, the Commission will take a set of dedicated, immediate actions to further enhance the transparency and efficiency of the European standardisation process. This will reinforce the legal certainty for stakeholders and users and clarify the roles and responsibilities of the different actors.

The Commission is reviewing its internal decision making processes with a view to streamlining the procedures for publishing the references to harmonised standards in the Official Journal¹⁷. This review is based on best practices within the framework of the Commission's internal rules of procedure and will ensure a co-ordinated, timely and thorough preparation of the necessary decisions.

Second Action: *The Commission is reviewing its internal decision making processes with a view to streamlining the procedures for publishing the references to harmonised standards in the Official Journal.*

In order to further clarify the roles and responsibilities of the different actors during all stages of the harmonised standards development, the Commission will prepare a guidance document.

This guidance, complementing existing documents¹⁸ will in particular explain the substantive and procedural aspects of the new format of the standardisation request which the Commission is developing with the aim of ensuring greater transparency and predictability in the development of the standards. It will also clarify the role of the Commission and its expert consultants. Finally, it will provide additional guidance to improve the consistency and speed of the assessment procedure of harmonised standards across the all relevant sectors.

Third Action: *The Commission will elaborate over the next months in consultation with stakeholders, a guidance document on practical aspects of implementing the Standardisation*

¹⁷ As of 1 December 2018, these Decisions will be taken by accelerated written procedure by the Commission.

¹⁸ Vademecum on standardisation, the Blue Guide etc.

Regulation, paying particular attention to the division of roles and responsibilities in the development process of harmonised standards as well as to efficiency and speed.

In order to ensure better upstream coordination in the process of assessing harmonised standards, which the European Standardisation Organisations are in the process of developing, the Commission will continue to rely on the scientific input of the Joint Research Centre and, at the same time, will reinforce its liaison with the technical committees in charge of developing standards through the recently introduced system of expert consultants. The goal will be to maximise the speed, quality and accuracy of the assessments to improve the quality of the process and to ensure that the references to harmonised standards are published as quickly as possible in the Official Journal. Measures will include:

- reinforcing links between the relevant Commission services in charge of harmonised legislation and the technical committees in charge of developing harmonised standards;
- expanding the pool of expert consultants and their skills-sets to ensure the expertise required for high-quality assessments and the resilience of the system;
- refining the structure of the work procedures and task allocation to expert consultants;
- focussing on continuous quality review of the consultants' input; including training programmes for expert consultants;
- enhancing the horizontal coherence of the assessments by applying streamlined guidance across all sectors;
- appropriate management of possible conflicts of interest.

Fourth Action: *The Commission will reinforce, on an on-going basis, the system of consultants to support swift and robust assessments of harmonised standards and timely citation in the Official Journal of the European Union.*

CONCLUSION

The European standardisation system has been instrumental for the development of the Single Market. The presumption of conformity with the relevant Union legislation provides important legal certainty to all standard users and small and medium-sized companies in particular. The Standardisation Regulation, which came into force in 2013, introduced a new division of roles and responsibilities of the actors in the system based on a public private partnership. It also established a strong framework for inclusiveness requirements, allowing interests of small and medium-sized enterprises, consumers and workers, as well as environmental interests to be taken into consideration in the standardisation process. The joint objective of all partners in the European standardisation system is to ensure that the Standardisation Regulation and other relevant Union laws are implemented as effectively as possible.

The Commission is entrusted with the responsibility for the assessment of European harmonised standards. The Commission also needs to ensure that these standards are compatible with the requirements of the relevant harmonised Union legislation. The case law of the Court of Justice of the European Union has confirmed the importance of this responsibility and highlighted its legal implications.

While the current system is functional, the Commission recognises that further improvement is necessary. The four actions outlined above will be initiated immediately in order to achieve

further progress with regard to inclusiveness, legal certainty, predictability and the rapid delivery of the benefits of harmonised standards for the Single Market. Innovation and the protection of citizens and the environment are also key objectives in this context. The Commission will continue to work with all relevant partners to ensure the continued success of European standardisation as a cornerstone of a fully functioning Single Market.

ANNEX A5



2017

ANNUAL REPORT

The logo for the European Committee for Standardization (CEN), featuring the lowercase letters 'cen' in white on a dark blue square background, with a white swoosh underneath.

European Committee for Standardization

ANNUAL ACCOUNTS



www.cen.eu

ASSETS (€ x 1000)*	2015	2016	2017
Fixed Assets	196	191	1 093
Current Assets	3 912	3 238	4 299
Liquid Assets	10 691	11 985	9 532
Prepaid Expenses and Accrued Income	143	406	159
TOTAL	14 942	15 820	15 083

LIABILITIES (€ x 1000)*	2015	2016	2017
Reserves	3 602	3 742	3 475
Provisions for liabilities and charges	1 368	1 371	972
Payable	4 741	3 299	3 731
Accrued expenses & deferred income	5 231	7 408	6 905
TOTAL	14 942	15 820	15 083

EXPENDITURE (€ x 1000)*	2015	2016	2017
Staff costs	6 549	6 828	7 359
Other operating costs	2 677	2 224	2 233
Contractual expenses	13 110	7 731	14 828
Office move project costs	–	–	284
Office move project / Use of provision	–	–	- 284
Reserve for investment	–	140	–
TOTAL	22 336	16 923	24 420

INCOME (€ x 1000)*	2015	2016	2017
Contributions	5 816	6 278	6 808
Interest	36	18	3
Contractual income	16 366	10 454	17 153
Miscellaneous	118	173	189
Loss of the year / Use of Social Reserve	–	–	267
TOTAL	22 336	16 923	24 420

FINANCING OF THE CEN-CENELEC MANAGEMENT CENTRE (CEN Part)	2015	2016	2017
Membership fees	63%	69%	71%
EC/EFTA support to standardization	35%	29%	24%
Other support	2%	2%	5%
TOTAL	100%	100%	100%

* Figures are given in thousands of euro.

ANNEX A6

**GENERAL GUIDELINES FOR THE COOPERATION BETWEEN CEN, CENELEC AND ETSI AND
THE EUROPEAN COMMISSION AND THE EUROPEAN FREE TRADE ASSOCIATION**

28 March 2003

(2003/C 91/04)

1. GENERAL

CEN, Cenelec, and ETSI on one side and the European Commission and the European Free Trade Association (EFTA) on the other side, confirm that standardisation is a voluntary, consensus-driven activity, carried out by and for the interested parties themselves, based on openness and transparency, within independent and recognised standards organisations, leading to the adoption of standards, compliance with which is voluntary ⁽¹⁾. They take note that because of the public recognition ⁽²⁾ of the organisations that issue them, and by compliance with specific procedures, including a public enquiry and a vote, standards (ENs) thus adopted are distinct from other technical specifications established on a voluntary basis.

CEN, Cenelec, ETSI, the European Commission and EFTA acknowledge that standards should be fit for purpose, have a high degree of acceptability as a result of the full involvement of all relevant parties in the standardisation process, be coherent with each other and allow for technological innovation and competition; that therefore they should be based on sound scientific research, be updated regularly, and be performance-based, where possible ⁽³⁾.

Although standardisation is a voluntary and independent activity, CEN, Cenelec, ETSI, the European Commission and EFTA recognise that it has an effect on a number of areas of public concern, such as the competitiveness of industry, the functioning of the single market and the environment. On various occasions the EU institutions and EFTA have recognised that standardisation can play a role in public policy and support legislation.

This understanding was first established in 1984, and laid down in the General Guidelines for Cooperation between the European Commission and CEN and Cenelec, agreed on 13 November 1984, and published as CEN/Cenelec Memorandum No 4, Part 1. Since then, however, the situation has evolved and they agree that these Guidelines should be updated in order to take account of this evolution.

Equivalent agreed guidelines were signed between EFTA and CEN and Cenelec on 30 April 1985 (published as CEN/Cenelec Memorandum No 4, Part 2). A revised version of these was

⁽¹⁾ Council Resolution of 28 October 1999 on the role of standardisation in Europe, point 11 (OJ C 141, 19.5.2000).

⁽²⁾ Council Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 204, 21.7.1998).

⁽³⁾ Council Resolution of 28 October 1999 on the role of standardisation in Europe, point 12 (OJ C 141, 19.5.2000).

adopted by the EFTA Council on 30 October 1992, taking especially into account the extended status attributed to standards in the EFTA States by the Agreement on the European Economic Area (EEA).

2. THE EVOLUTION OF EUROPEAN STANDARDISATION

CEN, Cenelec, ETSI, the European Commission and EFTA consider that the new Guidelines should take into consideration the following elements, presenting notable changes with respect to the situation which existed in 1984 and 1985 respectively:

— Whilst in 1984 there were only two European Standards Organisations, with the recognition under Directive 98/34/EEC of the European Telecommunications Standards Institute, ETSI, there are now three European Standards Organisations, i.e., CEN, Cenelec and ETSI.

— With the EEA Agreement, the EFTA States party to the Agreement committed themselves to participating in the Single Market, with the same rights and obligations as the EU Member States. The Agreement created the same legal basis for the use of standards in the EFTA EEA States as exists in the EU.

— Standardisation activities in Europe have moved substantially from the national level to the European and international level. The role of the national standards organisations has, in consequence, taken a new dimension in the context of European and international standardisation. The national standards bodies will, however, continue to play an important role in international and European standardisation. They contribute on a national level to consensus, in many cases provide support to the technical work, are a permanent link between market players, in particular SMEs, consumers and environmentalists, and provide access to, and advice on, both international and European standards. The official adoption through public enquiry and formal vote on European standards (ENs) is carried out by the national standards bodies.

— Economic and social interest groups and relevant organisations, namely NGOs have shown an increased interest in European standardisation, and, organised at the European level, they now have increased possibilities of access to the European standards-making process and various structures within CEN, Cenelec and ETSI. However, this does not diminish the need for their involvement at national level.

- High levels of environmental and consumer protection have become fundamental objectives under the EC Treaty. Subsequently, environmental and consumer considerations need to be systematically integrated into other policy areas and sectors of society. This development also concerns European standardisation.
- European standardisation is acknowledged as playing a key role for the economic and political integration of the candidate countries into the European Union; and conversely, these countries are increasingly participating in the work of the European Standards Organisations.
- With the globalisation of the economy, international standards have become a major factor for Europe. The importance to be attributed to international standards has been confirmed by the WTO, notably the Agreement on Technical Barriers to Trade and the WTO decision on principles for the development of international standards used under the Agreement⁽¹⁾, as well as by the Commission's services in the staff working paper SEC(2001) 1296 on European policy principles on International Standardisation of 26 July 2001.
- The needs of the market for technical specifications have been subject to change and they differ by sector. In addition, industrial sectors are becoming more interrelated, and the traditional boundaries between them are becoming less distinct, thus reinforcing the need for a strong cooperation between the European Standards Organisations and the way in which standards are made.
- The use of standards in public policy has evolved. Apart from the continuing need to complete the internal market, encouraging competitiveness and information technology, there are new areas in which policy makes increasing use of standards, such as safety in the work place, consumers and the environment, transfer of research results to the market, and the establishment of trans-European networks.
- The rapid development of technologies and processes in the Information and Communication Technology (ICT) has led to a need for the equally rapid elaboration of new types of publications. Taking account of these developments, the European Standard Organisations have developed new deliverables which do not have the status of formal standards (ENs).
- With regard to the possible restrictions to competition caused by horizontal cooperation agreements between companies operating on the same market level(s), the

Commission published a notice on the applicability of Article 81 of the EC Treaty⁽²⁾. In this notice, standardisation agreements are considered to be a type of horizontal cooperation agreement, either concluded between private undertakings or determined under the aegis of public bodies or bodies entrusted with the operation of services of general economic interest, such as the standards organisations recognised under Directive 98/34/EC. The notice also states that, in principle, standardisation agreements do not restrict competition if the standards are adopted by the recognised standard organisations, based on non-discriminatory, open and transparent procedures.

- Standardisation has acquired a high political profile. This reflects the unique position of standards in contrast to other forms of specification and creates a correspondingly enhanced obligation to observe the principles of transparency, openness, consensus, independence, efficiency and coherence.

For these reasons, CEN, Cenelec, ETSI, the European Commission and EFTA wish to confirm their mutual understanding on a number of policy objectives and the role of standards in that context, on the principles of their relationship and cooperation, and on their present intentions for the attainment of these objectives.

3. COMMON POLICY OBJECTIVES

CEN, Cenelec, ETSI, the European Commission and EFTA have a common understanding that standardisation plays an important role for the European market, for the competitiveness of enterprises and that it constitutes an important instrument in support of European policy reflecting the public interest. European Standardisation policy objectives are, therefore, as follows:

- To play a role in the completion of the internal market, facilitating the free movement of goods and services and ensure sustainable development, having a high level of safety and quality and taking into account all economic, social and environmental aspects. Under the New Approach, harmonised European standards provide technical solutions for presumption of conformity with legal requirements; they constitute a common and transparent reference for public procurement; they contribute to the elimination of technical trade barriers; they encourage environmentally sound development of products; and they provide a source of common reference for trade and national and European legislation, thus promoting European technical integration.
- To help attain the goal of high environmental protection.

⁽¹⁾ Annex 4 of G/TBT/9, 10.11.2000.

⁽²⁾ OJ C 3, 6.1.2001, pp. 2 to 30.

- To constitute a tool for the advancement of European competitiveness and to allow for technological innovation. European standards provide a common, yet flexible, technical environment across the single market and constitute accepted references for quality, certification, and regulatory compliance; they encourage technical cooperation and the exchange of expertise and provide entrepreneurs with an opportunity to exploit economies of scale.
- To provide a graduated range of types of deliverables that respond to different market needs.
- To provide a flexible and transparent mechanism for consensus building on identified issues in Europe. The basis of consensus necessary to meet the needs of the parties concerned (including the public authorities) varies according to the industrial sector, the relationship to the regulatory environment and factors such as safety and the potential for harm to the environment.
- Through participation by their respective members in the international work, to promote Europe's interests in the global economy and create conditions for access to world markets; standards provide a means of reference for technical cooperation, assistance and Mutual Recognition Agreements (MRAs) with third countries. It is of utmost interest that international standards be uniformly adopted and applied when legitimate objectives can be ensured, i.e. the protection of human health and safety, animals or plant life and/or the environment.
- To provide candidate countries and neighbouring countries with a major tool for the facilitation of adaptation of their economies to the Community market and to promote sustainable development, economic and technological integration or cooperation.
- To provide a mechanism for economic and social partners in Europe and other relevant interest groups, namely NGOs, that might not otherwise be involved but who have a legitimate interest in the outcome, to be involved in the process of standardisation. This constitutes a means for them to play an active role in relation to public interests such as protection of the environment, workers, and consumers. It allows them to contribute to sustainable development and to safeguard the public interest in areas where co-regulation or self-regulation is considered preferable to outright regulation.
- Relations between the European Standards Organisations and the public authorities at a European level should be based on their acknowledgement of the common objectives set out in detail in section 3 above, bearing in mind their distinct responsibilities and competencies. They emphasise that a permanent, open and transparent dialogue between them is a fundamental basis for cooperation.
- The national member bodies of CEN and Cenelec and the members of ETSI have a vital role in the cooperation between the European Standards Organisations, the European Commission and EFTA. Cooperation between all the relevant bodies and common understanding of the objectives set out in section 3 above is essential for these guidelines to be successful.
- The institutional rules of the European Standards Organisations should ensure that European standardisation, in particular where it supports European policies and Community regulation, remains fully accountable to all the interested parties in Europe, that is, that the standardisers take into account the broadest possible range of views in drawing up standards and other documents and that the procedures (during development, inquiry and voting) are open and transparent.
- The European standardisation system has a broad responsibility to all interests, including industry, workers, consumers, environmental interests, public authorities, and in consequence must not act on the basis of vested interests.
- Coherence, at all levels and between the three European Standards Organisations, should be ensured in the planning, execution and implementation of standardisation programmes and activities carried out by the European Standards Organisations, where applicable through the approval and implementation activities at national level.
- It is essential that the European standardisation system should respond readily and appropriately to differing market needs in different sectors, with due respect for the fundamental principles of European standardisation set out in section 3 above. In particular, different market needs may call for different types of deliverables. However, for all types of deliverables the principles of transparency, access, openness, efficiency, coherence and voluntary work and application should still be followed.
- International standardisation should be reinforced and Europe's interests safeguarded within it; international standards should be uniformly applied except where this would be ineffective or inappropriate for the objectives pursued.

4. PRINCIPLES OF RELATIONSHIP AND COOPERATION

In order to attain these objectives, CEN, Cenelec, ETSI, the European Commission and EFTA have a common understanding that:

- Effort shall be made to support the integration of the economies of the candidate countries into the Community.

— The use of European standards should be further encouraged as an instrument of economic and technological integration within and outside the European market and as an instrument in order to work with the market and as a technical basis for legislation, in particular in defining technical specifications for products and services and for testing methods.

5. IMPLEMENTATION

Against the background of the previous sections, the European Standards Organisations expect the European Commission and EFTA to:

- Maintain a transparent legal and political framework for European standardisation as an independent, consensus-oriented and voluntary activity.
- Make use of European standards where they are appropriate in support of European regulations and other policies, and continue to pursue a policy of broader use of standards.
- In accordance with the provisions of Directive 98/34/EC, indicate legal and political requirements for standards.
- Refrain from drawing up technical regulations on subjects covered by mandates assigned to the European Standards Organisations, except where considered necessary in the public interest. Request, to the extent feasible, the opinion of the European Standards Organisations, and possibly their members, on matters relating to standardisation and, where appropriate, technical barriers to trade at the European and global levels.
- Intend to continue to provide targeted financial support to the European Standards Organisations, subject to the limits imposed by available budgetary assets, towards the maintenance of an appropriate European standardisation infrastructure and towards the improvement of the quality of efficiency and visibility of the European Standards Organisations.
- Invite the advice of the European Standards Organisations on the needs for pre-normative research and development, and stimulate the exploitation of Community and/or EFTA funded pre-normative research, arising both from the direct and indirect research actions, into European standards.
- Encourage those participating in European R & D programmes to feed back their results into the European Standards Organisations, as appropriate.
- Seek, where appropriate, the advice and active cooperation of the European Standards Organisations in the establishment and implementation of European programmes of technical assistance to, and cooperation with, third countries.

— Promote the use of standards by Europe's trading partners in their policy and regulation.

For their part, the European Commission and EFTA expect the European Standards Organisations CEN, Cenelec and ETSI to:

- Maintain the standardisation infrastructure and procedures to meet legitimate needs (including safety, health, consumer and environmental protection) in Europe, and actively cooperate to ensure that stakeholders gain the maximum benefit of the European standardisation infrastructure and its links with other standards organisations.
- Ensure that structures and procedures allow for the highest possible degree of openness, transparency and representativeness. Procedures should be transparent and ensure independence from vested interests. Further efforts should be made to increase the participation of interested circles, especially public authorities, manufacturers, small and medium-sized enterprises, consumers, workers and environmental interest groups, at the national and European level in the drafting of standards and other deliverables and in ensuring their views are adequately taken into account.
- Ensure that all interested parties participating in the development process have access to documents in order to effectively participate.
- Take the public interest into account, in particular, safety and health, the protection of workers, consumers and environment.
- Maintain a dialogue with the Commission and EFTA while carrying out standardisation work.
- Ensure that the environment is fully considered and where relevant taken into account in the development of standards in order to contribute to a high level of environmental protection.
- Pro-actively support participation of relevant stakeholders in standardisation work on national, European, and international level.
- Establish and maintain institutional rules and procedures that ensure coherence, speed and quality in the establishment, elaboration and implementation of the programmes, standards, other deliverables and activities carried out in order to meet the needs of evolving markets. This specifically includes coherent rules for standstill, notification of activities, uniform transposition and withdrawal of conflicting national standards (as far as ENs are concerned).

-
- Ensure that when common mandates are issued by the Commission and the EFTA side a consistent approach is taken in accepting and executing or in rejecting the mandate.
 - Ensure that rules in decision-making procedures continue to preserve accountability to European Community, EFTA members and the economic and social partners concerned in work undertaken under a mandate from the European Commission and the EFTA side.
 - Carry out their tasks with the highest efficiency and quality, including the use of modern methods and technologies for the elaboration and distribution of their work.
 - Keep their corpus of publications up to date and in line with technological evolution by means of regular reviews leading to their confirmation, amendment, revision or withdrawal, as appropriate.
 - Together with their members, adapt their structures, procedures, and publications to meet developments in the legitimate needs of interested parties. Develop appropriate mechanisms to accept documents originating from interest groups and other parties, and transform them, if appropriate, into deliverables of the European Standards Organisations.
 - Ensure that all interested parties have access to standards, by broad provision of information on their availability, and by ensuring that standards, including any intellectual property rights (IPRs) they might contain, can be used by market operators on fair, reasonable and non-discriminatory conditions.
- Undertake and support actions to improve the visibility of European standardisation.
 - Work towards the development and widespread use of a single mark of conformity with European standards, as appropriate.
 - Provide support to the progress of standards organisations in the countries that have applied for EU or EFTA membership, to full participation in, and membership of the European Standards Organisations. Grant full membership once the appropriate and approved conditions have been met.
 - Cooperate actively with international standardisation structures; observe the terms of the WTO Code of Good Practice for the Preparation, Adoption and Application of Standards; promote the international standard organisations, promote the use of international standards in their own work and at the global level when legitimate objectives can be ensured, i.e. the protection of human health and safety, animals or plant life and/or the environment. Use best efforts to support access by interested circles to standardisation processes at the international level.
 - Cooperate with the European Commission and EFTA in the development and implementation of Community and EFTA programmes of technical assistance and cooperation with third countries, and ensure where possible that related policies of their member organisations are coherent.
 - Maintain and develop a dialogue with the European Commission and EFTA on all issues of strategic, political or technical importance of common interest.
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ANNEX A7

CAMBRIDGE
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The Rule of Law

Author(s): Lord Bingham

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ARTICLES

THE RULE OF LAW

LORD BINGHAM*

It is an immense honour and privilege to give the Sixth Sir David Williams Lecture. It is also a formidable challenge, since Sir David's scholarly reputation is so high as to discourage comparison. But the great range of his achievement – as legal scholar, university leader, head of house, public servant and loyal son of Wales – gives the lecturer a broad range of subject matter from which to choose, without straying into fields Sir David has not adorned. In choosing to address the Rule of Law – a big subject for a lecture – my best hope must be that Sir David will himself be provoked into giving us, at greater length, his considered reflections on the subject.

The Constitutional Reform Act 2005 provides, in section 1, that the Act does not adversely affect “the existing constitutional principle of the rule of law” or “the Lord Chancellor's existing constitutional role in relation to that principle”. This provision, the Attorney-General has suggested,¹ illustrates the importance attached to the rule of law in the modern age,² which is further reflected in the oath to be taken by Lord Chancellors under section 17(1) of the Act, to respect the rule of law and defend the independence of the judiciary. But the Act does not define the existing constitutional principle of the rule of law, or the Lord Chancellor's existing constitutional role in relation to it.

The meaning of this existing constitutional principle may no doubt have been thought to be too clear and well-understood to call for statutory definition, and it is true that the rule of law has been routinely invoked by judges in their judgments.³ But they have not

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¹ Lord Goldsmith QC, “Government and the Rule of Law in the Modern Age”, lecture given on 22 February 2006, p 1.

² The clause did not appear in the original draft of the Bill. It was finally inserted on Third Reading in the House of Lords: HL Hansard 20 December 2004. This followed, and responded to the recommendations of, a House of Lords Select Committee on the Bill chaired by Lord Richard QC.

³ Many examples could be cited: see, for example, *R. v. Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 A.C. 42 at pp 62, 64 (Lord Griffiths), 67 (Lord Bridge), 75, 76, 77 (Lord Lowry); *A v. Secretary of State for the Home Department* [2005] 2 A.C. 68, [2004] UKHL 56, paras. [42] (Lord Bingham), [74] (Lord Nicholls).

explained what they meant by the expression, and well-respected authors have thrown doubt on its meaning and value. Thus Joseph Raz has commented on the tendency to use the rule of law as a shorthand description of the positive aspects of any given political system.⁴ John Finnis has described the rule of law as “[t]he name commonly given to the state of affairs in which a legal system is legally in good shape”.⁵ Judith Shklar has suggested that the expression may have become meaningless thanks to ideological abuse and general over-use: “It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.”⁶ Jeremy Waldron, commenting on *Bush v. Gore*,⁷ in which the rule of law was invoked on both sides, recognised a widespread impression that utterance of those magic words meant little more than “Hooray for our side!”.⁸ Brian Tamanaha has described the rule of law as “an exceedingly elusive notion” giving rise to a “rampant divergence of understandings” and analogous to the notion of the Good in the sense that “everyone is for it, but have contrasting convictions about what it is”.⁹ The authors of the 2005 Act may or may not have known of these critical academic opinions. But they can scarcely have been unaware that Dicey’s exposition of the rule of law, first propounded in 1885,¹⁰ had attracted considerable controversy over the years which had elapsed since then. So it seems unlikely that the meaning of the existing constitutional principle was thought so clear as to obviate the need for definition.

It is perhaps more likely that the authors of the 2005 Act recognised the extreme difficulty of formulating a succinct and accurate definition suitable for inclusion in a statute, and preferred to leave the task of definition to the courts if and when occasion arose.¹¹ If so, one has considerable sympathy with that view, the more

⁴ Joseph Raz, “The Rule of Law and its Virtue”, in *The Authority of Law: Essays on Law and Morality* (Oxford 1979), p. 210.

⁵ John Finnis, *Natural Law and Natural Rights* (Oxford 1980), p. 270.

⁶ Judith Shklar, “Political Theory and The Rule of Law”, in A. Hutchinson and P. Monahan (eds.), *The Rule of Law: Ideal or Ideology* (Toronto 1987), p. 1.

⁷ 531 US 98 (2000).

⁸ Jeremy Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida)?”, in R. Bellamy (ed.), *The Rule of Law and the Separation of Powers* (Aldershot 2005), p. 119.

⁹ Brian Tamanaha, *On the Rule of Law* (Cambridge 2004), p. 3. But not everyone is for the rule of law. The historian E. P. Thompson’s view that it was an “unqualified, human good” (*Whigs and Hunters: The Origin of the Black Act* (New York 1975), p. 266 has not been universally accepted: see Morton Horwitz, “The Rule of Law: An Unqualified Human Good?” (1977) 86 *Yale Law Journal* 561; *The Transformation of American Law: 1870–1960* (New York 1992).

¹⁰ A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London 1885), Part II.

¹¹ In the House of Lords (HL Hansard 7 December 2004, cols 742–743) Lord Kingsland suggested that the clause (in a slightly different earlier version) was not justiciable. I find this impossible to accept. A constitutional principle that cannot be legally enforced would not appear to me to be very valuable.

so since the meaning of the concept has to some extent evolved over time and is no doubt likely to continue to do so. But the statutory affirmation of the rule of law as an existing constitutional principle and of the Lord Chancellor's existing role in relation to it does have an important consequence: that the judges, in their role as journeymen judgment-makers, are not free to dismiss the rule of law as meaningless verbiage, the jurisprudential equivalent of motherhood and apple pie, even if they were inclined to do so. They would be bound to construe a statute so that it did not infringe an existing constitutional principle, if it were reasonably possible to do so.¹² And the Lord Chancellor's conduct in relation to that principle would no doubt be susceptible, in principle, to judicial review. So it is not perhaps premature to attempt to define what, in this country, today, is meant by the existing constitutional principle of the rule of law, recognising of course – as a serving judge necessarily must – that any thoughts he proffers may wilt or die in the light of future adversarial argument in a concrete case.

The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts. I doubt if anyone would suggest that this statement, even if accurate as one of general principle, could be applied without exception or qualification. There are, for instance, some proceedings in which justice can only be done if they are not in public. But it seems to me that any derogation calls for close consideration and clear justification. And I think that this formulation, of course owing much to Dicey, expresses the fundamental truth propounded by John Locke in 1690 that “Wherever law ends, tyranny begins”,¹³ and also that famously stated by Thomas Paine in 1776, “that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other.”¹⁴ But I do not think the scope of the existing principle can be adequately understood without examining its implications, which may be conveniently broken down into a series of sub-rules. I have identified eight such rules, which I shall briefly discuss. There is regrettably little to startle in any of them. More ingenious minds could doubtless propound additional and better sub-rules, or economise with fewer.

First, the law must be accessible and so far as possible intelligible, clear and predictable. This seems obvious: if everyone is bound by the

¹² See *R. v. Secretary of State for the Home Department, Ex p Pierson* [1998] A.C. 539, 575, per Lord Browne-Wilkinson; *R. v. Secretary of State for the Home Department, Ex p Simms* [2000] 2 A.C. 115, 131, per Lord Hoffmann.

¹³ John Locke, *Second Treatise of Government* (1690), Chap XVII, s.202 (Cambridge 1988), p. 400.

¹⁴ Thomas Paine, *Common Sense* (London 1994), p 279.

law they must be able without undue difficulty to find out what it is, even if that means taking advice (as it usually will), and the answer when given should be sufficiently clear that a course of action can be based on it. There is English authority to this effect,¹⁵ and the European Court of Human Rights has also put the point very explicitly:

[T]he law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case ... a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.¹⁶

Obvious this point is, but not, I think, trivial. Given the legislative hyperactivity which appears to have become a permanent feature of our governance – in 2004, some 3500 pages of primary legislation; in 2003, nearly 9000 pages of statutory instruments – the sheer volume of current legislation raises serious problems of accessibility, despite the internet. And this is compounded by the British tradition of parliamentary draftsmanship which, for all its technical virtuosity, depends so heavily on cross-reference and incorporation as on occasion to baffle.

The accusing finger cannot however be fairly pointed at legislators alone: the length, complexity and sometimes prolixity of modern common law judgments, particularly at the highest level, raise problems of their own. These problems could, at least in theory, be mitigated if the House of Lords were to give a single opinion, a solution advocated from time to time and raised with me by the late Lord Brightman, very shortly before he died, with reference to the lengthy opinions of the House in *R (Jackson) v. Attorney General*.¹⁷ This is a serious argument, recently echoed by Chief Justice Roberts of the United States in an address to the American College of Trial Lawyers,¹⁸ but not one which I would in general accept, for very much the reasons given by Lord Reid, addressing the Society of Public Teachers of Law, in 1971.¹⁹ I agree with Lord Reid that the quality of single Privy Council judgments has on the whole been inferior from the point of view of developing the law to the more diverse opinions of

¹⁵ *Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenberg AG* [1975] A.C. 591, 638; *Fothergill v. Monarch Airlines Ltd* [1981] A.C. 251, 279.

¹⁶ *Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245, 271, §49.

¹⁷ [2005] UKHL 56; [2006] 1 A.C. 262.

¹⁸ At Grosvenor House, London, on 15 September 2006.

¹⁹ Lord Reid, “The Judge as Law-Maker” (1972) 12 *Journal of the Society of Public Teachers of Law* (NS) 22, at pp. 28–29.

the House. A single lapidary judgment buttressed by four brief concurrences can give rise to continuing problems of interpretation which would have been at least reduced if the other members had summarised, however briefly, their reasons for agreeing. And a well-constituted committee of five or more, can bring to bear a diversity of professional and jurisdictional experience which is valuable in shaping the law.

But I would add three important caveats. First, whatever the diversity of opinion the judges should recognise a duty, not always observed, to try to ensure that there is a clear majority ratio. Without that, no one can know what the law is until Parliament or a later case lays down a clear rule. Secondly, and without challenging the value or legitimacy of judicial development of the law, the sub-rule under consideration does in my view preclude excessive innovation and adventurism by the judges.²⁰ It is one thing to alter the law's direction of travel by a few degrees, quite another to set it off in a different direction. The one is probably foreseeable and predictable, something a prudent person would allow for, the other not. Thus one can agree with Justice Heydon of the High Court of Australia that judicial activism, taken to extremes, can spell the death of the rule of law.²¹ But thirdly, and importantly, all these points apply with redoubled force in the criminal field. The torrent of criminal legislation in recent years has posed very real problems of assimilation. Not all of this legislation is readily intelligible.²² Whether derived from statute or judicial opinion the law must be stated in terms which a judge can without undue difficulty explain to a jury or an unqualified clerk to a bench of lay justices. And the judges may not develop the law to create new offences or widen existing offences so as to make punishable conduct of a type hitherto not subject to punishment,²³ for that would infringe the fundamental principle that a person should not be criminally punishable for an act not proscribed as criminal when the act was done.²⁴

²⁰ The distinction between a legitimate development of the law and an objectionable departure from settled principle may of course provoke sharp differences of opinion: see, for example, *Kleinwort Benson Ltd v. Lincoln City Council* [1999] 2 A.C. 349.

²¹ J. D. Heydon, "Judicial Activism and the Death of the Rule of Law", *Quadrant*, January-February 2003.

²² The Criminal Justice Act 2003 is a prime example. In *R. v. Lang* [2005] EWCA Crim 2864, [2006] 1 W.L.R. 2509, paras. [16] and [153] Rose L.J. described the provisions of the Act as "labyrinthine" and "astonishingly complex". In *R. (Crown Prosecution Service) v. South East Surrey Youth Court* [2005] EWHC 2929 (Admin), [2006] 1 W.L.R. 2543, para. [14], he spoke of the "deeply confusing" provisions of the Act, and added: "We find little comfort or assistance in the historic canons of construction for determining the will of Parliament which were fashioned in a more leisurely age and at a time when elegance and clarity of thought and language were to be found in legislation as a matter of course rather than exception".

²³ *R. v. Withers* [1975] A.C. 842 at 854, 860, 863, 867, 877; *R. v. Rimmington* [2005] UKHL 63, [2006] 1 A.C. 459, para. [33].

²⁴ Now enshrined in article 7 of the European Convention on Human Rights.

My second sub-rule is that questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion. Most modern commentators would not share to the full Dicey's hostility to the exercise of official discretions. In the immigration field, for example, judges have routinely and gratefully invited the Secretary of State to exercise his discretion to grant leave to enter or remain to applicants who do not meet the tests for entry laid down in the immigration rules but whose personal history or circumstances demand sympathetic consideration. But the essential truth of Dicey's insight stands. The broader and more loosely-textured a discretion is, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the rule of law.²⁵ This sub-rule requires that a discretion should ordinarily be narrowly defined and its exercise capable of reasoned justification. These are requirements which our law, in my opinion, almost always satisfies, because discretion imports a choice between two possible decisions and orders, and usually the scope for choice is very restricted.

There can, first of all, be no discretion as to the facts on which a decision-maker, official or judicial, proceeds. An assessment of the facts may of course be necessary and will depend on the effect made by the evidence on the mind of the decision-maker. The assessment made may be correct or it may not, but if the evidence leads the decision-maker to one conclusion he has no discretion to reach another, any more than a historian has a discretion to conclude that King John did not execute Magna Carta at Runnymede in June 1215 when all the evidence shows that he did. Similarly, most so-called discretions depend on the making of a prior judgment which, once made, effectively determines the course to be followed, and leaves no room for choice. Even the least constrained of judicial discretions – that as to the award of costs – is governed by principles and practice.²⁶ I take three examples, two judicial and one official.

The grant of a civil injunction, it is always said, is discretionary. But if a clear violation of legal right is shown, and there is a clear risk of repetition injurious to the victim for which damages will not compensate, and there is no undertaking by the lawbreaker to desist, the trial judge ordinarily has no choice. His discretion can only, usually, be exercised one way. A second, very familiar, example is

²⁵ "To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand": *Scott v. Scott* [1913] A.C. 417, 477, per Lord Shaw of Dunfermline.

²⁶ In sentencing there is in some cases a genuine choice as to the mode of punishment, but in many cases the only real choice is as to the measure of punishment, and even then the choice is more limited than sometimes supposed, as the recent furore over the sentencing of Craig Sweeney graphically illustrated.

found in section 78(1) of the Police and Criminal Evidence Act 1984, which provides:

In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

The use of the word “may” is relied on as conferring a discretion. But what the subsection does, I suggest, is to require an exercise of judgment, which may be difficult to make but which will determine the outcome: if the statutory condition is judged to be satisfied, the judge must refuse to allow the evidence to be given; if it is not, the subsection does not authorise the judge to exclude the evidence. For my third illustrative example I return to the immigration field. If an official were to grant leave to enter or remain to a person who did not meet the tests laid down in the immigration rules, but whose case presented no exceptional features whatever suggesting the need for special treatment, such decision would be incapable of rational justification and could not be defended as an exercise of discretion. There is in truth no such thing as an unfettered discretion, judicial or official, and that is what the rule of law requires.

My third sub-rule is that the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation. I doubt if this would strike a modern audience as doubtful. While some special legislative provision can properly be made for some categories of people such as children, prisoners and the mentally ill, based on the peculiar characteristics of such categories, we would regard legislation directed to those with red hair (to adopt Warrington L.J.’s long-lived example)²⁷ as incompatible with the rule of law. Even more obviously incompatible would be the statute 22 Henry 8 cap 9 which convicted Richard Rose, the Bishop of Rochester’s cook, who had not been tried, of high treason: he had put poison into the porridge in the bishop’s kitchen, and the statute ordered that he be boiled to death without having any advantage of his clergy. Other poisoners were to be similarly treated, but the statute was primarily aimed at him. In much more recent times our law not only tolerated but imposed disabilities not rationally based on their religious beliefs on Roman Catholics, Dissenters and Jews, and disabilities not rationally connected with any aspect of their gender on women.

²⁷ *Short v. Poole Corporation* [1926] Ch. 66, 91.

It would be comforting to treat this sub-rule as of antiquarian interest only. But it would be unrealistic, as the treatment of non-nationals here and elsewhere reveals. The position of a non-national with no right of abode in this country differs from that of a national with a right of abode in the obvious and important respect that the one is subject to removal and the other is not. That is the crucial distinction, and differentiation relevant to it is unobjectionable and indeed inevitable. But it does not warrant differentiation irrelevant to that distinction, as Lord Scarman made clear in *R. v. Secretary of State for the Home Department, Ex p Khawaja*:

Habeas corpus protection is often expressed as limited to “British subjects”. Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic “no” to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed “the black” in *Sommerset’s Case* (1772) 20 St. Tr. 1. There is nothing here to encourage in the case of aliens or non-patrials the implication of words excluding the judicial review our law normally accords to those whose liberty is infringed.²⁸

This message seems clear enough. But it did not deter Parliament from providing, in Part 4 of the Anti-terrorism, Crime and Security Act 2001, for the indefinite detention without charge or trial of non-nationals suspected of international terrorism while exempting from that liability nationals who were judged qualitatively to present the same threat.²⁹ The record of the United States in this respect is not better than our own, and arguably worse. As an American academic author has written,

Virtually every significant government security initiative implicating civil liberties – including penalizing speech, ethnic profiling, guilt by association, the use of administrative measures to avoid the safeguards of the criminal process, and preventive detention – has originated in a measure targeted at noncitizens.³⁰

There is, I think, profound truth in the observation of Justice Jackson in the Supreme Court of the United States in 1949:

²⁸ [1984] A.C. 74, 111–112.

²⁹ See *A v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 A.C. 68. The Government considered that it would be “a very grave step” to detain British citizens in a similar way and that “such draconian powers would be difficult to justify”. A joint parliamentary committee observed that the Government’s explanation appeared to suggest “that it regards the liberty interests of foreign nationals as less worthy of protection than exactly the same interests of UK nationals ...” *Ibid.*, paras. [64]–[65].

³⁰ David Cole, *Enemy Aliens* (New York 2003), p 85. In this book the author considers discrimination against non-citizens in some detail.

I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.³¹

Sixty years on we may say that this is not merely a salutary doctrine but a pillar of the rule of law itself.

I turn to my fourth sub-rule, which is that the law must afford adequate protection of fundamental human rights. This would not be universally accepted as embraced within the rule of law. Dicey, it has been argued, gave no such substantive content to his rule of law concept.³² Professor Raz has written:

A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and racial persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies ... It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law ... The law may ... institute slavery without violating the rule of law.³³

On the other hand, as Geoffrey Marshall has pointed out, chapters V to XII of Dicey's *Introduction to the Law of the Constitution*,³⁴ in which he discusses what would now be called civil liberties, appear within part II of the book entitled "The Rule of Law", and, as Marshall observes, "the reader could be forgiven for thinking that Dicey intended them to form part of an account of what the rule of law meant for Englishmen."³⁵ The preamble to the Universal Declaration of Human Rights 1948 recites that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against

³¹ *Railway Express Agency Inc v. New York* 336 US 106, 112-113 (1949).

³² Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] P.L. 467, 473-474.

³³ J. Raz, "The Rule of Law and its Virtue", in *The Authority of Law* (Oxford 1979), at pp. 211, 221.

³⁴ A V Dicey, *An Introduction to the Study of the Law of the Constitution*.

³⁵ Geoffrey Marshall, "The Constitution: Its Theory and Interpretation", in Vernon Bogdanor (ed.), *The British Constitution in the Twentieth Century* (Oxford 2003), p. 58.

tyranny and oppression, that human rights should be protected by the rule of law.” The European Court of Human Rights has referred to “the notion of the rule of law from which the whole Convention draws its inspiration.”³⁶ The European Commission has consistently treated democratisation, the rule of law, respect for human rights and good governance as inseparably interlinked.³⁷

While, therefore, I recognise the logical force of Professor Raz’s contention, I would not myself accept it. A state which savagely repressed or persecuted sections of its people could not in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside were the subject of detailed laws duly enacted and scrupulously observed. So to hold would, I think, be to strip the existing constitutional principle affirmed by section 1 of the 2005 Act of much of its virtue and infringe the fundamental compact which, as I shall suggest at the end, underpins the rule of law. But this is a difficult area, for I would agree with Professor Jowell that the rule of law “does not, for example, address the full range of freedoms protected by bills of rights in other countries or in international instruments of human rights, or those now protected by our recently enacted Human Rights Act 1998, as set out in the European Convention on Human Rights (such as the right not to suffer torture, or the right to freedom of expression or rights of privacy or sexual freedom).”³⁸ There is not, after all, a standard of human rights universally agreed even among civilised nations. We may regret the United States’ failure to ratify the UN Convention on the Rights of the Child 1989, which forbids the imposition of capital punishment for offences committed by persons under 18,³⁹ and the Supreme Court’s decision upholding the imposition of capital punishment for a murder committed at the age of 16½,⁴⁰ but accession to any international convention is a matter of national choice, and different countries take different views on the morality as well as the efficacy of the death penalty. It is open to a state to acknowledge, as some have,⁴¹ that a penalty is cruel and unusual treatment or punishment within the meaning of its Constitution, and nonetheless to assert that it is authorised by that Constitution as lawful. There is, I would accept, an element of vagueness about the content of this

³⁶ *Engel v. The Netherlands* (No 1) (1976) 1 E.H.R.R. 647, 672, para. [69]. And see *Golder v. United Kingdom* (1975) 1 E.H.R.R. 524, 589, para [34].

³⁷ See, for example, *Commission Communication to the Council and Parliament*, 12 March 1998, COM (98) 146.

³⁸ Jeffrey Jowell “The Rule of Law Today”, in Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution*, 5th edn (Oxford 2004), p 23.

³⁹ Article 37(a).

⁴⁰ *Stanford v. Kentucky* 492 US 361 (1989).

⁴¹ *Matthew v. State of Trinidad and Tobago* [2004] UKPC 33, [2005] 1 A.C. 433, para [36].

sub-rule, since the outer edges of fundamental human rights are not clear-cut. But within a given state there will ordinarily be a measure of agreement on where the lines are to be drawn, and in the last resort (subject in this country to statute) the courts are there to draw them. The rule of law must, surely, require legal protection of such human rights as, within that society, are seen as fundamental.

My fifth sub-rule is that means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve. It would seem to be an obvious corollary of the principle that everyone is bound by and entitled to the benefit of the law that people should be able, in the last resort, to go to court to have their rights and liabilities determined. This is not a rule directed against arbitration and more informal means of dispute resolution, all of which, properly resorted to and fairly conducted, have a supremely important contribution to make to the rule of law. Nor is it a rule requiring every claim or defence, however spurious and lacking in merit, to be guaranteed full access to the process of the law. What it does is to recognise the right of unimpeded access to a court as a basic right, protected by our own domestic law,⁴² and in my view comprised within the principle of the rule of law. If that is accepted, then the question must be faced: how is the poor man or woman to be enabled to assert his or her rights at law? Assuming, as I would certainly wish to do, the existence of a free and independent legal profession, the obtaining of legal advice and representation is bound to have a cost, and since legal services absorb much professional time they are inevitably expensive. The old gibe about the Ritz Hotel is one that cannot be ignored.

For many years, of course, this problem was addressed through the civil Legal Aid scheme established in 1948, a bold, imaginative and somewhat under-celebrated reform of the Attlee post-war government. Although subject to well-known defects, the scheme did bring legal redress within reach of the less well-off. But, as we know, the cost of the scheme rose exponentially, and this led to its curtailment. Whether conditional fees, various pro bono schemes and small claims procedures have filled the gap left by this curtailment I do not myself know. Perhaps they have, and advice and help are still available to those of modest means who deserve it. But I have a fear that tabloid tales of practitioners milking the criminal legal aid fund of millions, and more general distrust of lawyers and their rewards, may have enabled a valuable guarantee of social justice to wither unlamented.

⁴² *Raymond v. Honey* [1983] 1 A.C. 1, 12–13; *R. v. Secretary of State for the Home Department, Ex p Leech* [1994] Q.B. 198, 210; *R. v. Lord Chancellor, Ex p Witham* [1998] Q.B. 575, 585–586.

Lurking in the background is another point which, at a certain point, must concern adherents of the rule of law. Successive British governments have insisted that the civil courts, judicial salaries usually aside, should be self-financing: the cost of running the courts should be covered by fees recovered from litigants. The judges for their part have accepted that those using the courts may generally be called on to contribute specifically to the cost of the service – resort to the law being less universal than that to the doctor – but have never, I think, accepted the full recovery principle, regarding the provision of courts as one of the essential functions of a liberal democratic state.⁴³ The danger again is that the cost of obtaining redress may lead to its being denied to some at least of those who need it. The rule of law plainly requires that legal redress should be an affordable commodity. That it should also be available without excessive delay is so obvious as to make any elaboration unnecessary.

My sixth sub-rule expresses what many would, with reason, regard as the core of the rule of law principle. It is that ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers. This sub-rule reflects the well-established and familiar grounds of judicial review.⁴⁴ It is indeed fundamental. For although the citizens of a democracy empower their representative institutions to make laws which, duly made, bind all to whom they apply, and it falls to the executive, the government of the day, to carry those laws into effect, nothing ordinarily authorises the executive to act otherwise than in strict accordance with those laws. (I say “ordinarily” to acknowledge the survival of a shrinking body of unreviewable prerogative powers). The historic role of the courts has of course been to check excesses of executive power, a role greatly expanded in recent years due to the increased complexity of government and the greater willingness of the public to challenge governmental (in the broadest sense) decisions. Even under our constitution the separation of powers is crucial in guaranteeing the integrity of the courts’ performance of this role.

The British Government, through one entity or another, is very frequently involved in litigation. It is usually successful, but not invariably so. When unsuccessful it is displeased, being driven like

⁴³ They are not alone in holding this view: see Michael Beloff QC “Paying Judges: Why, Who, Whom, How Much?” [2006] *Denning Law Journal* 1, 21; Shimon Shetreet, *Justice in Israel: A Study of the Israeli Judiciary* (Dordrecht 1994), p 143. These authors are addressing the question of judicial salaries. But their conclusion that the state should pay judges rests on the view that “the legal system provides a vital public service”.

⁴⁴ See Jeffrey Jowell, “The Rule of Law Today”, in Jowell and Oliver, *The Changing Constitution* (above note 38), pp 20–21. Dicey and a host of later authorities might have been surprised to learn from Mr Blunkett that “Judicial review is a modern invention. It has been substantially in being from the early 1980s ...”. David Blunkett, *The Blunkett Tapes* (London 2006), p 607.

every other litigant by a belief in the rightness of its cause but also no doubt by a belief that the public interest is best served by its succeeding. In the past the convention was that ministers, however critical of a judicial decision, and exercising their right to appeal against it or, in the last resort, legislate to reverse it retrospectively,⁴⁵ forbore from public disparagement of it. This convention appears to have worn a little thin in recent times,⁴⁶ as I think unfortunately, since if ministers make what are understood to be public attacks on judges, the judges may be provoked to make similar criticisms of ministers, and the rule of law is not, in my view, well served by public dispute between two arms of the state. Some sections of the press, with their gift for understatement, have spoken of open war between the government and the judiciary. This is not in my view an accurate analysis. But there is an inevitable, and in my view entirely proper, tension between the two. There are countries in the world where all judicial decisions find favour with the government, but they are not places where one would wish to live. Such tension exists even in quiet times. But it is greater at times of perceived threats to national security, since governments understandably go to the very limit of what they believe to be their lawful powers to protect the public, and the duty of the judges to require that they go no further must be performed if the rule of law is to be observed. This is a fraught area, since history suggests that in times of crisis governments have tended to overreact and the courts to prove somewhat ineffective watchdogs.⁴⁷ In our country and in the United States, decisions have been made of which neither country can be proud.⁴⁸ The cautionary words of Justice William Brennan of the United States Supreme Court in 1987 remain pertinent:

There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of

⁴⁵ As when, in the War Damage Act 1965, Parliament reversed the decision of the House of Lords in *Burmah Oil Co Ltd v. Lord Advocate* [1965] A.C. 75.

⁴⁶ The best known example relates to Sullivan J.'s decision to quash the Secretary of State's refusal of discretionary leave to remain to a number of Afghans previously acquitted on charges of hijacking aircraft: *R. (on the application of S) v. Secretary of State for the Home Department* [2006] EWHC 1111 (Admin). The judge found it difficult to conceive of a clearer case of "conspicuous unfairness amounting to an abuse of power". Commenting on the decision (as reported by the BBC on 10 May 2006), the Prime Minister said: "it's not an abuse of justice for us to order their deportation, it's an abuse of common sense frankly to be in a position where we can't do this". The Court of Appeal dismissed an appeal by the Secretary of State, commending the judge for "an impeccable judgment": [2006] EWCA Civ 1157, para. [50].

⁴⁷ See Tom Bingham, "Personal Freedom and the Dilemma of Democracies" (2003) 52 I.C.L.Q. 841.

⁴⁸ In this country one would instance *R. v. Halliday* [1916] 1 K.B. 738, [1917] A.C. 260 and *Liversidge v. Anderson* [1942] A.C. 206; in the United States, notably, *Korematsu v. United States* 323 US 214 (1944), a decision which Scalia J. has put on a par with that in *Dred Scott*, thereby assigning it to the lowest circle in Hades. See David Cole, *Enemy Aliens* (New York 2003), pp 99, 261 n. 42.

war and perceived threats to national security ... After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.⁴⁹

So to my seventh and penultimate sub-rule: that adjudicative procedures provided by the state should be fair. The rule of law would seem to require no less. The general arguments in favour of open hearings are familiar, summed up on this side of the Atlantic by the dictum that justice must manifestly and undoubtedly be seen to be done⁵⁰ and on the American side by the observation that “Democracies die behind closed doors.”⁵¹

Application of this sub-rule to ordinary civil processes is largely unproblematical, once it is remembered that not all decisions are purely judicial.⁵² As the Chief Justice of Australia has pointed out, “the rule of law does not mean rule by lawyers.”⁵³

There is more scope for difficulty where a person faces adverse consequences as a result of what he is thought or said to have done or not done, whether in the context of a formal criminal charge or in other contexts such as deportation, precautionary detention, recall to prison or refusal of parole. What in such contexts does fairness ordinarily require? First and foremost, I suggest, that decisions are made by adjudicators who, however described, are independent and impartial: independent in the sense that they are free to decide on the legal and factual merits of a case as they see it, free of any extraneous influence or pressure, and impartial in the sense that they are, so far as humanly possible, open-minded, unbiased by any personal interest or partisan allegiance of any kind. In addition, certain core principles have come to be accepted: that a matter should not be finally decided against any party until he has had an adequate opportunity to be heard; that a person potentially subject to any liability or penalty should be adequately informed of what is said against him; that the accuser should make adequate disclosure of material helpful to the other party or damaging to itself; that where the interests of a party cannot be adequately protected without the benefit of professional help which the party cannot afford, public assistance should so far as practicable be afforded; that a party accused should have an adequate

⁴⁹ William J. Brennan Jr., “The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises” (1988) 18 *Israel Yearbook of Human Rights* 11.

⁵⁰ *R. v. Sussex Justices, Ex p McCarthy* [1924] 1 K.B. 256, 259.

⁵¹ *Detroit Free Press v. Ashcroft* 303 F 3d 681, 683 (6th Cir. 2002).

⁵² See, for example, *R. (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 A.C. 295; *Runa Begum v. Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 A.C. 430.

⁵³ Murray Gleeson, “Courts and the Rule of Law”, Lecture at Melbourne University, 7 November 2001, <http://www.hcourt.gov.au/speeches/dj/dj-ruleoflaw.htm>

opportunity to prepare his answer to what is said against him; and that the innocence of a defendant charged with criminal conduct should be presumed until guilt is proved.

In the strictly criminal context, two of these principles in particular have raised questions. The first concerns disclosure, since the prosecutor may be in possession of material which he is for public interest reasons unwilling or very reluctant to disclose to the defence. This problem, when it arises, calls for the exercise of very careful judgment by the trial judge. But as the law now stands, material need not be disclosed if in no way helpful to the defence; if helpful to the point where the defence would be significantly prejudiced by non-disclosure, the prosecutor must either disclose or abandon the prosecution.⁵⁴ Questions have also arisen concerning statutory offences defined so as to place a reverse burden on the defendant. These are not in themselves objectionable, but may be so if the burden is one which a defendant, even if innocent, may in practice be unable to discharge.⁵⁵ I do not think these solutions, even if not ideal, infringe the rule of law.

More disturbing are the growing categories of case outside the strictly criminal sphere in which Parliament has provided that the full case against a person, put before the adjudicator as a basis for decision, should not be disclosed to that person or to any legal representative authorised by that person to represent him.⁵⁶ Any process which denies knowledge to a person effectively, if not actually, accused of what is relied on against him, and thus denies him a fair opportunity to rebut it, must arouse acute disquiet. But these categories reflect the undoubted danger of disclosing some kinds of highly sensitive information, and they have been clearly identified and regulated by Parliament, which has judged the departure to be necessary and attempted to limit its extent.⁵⁷ Resort to a similar procedure by the Parole Board in the absence of any express statutory authority provoked a division of opinion in the House of Lords: a majority upheld the practice; a minority (which included myself) strongly dissented.⁵⁸ There the matter rests. All would probably agree that this is difficult terrain.

My eighth and last sub-rule is that the existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or

⁵⁴ *R. v. H* [2004] UKHL 3, [2004] 2 A.C. 134.

⁵⁵ *Sheldrake v. Director of Public Prosecutions, Attorney General's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 A.C. 264.

⁵⁶ See *R. (Roberts) v. Parole Board* [2005] UKHL 45, [2005] 2 A.C. 738, paras. [26]-[30].

⁵⁷ I omit as immaterial the instance discussed in *R. (Roberts) v. Parole Board* [2005] UKHL 45, [2005] 2 A.C. 738, para [29].

⁵⁸ *R. (Roberts) v. Parole Board*, [2005] UKHL 45, [2005] 2 A.C. 738.

international custom and practice governs the conduct of nations. I do not think this proposition is contentious. Addressing a joint session of Congress in September 1990 after the Iraqi invasion of Kuwait, the first President Bush said that a new world was emerging, “a world where the rule of law supplants the rule of the jungle. A world in which nations recognize the shared responsibility for freedom and justice. A world where the strong respect the rights of the weak ... America and the world must support the rule of law. And we will.”⁵⁹ President George W Bush, in his State of the Union Address of 29 January 2002, speaking of the international, not the domestic, scene, echoed the same sentiment: “But America will always stand firm for the non-negotiable demands of human dignity; the rule of law; limits on the power of the state; respect for women; private property; free speech; equal justice; and religious tolerance.” British statesmen today would, I think, share this belief.

It was not always so. On the outbreak of war in 1914 the German Chancellor told the Reichstag:

Gentlemen, we are in a state of necessity, and necessity knows no law. Our troops have occupied Luxembourg and perhaps are already on Belgian soil. That is contrary to international law. The wrong we thus commit we will endeavour to repair directly our military aim is achieved.⁶⁰

Defending the British blockade of Germany, known to be of doubtful legality, Mr Asquith was not deterred by legal considerations:

In dealing with an opponent who has openly repudiated all the restraints, both of law and of humanity, we are not going to allow our efforts to be strangled in a network of juridical niceties.⁶¹

I shall not for obvious reasons touch on the vexed question whether Britain’s involvement in the 2003 war on Iraq was in breach of international law and thus, if this sub-rule is sound, of the rule of law. But a revealing comparison may be made between the procedures followed in 2003 and those followed at the time of the Suez invasion of 1956, and the comparison does suggest that over that period the rule of law has indeed gained ground in this country and the law of the jungle lost it. First, Sir Anthony Eden, Prime Minister in 1956, appears to have treated legal considerations as at best peripheral. Echoing Asquith, but with much less justification, he said:

⁵⁹ President’s Address to Joint Session of Congress, *New York Times*, 12 September 1990, at A 20.

⁶⁰ Quoted in G. P. Gooch, *Germany* (New York 1925), pp. 112–113. And see Patrick Devlin, *Too Proud to Fight* (Oxford 1974), p 142.

⁶¹ HC Hansard, 1 March 1915, col. 600.

We should not allow ourselves to become involved in legal quibbles about the rights of the Egyptian Government to nationalise what is technically an Egyptian company ...⁶²

At a later stage of the crisis, the prime minister specifically instructed that Sir Gerald Fitzmaurice, the very distinguished Legal Adviser to the Foreign Office, who had strongly and consistently advised that the British action was unlawful, should not be informed of developments: "Fitz is the last person I want consulted," he said. "The lawyers are always against our doing anything. For God's sake, keep them out of it. This is a political affair."⁶³ So far as I know, no similar sentiments were ever expressed by Mr Blair.

Secondly, and although in 1956 as in 2003 it was the function of the Law Officers to tender legal advice to the Government, in 1956 they were never formally consulted before the ultimatum to Egypt was delivered.⁶⁴ Instead, the Government relied on the advice of the Lord Chancellor, who in turn relied on an ambiguous footnote in an article by Professor Waldock, on which, however, Waldock was never approached.⁶⁵ In 2003, so far as is known, the Lord Chancellor did not give a legal opinion on the lawfulness of war but the Attorney General made a brief public statement on the eve of war, and some two years later his more detailed earlier opinion reached the public domain. There seems to me to be room to question whether the ordinary rules of client privilege, appropriate enough in other circumstances, should apply to a law officer's opinion on the lawfulness of war: it is not unrealistic in my view to regard the public, those who are to fight and perhaps die, rather than the government, as the client. If the government is sued for damages in negligence for (say) injuries caused by an army lorry or a mishap in a military hospital, I see no reason why the ordinary rules of client professional privilege should not apply. The government's position as a defendant would be greatly and unfairly weakened if this were not so. An opinion on the lawfulness of war, the ultimate exercise of sovereign power, involving the whole people, seems to me to be quite different. And the case for full, contemporaneous, disclosure seems to me even stronger when the Attorney General is a peer, not susceptible to direct questioning in the elected chamber. But this is not an accepted view, and we know that in 2003 the Attorney General's advice supported the proposed action.

⁶² Quoted in Geoffrey Marston, "Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice tendered to the British Government" (1988) 37 I.C.L.Q. 773, 777.

⁶³ Marston, *op. cit.*, p 798.

⁶⁴ Marston, *op. cit.*, p 804.

⁶⁵ C. H. M. Waldock, "The Regulation of the Use of Force by Individual States in International Law" (1952) 81 Hague Rec. 451, 497, 503. See also Marston, *op. cit.*, pp 792-793, 796. It appears that Waldock, if consulted, would not have accepted the interpretation placed on his article: Marston, *op. cit.*, p 806.

Thirdly, and surprisingly with memories of Nuremberg relatively fresh, it does not appear that the service chiefs in 1956 called for any assurance that the invasion would be lawful. In 2003, as is well known, they did.

The fourth distinction is the most striking of all. Although not formally consulted on the lawfulness of the proposed intervention in 1956, the Law Officers learned what was in the air and expressed the clear view that it could not be justified in law.⁶⁶ But despite this they supported the Government's action. Writing to the Prime Minister on 7 November 1956, the Attorney General, Sir Reginald Manningham-Buller QC, said "... I support and have supported the Government's actions though I cannot do so on legal grounds."⁶⁷ After a meeting the next day he wrote again, on behalf of himself and the Solicitor General, Sir Harry Hylton-Foster QC: "Although I support what we have done and have said so publicly, we cannot, as you know, agree with the statements made on behalf of the Government that we were legally entitled so to act."⁶⁸ Sir Harry also wrote to the Prime Minister saying: "Reflection has convinced me that I was wrong to allow legalistic considerations to weigh so heavily with me."⁶⁹ It would no doubt be naïve to suppose that even today major democratic states do not on occasion resort to legal casuistry to justify the use of force in doubtful circumstances. But I do not think that, save perhaps *in extremis*, the government of such a state would embark on a course which it acknowledged to be blatantly unlawful, or that lawyers advising the government of such a state at a senior level would publicly support action for which they could find no legal justification. To do either would pay scant respect to the existing constitutional principle of the rule of law.

There has been much debate whether the rule of law can exist without democracy. Some have argued that it can.⁷⁰ But it seems to me that the rule of law does depend on an unspoken but fundamental bargain between the individual and the state, the governed and the governor, by which both sacrifice a measure of the freedom and power which they would otherwise enjoy. The individual living in society implicitly accepts that he or she cannot exercise the unbridled freedom enjoyed by Adam in the Garden of Eden, before the creation of Eve, and accepts the constraints imposed by laws properly made because of the benefits which, on balance, they confer. The state for its part accepts that it may not do, at home or abroad, all that it has the power

⁶⁶ Marston, *op. cit.*, pp 803–805.

⁶⁷ Marston, *op. cit.*, p 810.

⁶⁸ *Ibid.*

⁶⁹ Marston, *op. cit.*, p 811.

⁷⁰ Tamanaha, above note 9, p 37.

to do but only that which laws binding upon it authorise it to do. If correct, this conclusion is reassuring to all of us who, in any capacity, devote our professional lives to the service of the law. For it means that we are not, as we are sometimes seen, mere custodians of a body of arid prescriptive rules but are, with others,⁷¹ the guardians of an all but sacred flame which animates and enlightens the society in which we live.⁷²

⁷¹ Lord Goldsmith is of course right that responsibility for maintaining the rule of law rests on Parliament as well as the courts: see his lecture referred to in note 1 above, pp 10, 19.

⁷² I am greatly indebted to Richard Moules and Matthew Slater, successively my judicial assistants, for their help in preparing this lecture, and I am as always indebted to Diana Procter.

ANNEX A8

The Rule of Law Framework in the European Union: Its Rationale, Origins, Role and International Ramifications



Artur Nowak-Far

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Abstract At present, the European rule of law enforcement framework under Article 7 TEU (RLF) is vulnerable to unguaranteed, discretionary influences of the Member States. This vulnerability arises from its procedural format which requires high thresholds in decision-making with the effect that this procedure is prone to be terminated by the EU Member States likely to be scrutinized under it, if only they collude. Yet, the Framework may prove effective to correct serious breaches against human rights (in the context of ineffective rule of law standards). The European Commission is bound to pursue the RLF effectiveness for the sake of achieving relative uniformity of application of EU law (at large), and making the European Union a credible actor and co-creator of international legal order. The RLF is an

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important tool for the maintenance of relative stability of human rights and the rule of law in the EU despite natural divergence propensity resulting from the procedural autonomy of the EU Member States. By achieving this stability, the EU achieves significant political weight in international dialogue concerning human rights and the rule of law and preserves a high level of its global credibility in this context. Thus, RLF increases the EU's effectiveness in promoting the European model of their identification and enforcement.

1 Introduction

The Rule of Law Framework (here referred to as 'RLF' or 'the Framework') is a contingency procedure adopted to reflect on these processes of political (and legal constitutional) developments in the European Union Member States which give rise to significant enough doubts of whether these developments are in line with the fundamental standards set forth in the EU Treaties, i.e. the Treaty on the European Union (TEU) and the Treaty on the functioning of the European Union (TFEU). In the context of the RLF, the most important provisions of these two legal instruments are those which specify the constitutional standard values of the European Union as an international organisation and those which provide for a legal basis of the RLF.

For the sake of analysis, two distinctive forms of RLF are distinguished:

- (a) RLF *sensu largo*—which should be construed under Articles 2 and 7 TEU and which includes all other legal vehicles adopted to enforce these two provisions;
- (b) RLF *sensu stricto*—which, for analytical purposes, can be considered the mechanism of enforcement of Article 7 TEU designed by the European Commission and adopted pursuant to its communication of 19 March 2014 (further referred to as 'the RLF communication').¹

The objective of this Chapter is to verify the following hypotheses:

1. In the RLF, the political element dominates over the legal one as much of the Framework is owned by the EU Member States rather than by an independent judiciary; in consequence, the very rationale of the RLF is contradictory: at the material level, it is to protect the rule of law where the role of independent judiciary is enshrined, whereas at the procedural level, its fundamental mechanisms rely upon the political will of the EU Member States to protect them; this makes the RLF a relatively easy prey for at least two European Union Member States prone to collude in the situation where, at the same time, they may find themselves within remit of the Framework because of their defiance of the EU Treaty values.

¹Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, 10 March 2014, document COM (2014) 158 final/2.

2. Despite this vulnerability, the RLF has significant systemic value as it is able to put on a check all EU Member States' practices which manifestly contravene the values enshrined in the Treaties, including the rule of law; moreover, the RLF is not a final format and is very likely to be further developed into a more stringent, and legally certain construct—which is the area where the European Commission evidently sees its significant role in the future, and where it nurtures its powers *vis-à-vis* other EU institutions and the Member States.
3. The Commission is bound to pursue its active and, in terms of competences, rather expansionary policy in order to ensure uniformity of EU law enforcement internally and to preserve a high level of EU credibility as a globally significant promotor of human rights.

2 Rule of Law Framework *sensu largo*: Articles 2 and 7 TEU

2.1 *The Benchmark: Article 2 TEU*

The RLF is meant to assure enforcement of EU values enshrined in Article 2 TEU. Article 2 provides that:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and quality between women and men prevail.

The provision was adopted originally in the Treaty of Amsterdam in 1997. It was intended to provide for the axiological foundations of the European Union. In the post-Lisbon setting (i.e. after 2008) this provision was meant to create—together with the Charter of Fundamental Rights (which in the Treaty of Lisbon was given binding force) and other, already existing, provisions of EU law (pertaining especially to EU citizenship)—a set of overarching systemic reference for any other EU law provision, if only it concerned rights of individuals.

Article 2 TEU has its direct equivalent in Article I-2 of the Treaty establishing the Constitution for Europe, i.e. the EU treaty of 2004 which had been intended to replace the then present EU Treaty framework but had failed as a result of lack of ratifications in all the EU Member States.

In the EUCJ's jurisprudence of recent years, the question of the interpretation of Article 2 TEU has been deliberated quite frequently especially in the context of mutual trust of judicial systems. Thus, in its opinion 2/13² (EU accession to the

²CJEU, Opinion 2/13 of 18 December 2014, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454.

European Convention of Human Rights), the Court suggested that this mutual trust required that fundamental to the EU legal system values would be recognized in each and every EU member states as a precondition to the proper implementation of EU law;³ this requirement was construed as a straightforward product of the very fabric of EU law which represents ‘a structured network of principles, rules and mutually independent legal relations linking the EU and its Member States’.⁴ In the judgment of 27 February 2018 in case C-64/16 *Associação Sindicos dos Juizes Portugueses (ASJP)*,⁵ the Court held that Article 2 was a pivotal provision for the mutual trust of national judiciaries in the EU jurisdictional system construed pursuant to Article 19 (1) TEU to consist also of national courts.⁶ Thus, guarantees of judicial independence are required also at the national level.⁷ The Court also upheld that the interpretation of art. 19(1) TEU could be rendered independently of whether, in a given situation, Article 51(1) CFR applies.⁸ The issue has also been quite extensively discussed in a series of illustrious opinions presented by Advocate General Evgeni Tanchev.⁹ AG Tanchev adopted a broader, systemic view of respective elements of judiciary reform in Poland (such as, especially, setting forth a lowered cap on the retirement age of judges during their tenure or subjecting the access to judicial positions or advancement in it to a scheme *de facto* controlled by the executive). In his opinions, he assessed them as contributing to an extensive systemic overhaul of the judiciary defying the relevant EU standards enshrined in the EU Treaty, thus undermining mutual trust principle. All these recent developments has proved to be a departure from a narrower analytical concept which had been adopted by the EU Court of Justice in the case C-286/12 *Commission v. Hungary*,¹⁰ where the question of judiciary-concerned regulation on judges’ age of retirement had been assessed in terms of its compliance with the EU principle of proportionality.

No doubt, the systemic position of Article 2 TEU and the exact content of values it enshrines has also been extensively debated in rule of law-concerned publications. Many of them considered *ASJP* judgment to have ‘conceptual’ importance for the whole rule of law discourse in the context of modifications of judiciary systems in some EU member states.¹¹ It has been argued in literature that the existing

³Id., para. 168.

⁴Id., para. 167.

⁵ECLI:EU:C:2018:117.

⁶Id., para. 30.

⁷Id., para. 42.

⁸Id., para. 29.

⁹Opinions in cases C-619/18 *Independence of the Polish Supreme Court* of 11 April 2018, ECLI:EU:C:2019:325; C-192/18 (retirement age of judges) of 20 June 2019, ECLI:EU:C:2019:529; C-585/18, C-524/28, C-625/18 *Polish National Judiciary Council, Disciplinary Chamber of the Supreme Court* of 27 June 2019, ECLI:EU:C:2019:551.

¹⁰Judgment of 6 November 2012, ECLI:EU:C:2012:687.

¹¹Pech and Platon (2018), pp. 1827–1854; Krajewski (2018), pp. 395–405; Bonelli and Claes (2018), pp. 622–643.

infringement procedures proved to be badly needed to defend basic principles of EU law and that they are paramount for the development of the underlying legal concept.¹² Some authors argued that the rule of law procedures were important to maintain the EU axiological system intact despite possible or existing stresses arising from the ever-changing political strains in the EU member states.¹³ The TEU arrangements for the protection of rule of law were interpreted as unique as they were meant to provide for cooperation and axiological consensus instrumental for the EU to maintain its character as a polity of constitutional quality able to effectively protect its citizens whenever they happen to enjoy EU law rights.¹⁴

Systemic approach and adequate institutional arrangements were considered to be of acute importance for the effectiveness of the existing EU rules meant to promote and/or protect EU values.¹⁵ It has been argued that a causal model of infringement of values enshrined in Article 2 TEU was needed to make liability of the Member State possible under art. 7 TEU.¹⁶

2.2 *Two-Stage Procedure Under Article 7 TEU*

A rough equivalent of Article 7 appeared in the EU legal system in 1997, with the successful ratification of the Treaty of Amsterdam. Now it is one of the provisions of the Treaty of Lisbon. Article 7 can be applied in two distinctive situations emerging in the EU Member States:

- (a) in a situation of a ‘clear risk of a serious breach (. . .) of the values referred to in Article 2’;
- (b) in a situation of a ‘serious and persistent breach (. . .) of the values referred to in Article 2’.

These two situations are addressed upon in two distinctive provisions of Article 7: its paragraph 1 and 2, respectively. Depending on specific circumstances, these provisions can be applied one after another, or—if the gravity of the situation commends it—just paragraph 2 can apply even from the very outset. In the former case, the two paragraphs concerned represent a two-stage description of the situation in which the breach of the values referred to in Article 2 has persisted over sufficiently long time or even aggravated.

For each of the so distinguished stages, different modes of situation identification and application of corrective measures apply. In each of these models a fairly

¹²Prete (2017), pp. 6–10, 301–304.

¹³Kochenov (2017), pp. 9–27.

¹⁴Tichý (2018), pp. 85–108.

¹⁵Itzcovich (2017), pp. 28–43; Schmidt and Bogdanowicz (2017), pp. 1069–1073.

¹⁶Bagińska and Majkowska-Szulc (2018), pp. 125–144.

complex and subtle interplay of the European Commission, the European Parliament, the Council, the European Council and the Member States is granted.

The procedure of Article 7(1) is initiated by $\frac{1}{3}$ of the EU Member States, or the European Parliament of the European Commission; under Article 7(2) the mode of the initiation is the same, with the exception that the European Parliament cannot trigger the procedure. The core institution making the pivotal decision for each procedure is different for paragraph 1 and 2. In Article 7(1) procedure, the decision is made by the Council (in its General Council formation, i.e. in the format made up of the European affairs ministers from all EU Member States) acting with a very challenging $\frac{4}{5}$ majority of votes. In contrast, in Article 7(2) procedure, the decision on the existence of ‘a serious and persistent breach (. . .) of values referred to in Article 2’ is to be made by the European Council. Only within the procedure under Article 7(1), the Council may address to the Member State (under the preliminary RLF scrutiny) its corrective recommendations prior to the determination that this Member State experiences a situation of ‘a clear risk of a serious breach of the values referred to in Article 2’. The European Council is not empowered to take a similar step under Article 7(2).

The procedures of Article 7(1) and Article 7(2) can be distinguished also by their different outcomes. Under Article 7(1), the Council is invested with the right to regularly verify whether the grounds on which the Member State considered was determined to experience ‘a clear risk of a serious breach (. . .) of values referred to in Article 2’. In contrast, in the aggravated situation falling within the ambit of Article 7(2), the outcome of the procedure is that the Council would now be empowered (pursuant to Article 7(3)) to decide (by a qualified majority) ‘to suspend certain of the rights deriving from the application of the Treaties to the Member States in question’. This coercive suspension may take the form of excluding the Member State’s representative from voting in the Council; the suspension can as well involve any negative deformation of the regular rights of the Member State under the TEU and TFEU. The only limitations applicable to the power of the Council in this context is that—under Article 7(3) TEU—it should ‘take into account the possible consequence of such a suspension on the rights and obligations of natural and legal persons’. Because of a high position of general principles of law in the EU legal system, the Council should also make its measures applied under Article 7(3) in line with these principles, especially with the principle of proportionality. Yet, as any overview of the Court of Justice jurisprudence may indicate, only serious, ‘manifest’ errors in this principle application are most likely to make the measures so adopted subject to annulment by the Court of Justice.¹⁷ Moreover, these measures may escape any EU Court of Justice’s scrutiny initiated by natural and legal persons, as under the well-established *Plaumann* doctrine they are required to substantiate that the contested measures are uniquely applicable to the person challenging them—which is a difficult task. In other words, the decisions adopted under Article 7(3) are

¹⁷See the judgment in the case 25-62 *Plaumann & Co. v. Commission*, ECR [1963] 95. See also: Arnulf (2006), pp. 41–49.

bound to be quite enduring in the EU legal system.¹⁸ The RLF Treaty procedures specified in Article 7 is graphically depicted in Fig. 1.

The Treaty does not offer any further or more detailed elaboration of the system of Article 7 enforcement. This implies that neither does it give any guidelines which may apply to the systematic monitoring of the situation in respective Member States prior to the application of Article 7. This shortage is quite striking when the system of Article 7 TEU is compared with the EU system of enforcement of rules of economic governance set forth in Articles 121 and 126 TFEU as the latter system is elaborated in a significant number of secondary legal acts which set forth detailed rules on the evaluation of relevant criteria and procedural aspects of their application.

The Treaty model of RLF, as it is, is quite vulnerable to the Member States' collective will to trigger its respective stages even in a rather hypothetical situation of serious infringements of any of them against the values enshrined in Article 2 TEU. This vulnerability arises from the very demanding unanimity threshold for the decision made under Article 7(2), i.e. the one which would determine 'serious and persistent breach of the values referred to in Article 2' by one of the EU Member States. It is therefore enough that two EU countries will simultaneously be subject to the RLF procedure to make it manifestly ineffective as each of these countries would be able to vote on the case of another. Such a voting 'complot' is not a novelty in the EU: e.g. exactly this type of cooperative behavior prevented the Council from making its decision effective in the seemingly much less vulnerable system of economic governance.¹⁹

2.3 Rule of Law Framework sensu stricto in the Preparatory Stage: Its Origins and Formula

European Union statutory law does not contain any specific provisions concerning the evaluation of the situation in any Member States with regard to Article 7 TEU. In other words, the initiation criteria for the RLF or the procedure applicable to the initiation of Article 7 application have not been detailed in the Treaties or any legislative legal acts. The fact that the EU law falls short of expectations with regard to the enforcement mechanisms of Article 7 (in connection with Article 2) TEU has not gone unnoticed to many actors of the EU legal system. The most pronounced political initiative to improve this situation was undertaken by a group of Northern EU Member States: Denmark, Finland, Germany, and the Netherlands which advocated for the development of an instrument which would make it possible to monitor the internal rule of law in EU Member States on a permanent basis. In the programming document of this initiative, a 2013 report titled 'Respect and Justice for All',

¹⁸Tridimas (2000), pp. 89–123.

¹⁹See the judgment in the case C-27/04 *Commission v. Council*, ECR [2004] I-6649. See also e.g. Andersen (2012), p. 27.

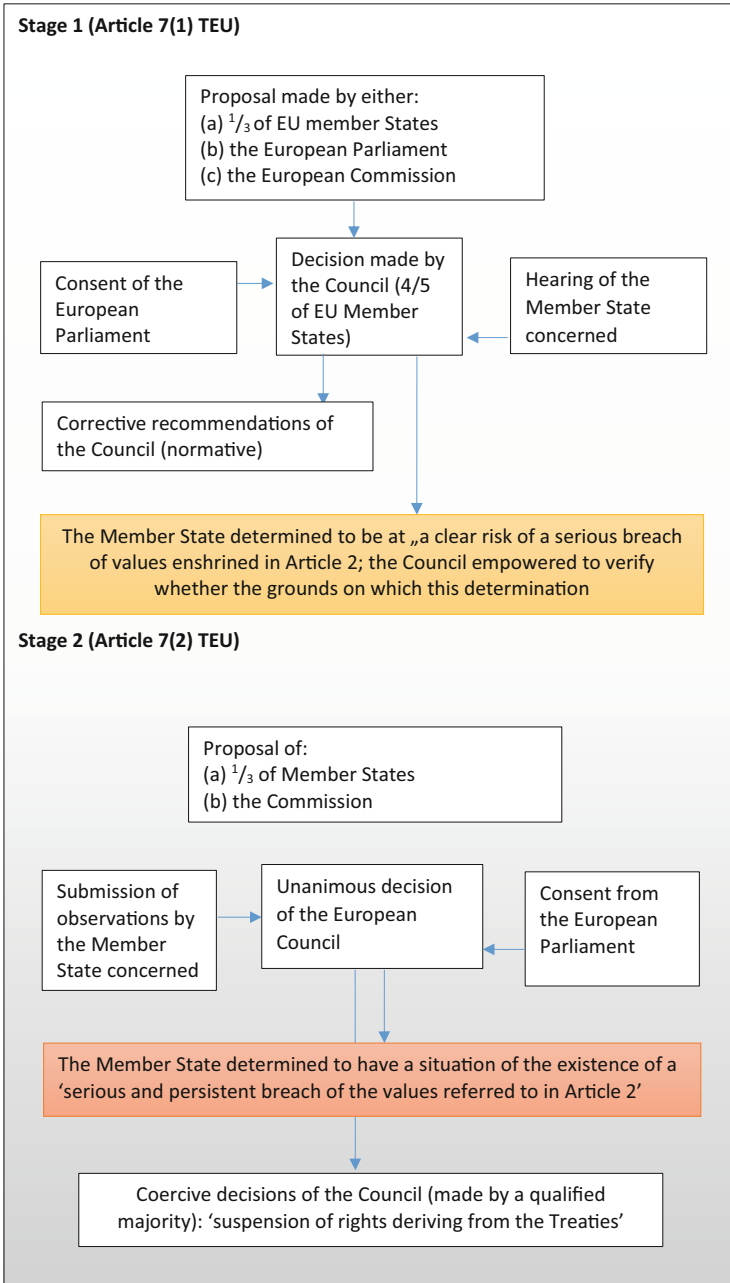


Fig. 1 Procedure of Article 7 paragraphs 1–2 TEU (Treaty of Lisbon). Source: Artur Nowak-Far

the Dutch Ministry of Foreign Affairs explained the rationale of the initiative in the following way:

...the rule of law does not always function sufficiently well, even within EU member states. To strengthen the rule of law within Europe, the government seeks to promote transparent governance, independent judiciaries, respect for human rights, antidiscrimination policy and legislation to curb corruption and conflicts of interest (...). Countries wanting to join the EU must comply with strict accession criteria in the realm of the rule of law and human rights (the Copenhagen criteria²⁰) (...). At the moment, there are still too few resources to call member states to account after their accession to the EU. Ideally, there should be a mechanism within the EU enabling member states to remind each other of their obligations on the basis of equality. There is already a system of this kind in the framework of the United Nations, but the EU also has a responsibility to tackle problems in its own house on a political level.²¹

The initiative coincided with some actions undertaken in the EU institutions: In June 2013 the Justice and Home Affairs Council and the European Parliament, respectively. The former called on the Commission ‘to take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method’ to monitor the observance of EU values in respective EU Member States and address detected departures from the generally accepted standards.²² The European Parliament requested that ‘Member States be regularly assessed on their continued compliance with the fundamental values of the Union and the requirement of democracy and the rule of law.’²³

The said RLF initiative did not earn any firm enough support from other Member States which remained neither neutral or negative to it. The Hungarian government already feared that the procedure would be used against it; some governments (like the Polish one, at least for some time) perceived it as an ‘elitist’ procedure which would be used by the ‘better’ states (most likely the ‘old’ EU members) to scrutinize political practices of the ‘worse’ countries (most likely to be the ‘new’ EU Member States, i.e. the ones which acceded past 2004 and which, indeed, had to meet the Copenhagen criteria). Some other Member States perceived the RLF as a tool to expand the European Commission’s realm of authority—something they were reluctant to easily accept.

Regardless of these hurdles, in response to these initiatives, the European Commission came up with its own communication concerning the procedure which could be used for activating the mechanisms foreseen in Article 7 TEU.²⁴ According to the Commission’s own statement, the proposed rules were to ‘precede and complement

²⁰For the explanation of this point refer to the next section of this chapter.

²¹Ministry of Foreign Affairs of the Netherlands (2013), p. 20.

²²Press release 3244th Council Meeting – Justice and Home Affairs, Luxembourg 6–7 June 2013, document 10461/13 (OR.en).

²³European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Report of 17 February 2014 on evaluation of justice in relations to criminal justice and the rule of law, rapporteur Kinga Göncz, document A7-0122/2014.

²⁴See *supra* Fig. 1.

Article 7 TEU mechanisms’; their application was to be ‘without prejudice to the Commission’s powers to address specific situations falling within the scope of EU law by means of infringement procedures under Article 258 TFEU’ (i.e. its powers to start up an EU law infringement procedure before the European Union Court of Justice). Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission can launch a ‘pre-Article 7 Procedure’ by initiating a dialogue with that Member State through the Rule of Law Framework.

According to the Commission communication, the RLF procedure has three stages:

- (a) the assessment stage—where the Commission collects and examines all the relevant information and assesses whether there are clear indications of a systemic threat to the rule of law; at this stage, if the Commission’s concerns have been substantiated, it would initiate a dialogue with the Member State concerned by sending its ‘Rule of Law Opinion’ to that state;
- (b) the recommendation stage—where the Commission would address its ‘Rule of Law Recommendation’ to the Member State concerned, in which this EU institution would make public expected actions and their applicable time-frame—all meant to improve the situation in the Member State concerned,
- (c) the follow-up stage—where the Commission would monitor the Member State’s action and, if it found the State’s performance unsatisfactory, it would trigger Article 7 procedure—either on its own, or by prompting $\frac{1}{3}$ of the Member States or the European Parliament to do so.

The RLF (*sensu stricto*) can thus be interpreted also as a system of structured discourse as it involves a continuous dialogue and exchange of views between the Commission and the Member State concerned and between the European Parliament and the Member States (represented within the Council).

3 Exposition of EU Axiological Basis in the Treaties and Its Procedural Ramifications

3.1 Driving Forces

The idea to expose the EU axiological basis in a EU treaty has been on the agenda for a long time prior to the entry into force of the Treaty of Lisbon (in December 2009). The sense of urgency with regard to this exposition emerged as a result of the following two phenomena:

- (a) the EU enlargement negotiations which started in 1998 and were successfully concluded in 2004 and resulted in accepting a group of Central and Eastern European countries as new Member States of the EU,
- (b) the emergence of the authoritarian right-wing coalition in Austria (in the period of 2000–2002).

One of the challenges of the EU enlargement negotiations which involved a group of Central and Eastern European countries (i.e. Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia, Slovenia) was their authoritarian heritage (in fact, a little bit less extensive for the Czech Republic, as prior to WWII, it had been a fully-feathered liberal democracy). All these 8 countries had a Communist past, the Baltic States (i.e. Estonia, Latvia, and Lithuania) were even the component republic of the USSR until 1991. For this reason, the rule of law and other EU democratic values were included in the EU membership criteria negotiation package, most importantly in the form of the so called ‘Copenhagen Criteria’. These were set forth by the European Council in its summit Conclusions of June 21–22 1993. The most relevant requirement was formulated in the following way:

Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.²⁵

Thus, throughout the negotiations, the incumbent States were required to modify their institutional and legal systems in a way which could guarantee that the Copenhagen Criteria were met. Interestingly, the question of meeting the Copenhagen Criteria had not been an issue in the 1995 EU enlargement which included Austria, Finland, and Sweden, but had again been quite important in the 2007 EU enlargement onto Bulgaria and Rumania and in 2013 when they were again applied to Croatia. The problem with the sheer application of the Copenhagen Criteria was, however, that—from the perspective of the EU legal order—these criteria represent non-binding set of rules (which does not mean that they cannot be considered to form contractual obligations-reference under international law). This means that they could effectively be applied whenever, in the context of EU membership negotiations, there was enough conditionality to enforce adequate standards in the EU membership-aspiring countries; yet this element was lost whenever they entered the EU as the European Council’s presidency conclusions of 1993 were not even their own original political commitment but rather something imposed ‘from outside’. Thus, in order to avoid departures from the negotiated standards, an adequate amendment of the Treaty appeared to be badly needed.

As it has already been said, the other phenomenon which prompted the process of adoption of adequate Treaty standards of democracy, the rule of law, human rights, and the protection of minorities was that of the political rise of right, authoritarian parties in Austria. The phenomenon found its pivotal moment after the 1999 parliamentary elections in Austria when the radical right party, Freedom Party of Austria (*Freiheitliche Partei Österreichs, FPÖ*), was able to create a coalition with the mainstream Social Democrats (*Sozialdemokratische Partei Österreichs, SPÖ*).

²⁵European Council in Copenhagen. Conclusions of the Presidency, June 21–22, 1993, document SN 180/1/93 REV 1, p. 14.

What now (unfortunately) appears not so unusual anymore, had in 2000 come as a surprise because of a controversial, nationalistic, anti-immigration, and authoritarian penchant of the controversial FPÖ's leader Jörg Haider. The resulting situation made it visible, that the only pressure other EU Member States could exert on the EU country whose policy might not be completely in line with the EU values was the political pressure (in fact, intra-EU cooperation with the Austrian government then was limited), but no firm legal tool could be used.

The first ever legislative reaction to the threat of rightist populists was the amendment of the Treaty introduced by the Treaty of Amsterdam (1997), often referred to as '*Lex Austria*'. Namely, in Article F.1, the Treaty was given a new provision which provided that:

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 the Member States.

It is quite striking that, when compared to Article 2 of the present TUE, Article F(1) TUE (the Amsterdam version) made its reference to a narrower catalogue of values. Moreover, it made a reference to liberty which is not made any more in the present Treaty. Its reference to human rights goes together with the reference to fundamental freedoms—whereas the present Treaty does not contain a reference to the latter value. Most importantly, Article F(1) TUE does not contain any specific catalogue of values which pertain to the societies of the Member States (such as pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men); rather, it points out an axiological network which should be 'common the Member States' but which apparently 'stem from the fundamental EU legal order'.

In Article F.1., the Amsterdam Treaty set forth, for the first time, a RLF procedure, yet it was quite distinctive from the present one. The most important difference is that the Amsterdam RLF was a single-stage procedure with the pivotal role of the Council, acting in a very special format (not used anymore in the EU institutional order) of the heads of states or governments (i.e. with no participation of the President of the Council nor any of its own President, as this position had never existed for this very special type of the Council). The Council was to act by unanimity on a proposal by 1/3 of the Member States or by the Commission and after obtaining the assent of the European Parliament—which is the same arrangement as the one used now (also with respect to the majority requirements). Article F.1 provided also that the Council's decision should be made only after inviting the Member State concerned to submit its observations. The procedure was to be concluded with the determination by the Council of 'the existence of a serious and persistent breach by a Member State of principles mentioned in Article F(1)'. When such a conclusion had been adopted in the decision, the Council, acting by a qualified majority, might decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. The Amsterdam RLF procedure is depicted in Fig. 2.

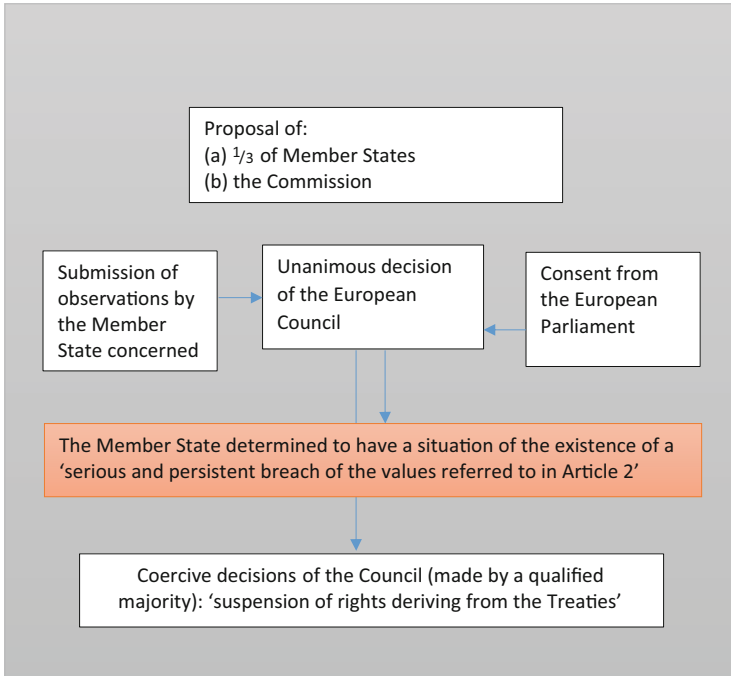


Fig. 2 Single stage RLF procedure of Article 7 TEU (Article F.1. of the Treaty of Amsterdam). Source: Artur Nowak-Far

Article F.1. TEU contained the same modalities as the present Article 7(2). Namely, the Council decision on the suspension of rights of the Member State put under the RLF scrutiny had to take into account ‘the possible consequences of such a suspension on the rights and obligations of natural and legal persons’. It could also, acting by a qualified majority, decide to vary or revoke measures originally adopted with respect to that Member States—reflecting on changes in the underlying situation.

The RLF procedure specified in the Amsterdam Treaty was quickly considered too rigid and inflexible as it did not allow for any preliminary stage where the Member State concerned could be involved in a dialogue on its practices. Thus, Article 7 TUE was amended in the subsequent revision of the TEU, now in the Treaty of Nice (2000).

The rule of law became an important element of the agenda within the negotiation of the EU Constitutional Treaty, which, in Article I-2 enshrined it together with other values deemed inextricably interwoven with it: democracy and the human rights. Moreover, it contained a clause not only stating that the EU-specific values listed in it are ‘common’ to the EU Member States, but also formulating requirements concerning the axiological fabric of their societies—all in the format which was later adopted in the Treaty of Lisbon as well. Thus, the wording of Article I-2 of the Constitutional Treaty was as follows:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

With regard to the RLF procedure, the Constitutional Treaty, in Article I-59, took over the wording of the Treaty of Nice. Interestingly and uniquely for the Constitutional Treaty, this act made also reference to these values in its preamble. It also contained numerous clauses which provided significant guidelines for interpretation of the values enshrined in its Article I-2. Interestingly, it also extended the requirements of the rule of law onto EU institutions, as well.

The Constitutional Treaty, adopted in 2004, had been intended to replace the then present EU treaty framework. Yet, it was a failed endeavor—as it had failed to win ratifications in all the EU Member States.

Soon after its failure, the EU Member States began the negotiation of a major revision of the then existing treaties (TEU and the Treaty establishing the European Community, TEC). These negotiations were successful. They produced a new version of the TEU and transformed the TEC into its major revision named the Treaty on functioning of the European Union. The new treaties (technically speaking resulting from the accord called the Treaty of Lisbon), were duly ratified and entered into force in December 2009.

This, however, has not solved the problems of an effective enforcement of the rule of law in the EU. A possibility for the EU venue to achieve a high enough standard in this area would be to accede to the European Convention of Human Rights and Fundamental Freedoms (ECHR). Yet, the EU failed to do it. The EU failure to make an accession to the European Convention of Human Rights and Fundamental Freedoms (ECHR) occurred despite the fact that the Convention is referred to in Article 6 TEU which

- (a) in its paragraph 2 provides that the Union shall accede to the ECHR, yet that ‘such accession shall not affect the Union’s competences as defined in the Treaties’,
- (b) in its paragraph 3, provides that fundamental rights, as guaranteed by the Convention shall (together with the fundamental rights resulting from constitutional traditions common to the Member States) constitute general principles of the EU law.

The former provision was intended to defy the Court of Justice’s negative opinion issued in 1994 (i.e. the opinion 2/94²⁶) which upheld that with no express legal Treaty basis, the Community was not entitled to accede to the ECHR. This ‘defying’ effect seemed to be even reinforced by a modification of the ECHR itself, by the introduction of the Protocol No. 14, which in Article 17 provided for a change in Article 59(2) ECHR with the effect that it now expressly foresaw the EU accession to

²⁶CJEU, Opinion 2/94, ECLI:EU:C:1996:140.

the Convention. The process of accession seemed to be reinforced by the fact that, by virtue of the Lisbon Treaty, the EU Chapter of Fundamental Rights (CFR) had been included into the EU legal system as a binding instrument.²⁷ As such, it required that the rights enshrined in it be identical with the rights arising from the ECHR (Article 52(3) CFR), yet with an important reservation that these rights be not interpreted in departure from the established EU law, international public law (at large) and international conventions to which the Union or all its Member States were counterparties (Article 53 CFR).

The specific conditions on which the EU was to accede to the ECHR were set forth in the Protocol No. 8 attached to the Treaty of Lisbon. This Protocol set forth the following principles applicable to the accession:

- (a) the principle of inter-semiotic retention (set forth in Article 1), i.e. the requirement that the accession should make it possible to retain specific features of the EU and the EU legal system (especially with regard to the participation of the EU in controlling mechanisms of the ECHR);
- (b) the principle of non-modification of external and internal powers of the EU (Article 2, first sentence),
- (c) the principle of non-modification of the status of the EU Member States in the ECHR legal order (Article 3, second sentence);
- (d) the principle of exclusive competence of the EU Court of Justice with regard to disputes concerning the interpretation and application of EU Treaties (Article 3 of the Protocol in connection with Article 344 TFEU).

In its opinion 2/13,²⁸ the EU Court of Justice upheld that the already negotiated agreement on the EU accession to the ECHR should not be signed. One of the most significant arguments which prompted the Court to conclude negatively was that the accession to the ECHR would result in a deformation of the principle of mutual trust inherent in the EU legal system. This principle implies that the Member States should not double-check, in any legal action context, whether other Member States observe fundamental rights guaranteed by the Union.²⁹ Nevertheless, such rights should be interpreted ‘within the framework of the structures and objectives of the Union’³⁰ which are determined by EU substantive law. In the case of doubt, national courts can refer to the Court of Justice within the preliminary questions procedure

²⁷The Chapter of Fundamental Rights had been considered to have just a ‘declaratory’ value before.

²⁸CJEU, Opinion 2/13 of 18 December 2014, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454.

²⁹Id, para. 191 of the Opinion 2/13, *supra* note 2. See also the CJEU’s judgment of 25 June 2018 in the case C-216/18 PPU *LM*, ECLI:EU:C:2018:586 in which the Court upheld that such a double-checking should guarantee rights conferred to EU citizens under Article 47 CFR; the CJ emphasized that the check should be based on specific and detailed analysis of the underlying situation and should take into account the specific situation of an individual concerned as well as the information provided for by the Member State whose legal system is to be trusted.

³⁰Id, para. 170.

under Article 267 TFEU. This important legal arrangement cannot be reconciled with the mechanisms of application of ECHR, as—among others—any interpretation offered by the EU Court of Justice could not be binding to the separate Court of Justice operating under the Convention. Instead, judiciary decisions of that latter court would be binding onto the EU Court of Justice which could undermine the principles set forth in Protocol No. 8.

Interestingly, this does not mean that the EU Treaties and the ECHR represent two legal systems immune from each other. In practice, they are in a constant intersemiotic dialogue (i.e. the dialogue in which two separate, yet interlegible ‘institutional languages’ are employed) as the judgments under the ECHR are often treated as a type of preliminary rulings by the EU Court of Justice.³¹ In turn, the ECHR Court sometimes invokes the EU preliminary questions procedure under Article 267 TFEU considering denial of its application a breach of the ECHR (i.e. its Article 6(2) which prohibits denial of justice).³² However, regardless of this dialogue, the linkage between the ECHR and the EU legal order proved to be insufficient to provide for a stronger enforcement mechanism of the EU values, especially those enshrined in the Charter of Fundamental Rights and in Article 2 TEU.

3.2 *Legal Interpretation of the RLF sensu stricto*

The legal meaning of the procedure set forth in Article 7 TEU does not yield any specific concerns as to its legal binding force. In contrast, the RLF *sensu stricto* does give rise to some concerns about its legal force which would likely be raised by the Member States subject to any form of the European Commission’s scrutiny in the context of Article 7.

Admittedly, the RLF *sensu stricto* was set forth in the European Commission communication (i.e. the RLF communication). The communication is not included in the list of binding legal acts specified in the Treaties; most importantly, it is not covered by Article 288 TFUE, which provides that regulations, directives and decisions have binding force in the EU legal system. Thus, the RLF communication can be considered an act of soft law.

The European Commission was empowered to make the RLF communication as it was meant to ‘precede and complement Article 7 TEU mechanisms’ and provide transparency in the Commission’s own actions—as such a specification can be

³¹See e.g. the judgment in the case C-404/15 and C/659/15 *Criminal Proceeding against Pál Aranyosi and Robert Căldăraru*, ECLI:EU:C:2016:198 (where the Court upheld that the European Arrest Warrant can be denied effect with respect to the Member State being persistently in contravention of the ECtHR—what has already been confirmed in the ECtHR judgments in *Vociu v. Rumania*, Application No. 22015/10, *Bujorean v. Rumania*, Application No. 13054/12, *Varga et al. v. Hungary*, Applications No. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, 64586/13.

³²ECtHR *Dhahbi v. Italy*, Application No. 17120/09.

considered a specification of the Commission's general powers arising from this Treaty provision. The rules set forth in the RLF communication can be interpreted as a measure to eliminate uncertainty of law resulting from the incompleteness of rules specified in Article 7 with regard to the triggering of the mechanism of RLF (*sensu largo*). Thus, the procedure foreseen in it is meant to produce legal (and at the end of the day, binding) effect, yet the RLF rules (*sensu stricto*) are deprived of a binding force. In the terminology developed by Susan Senden, the RLF communication can be classified as a decisional communication (as contrasted to informational or interpretative ones), i.e. a communication which provides for general rules regarding the way in which the already existing implementing powers will be exercised, in particular, indicating, how the Commission will apply binding law provisions in respective cases and how it will make use of the applicable discretion at its disposal.³³ Decisional communications are not binding but are apt to produce legal effects by virtue of some other rules to which they pertain and to which they pragmatically relate. In the specific RLF (*sensu stricto*) context, the RLF communication derives its legal effectiveness from the fact that it is meant to make sure that the application of Article 7 should commence on a well-reasoned and adequately substantiated basis. As such, the RLF *sensu stricto* could make the application of Article 7 much more informed than without it. Moreover, as it performs an obvious signaling element, the RLF *sensu stricto* guarantees that the Member States concerned would not be surprised with the decision to become subject to measures under Article 7. More than that—they will have a chance to get involved in a dialogue with the Commission where they would be able to submit their own argumentation concerning the rule of law situation.

It is a matter of serious doubt whether the Member States subjected to the RLF *sensu stricto* would be able to challenge the recommendations addressed to them within this procedure before the EU Court of Justice (under Article 263 TFEU, i.e. within the action of annulment of an EU legislative act). The doubt arises from at least two issues:

- (a) the formal one, which is based on an argument that Article 263 TFEU overtly excludes annulment actions brought against Commission's recommendations,
- (b) the material one, which is based on an argument that, even if Article 263 TFEU were applicable (as—because of the clear intention to produce legal effect—the 'recommendations' under the RLF could be re-interpreted as acts falling within the remit of actions for annulment³⁴), at the end of the day, they could not be challenged as they do not represent a final measure, but are rather steps in a procedure to be completed and to involve challengeable legal acts.³⁵

³³Senden (2004), pp. 148–149.

³⁴See e.g. the EU Court of Justice judgment in the case C-362/08 *P Internationaler Hilfsfonds eV v. Commission*, ECLI:EU:C:2010:40, para. 52; 22/70 *Commission v. Council*, ECLI:EU:C:1971:32, para. 42.

³⁵The argument *per analogiam* based on the EU Court of Justice (the Court of First Instance) judgment in the case T-126/95 *Dumez v. Commission*, ECLI:EU:T:1995:189.

Not being able to challenge the RLF recommendations, the Member States concerned, if only determined enough, would likely disregard them (as it was recently the case with Poland). Since (genuine) recommendations are not binding legal acts, the Commission will not be able to bring an action against the Member States concerned (under Article 258 TFEU) for not fulfilling them. Yet, this non-fulfillment will be a significant evidence in any further proceedings under Article 7.

This conclusion is in the same time an argument supporting the Commission's competence to issue the RLF recommendations. In the context of the entire RLF, they represent an important element of the dialogue between the Commission and the Member State concerned. The fact that the Member State ignored them (if this is the case) becomes an element of the argumentation sued for triggering the Article 7 procedure against this state.

4 The Content of the Rule of Law Under the RLF

To complete the analysis presented in this article, it is quite essential to identify what exactly is meant under the term 'rule of law' in the context of the RLF, regardless of its narrow or broader form. As the term does not have any Treaty definition, it is quite in place to rely on the legal doctrine and the EU Court of Justice's jurisprudence to answer this question.

4.1 *The Legal Doctrine*

More is known about what the rule of law is not than what it exactly is—especially in national contexts. Yet, basic conditions for the rule of law can be identified in the existing body of literature.³⁶ It is most often held that the rule of law is achieved whenever the following requirements are met:

- (a) law generality—law should be general; particular regulation should be avoided;
- (b) law publicity—law should be made public, known to those whom it concerns;
- (c) law non-retroactivity—law should not act retroactively;
- (d) law cataphaticity—law should be understandable to its primary stakeholders;
- (e) law relative stability—law should be kept stable, whenever there are not good reasons to amend it;
- (f) systemic consistency—legal norms of the system should be consistent with each other;
- (g) law observability—it should be possible for law stakeholders to observe it;

³⁶See e.g. May (2014), pp. 33–56; Sanchez-Cuenca (2003), pp. 62–93.

(h) behavioral congruence between legal norms and stakeholders' actions—all stakeholders should effectively observe the law.

Adriaan Bedner divided the features/requirements of the rule of law into three classes:

(a) procedural:

- the presence of the rule by law, i.e. the situation where the state actions are subject to law;
- the law formalization, which requires that it is understandable, stable and predictable);
- the creation of law in democratic procedures, i.e. under conditions requiring that the legislative consent should determine or at least influence legal actions)

(b) substantive:

- the law subordination to justice;
- the protection of individual rights and liberties;
- the respect to human rights and group rights

(c) controlling:

- the independence of judiciary;
- the responsibility of administrative and other independent bodies for reviewing legal process.³⁷

Interestingly, most of these requirements are primarily addressed to law-makers. Some of them require a good *ex ante* foresight into the expected perceptions/reactions of those who would be most likely and/or most strongly concerned with a given piece of law. It is striking that all of these requirements are formulated in procedural terms or, if they concern the content, they are highly abstract. As a result, the question about the 'content' law under the rule of law is quite justified.

One possible answer to this question is that the rule of law is about providing for conditions in which 'right' relationships between the government and citizens as well as between each and every citizen is set. 'Right' means, that the resulting setting is capable to protect and enforce individual rights and to give framework for a large degree of responsibility and accountability in the government. Some answers aspire even higher, as they would consider the 'real' rule of law to guarantee a perfect impartiality of the law-making system.

³⁷Bedner (2010), pp. 56–69.

4.2 The EU Court of Justice Jurisprudence

The rule of law was highlighted in the European Union relatively often in various forms. Most importantly in 1986, in its enshrined judgment in the case 294/83 *Parti écologiste ‘Les Verts’ v. European Parliament*,³⁸ the Court of Justice held that the Community was a ‘community of law’—and reminded that it required the consistency of all law (including national law) with the Treaty serving as a ‘basic constitutional charter’ (i.e. the systemic anchor of the entire, so defined, legal system). In 1993, the European Council formulated the so called ‘Copenhagen Criteria’ applicable to all states aspiring for EU membership, in which conformity with the ‘rule of law’ was enshrined. In 1997, the Treaty of Amsterdam made referrals to rule of law in Article 6 and the new suspension mechanism of Article 7 (so called *Lex Austria*). On some occasions, the Court of Justice upheld the idea that the EU was also subject to the rule of law. In its judgment in the case C-50/00 *P Unión de Pequeños Agricultores v. Council*,³⁹ the CJ stated that rule of law required consistency of EU secondary law with fundamental rights (see also similarly in joint cases C-402/05 P and C-415/05 *P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*⁴⁰). As it has already been argued, the most recent CJ’s jurisprudence has contributed significantly to this rather rudimentary understanding of the concept of rule of law—most importantly in the realm of judiciary. The most recent development of CJ jurisprudence established a link between Article 2 TEU and Article 19(1) TEU as well as the due process standard set forth in Article 47 CFR (concerning the right to an effective remedy and to a fair trial). The CJ construed the EU legal system as the one which is complete and fully capable to enforce all rights conveyed by the EU law onto EU citizens or undertakings, provided that the Member States effectively ensure judicial protection of these rights.⁴¹ In such a complete system, the respective judicial systems, at both national and supranational levels, sport mutual trust to each other.⁴² Yet, this trust is subject to the results of a careful double-checking procedure which can be triggered by national courts whenever there are substantiated grounds that the values enshrined in Article 2 TEU are not fully observed or implemented in another Member State.⁴³ The issue can be expected to be developed further as many cases concerning the rule of law issue are still pending. So far, they have been extensively discussed in a series

³⁸ECLI:EU:C:1986:166.

³⁹ECLI:EU:C:2002:462.

⁴⁰Judgment of 3 September; ECLI:EU:C:2008:461.

⁴¹Judgment of 6 March 2018 in the case C-284/16 *Slovak Republic v. Achmea BV*, ECLI:2018:158; see especially para 36.

⁴²E.g. Opinion 2/13 of 18 December 2014, *supra* note 2; judgment of 27 February 2018 in case C-64/16 *Associação Sindical dos Juizes Portugueses (ASJP)*, ECLI:EU:C:2018:117, para. 39.

⁴³Judgment of 5 April 2016 in the case C-404/15 and C-659/15 PP *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198, para 104; judgment of 25 June 2018 in the case C-216/18 PPU *LM*, *supra* note 29, para 23.

of illustrious opinions presented by Advocate General Evgeni Tanchev,⁴⁴ who adopted a broader, systemic approach in reviewing judiciary system quality in a Member State.

All these actions have contributed to the understanding of the EU concept of the rule of law. Yet, they definitely are not sufficient to make it possible to construe an independent, EU-specific definition of it. The wording of Article 2:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the *rule of law* and respect for human rights, including the rights of persons belonging to minorities. . . (emphasis added)

suggests that the rule of law is one of the values on which the EU is founded and that it is somehow different from other values enshrined in this particular provision of the Treaty. We also know (from other provisions of the Treaty as well as from the CJ jurisprudence) that the principle of procedural autonomy applies to the EU Member States. In the procedural realm, its rectifications in CJ's judgments in e.g. cases 21-24/72 *International Fruit Company NV et al. v. Produktschap voor Groenten en Fruit*,⁴⁵ C-188/89 *A. Foster et al. v. British Gas plc*,⁴⁶ 103/88 *Fratelli Costanzo v. Comune di Milano*⁴⁷ indicate that its major aspect is the Member States' free hand in shaping their basic constitutional (institutional) order. This means that also the rule of law (as it has been construed under Article 2 TEU) can be applied in divergent procedural settings of now numerous EU Member States. As a result, uniformity of application of 'the rule of law' (and almost all other standards of EU law) in the European Union is far from an ideal pattern attempted by the EU Court of Justice. In consequence, 'uniform EU law' is—by definition—divergent in real settings, where real interests of EU citizens are at stake. In other words, there is a great deal of intersemiotic discourse of EU Member States' judicial and administrative systems over EU law purported to be 'uniform'. Nevertheless, the already discussed recent developments in CJ's jurisprudence clearly indicated that the substantive concept of rule of law heavily relies on the judiciary independence of the executive.

⁴⁴Opinions in cases C-619/18 *Independence of the Polish Supreme Court* of 11 April 2018, ECLI:EU:C:2019:325; C-192/18 (retirement age of judges) of 20 June 2019, ECLI:EU:C:2019:529; C-585/18, C-524/28, C-625/18 *Polish National Judiciary Council, Disciplinary Chamber of the Supreme Court* of 27 June 2019, ECLI:EU:C:2019:551.

⁴⁵Judgment of 12 December 1972; ECLI:EU:C:1972:115.

⁴⁶Judgment of 12 June 1990; ECLI:EU:C:1990:313.

⁴⁷Judgment of 22 June 1989; ECLI:EU:C:1989:256.

5 The International Dimension of the EU Rule of Law Framework

5.1 *The Rule of Law Importance for the EU Common Foreign and Security Policy*

The fact that the initiative for increased enforcement of the rule of law within the Treaty of Lisbon system was promoted by the foreign affairs services of a group of the EU countries is quite telling about the significance of that idea for the EU external policy. It is enough to say that the TEU (in Article 21(1)) requires the EU foreign service (operating within the framework of the EU Common Foreign and Security Policy, CFSP⁴⁸) to consider the rule of law to be one of its guiding principles (together with democracy, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the Principles of the UN Charter and international law). Pursuant to Article 21(2) TEU, the Union shall define and pursue international common policies and actions which, *inter alia*, consolidate and support democracy, the rule of law, human rights and the principles of international law. As a result, the rule of law has become an idea well pronounced at various levels and in various fora where the EU is represented.

As a matter of fact, in the international sphere, the EU promotes its own model of human rights and—within it—the rule of law. Generally speaking, this model emphasizes the importance of the individual's dignity and individual rights—the ideas deeply rooted in the European Enlightenment. The rule of law can be considered a comprehensive instrument of safeguarding these rights and enforcing them in a uniform manner. Thus, the RLF mechanisms are vital for assuring that—despite the existing procedural divergences in respective EU Member States' legal systems—the EU preserves the integrity of the EU human rights model, and that the EU as an actor of international relations, maintains its high credibility in promoting this model. In other words, the RLF is meant to curb the existing divergence and achieve some uniform standards in the system of enforcement of human rights in order to attract global adherence.

The problem of a proper (i.e. complete and functional) intersemiotic translation of international human rights standards into domestic ones (i.e. the transposition of one legal-pragmatic model of making them reality into another) is pronounced even in systems of common legal tradition and philosophy. With regard to the relationship between legal systems of the Western legal and political tradition, Ernest A. Young noticed, that even when we looked to such systems which, with no doubt, shared common heritage and reflected the same or significantly similar axiological fundamentals, we saw 'divergence rather than convergence on many aspects of values and

⁴⁸I.e. the subject matter of the provisions of Title V TEU.

political culture'.⁴⁹ This not very encouraging conclusion is even more applicable to the relationship between the Western legal and political traditions and its more distant counterparts. The underlying prevalent local social circumstances, moral attitudes and customs may determine a significant gap between the Western concept of human rights and their popular/political acceptance beyond the Western world. This gap may also serve as a political excuse for a national policy of not pursuing any ambitious programme of human rights promotion. Moreover, the recent tensions within the EU which urged the Commission to make recourse to the RLF with respect to Poland were fundamentally caused by the fact that the present Polish government emphasized its different stance to human rights—as it does not seem to share the respect too common to most EU states legal tradition and philosophy stemming strongly from the ideas of the European Enlightenment. Instead, it prefers to derive its legitimacy from rather obscure and unclear ideas of social collectivism and Catholic nationalism.

In order to be effective, international human rights (that is the rights adopted in a context of an international agreement for the purpose of their more or less universal application), must be suitable for their at least relatively equivalent intersemiotic translation—that is their transformation into legal norms expressed in an international statute into legal norms of a given national system.⁵⁰ As a result, international standards will only be 'common' either if the transformation system is apt to act effectively and efficiently and/or if translated common standards represent a low enough denominator (which could be detrimental to the international level of human rights protection). Irrespective of the systemic capacity of intersemiotic translation or structural complexity of norms being translated, a firm and welcoming constitutional approach is required to make human rights enshrined in an international law instrument subject to such a translation. The resulting divergence eliminates 'an axiological common ground' to which respective EU Member States could refer in their EU wide and global discourse on human rights. As a result, this discourse could be deprived of important common reference framework which could have brought these counterparties closer to each other and make legal measures reconciliation more likely to achieve.

It is obvious that this problem is not only bilateral. In the globalized world, bilateral reciprocity shortages become aggregated so that they are increasingly likely to cause acute frictions between legal systems which tend to be more often exposed in the area of consular protection and asylum granting. As a result, they may become a source of a wide dispute over the general roles of the state needed to make the international order an effective and efficient system in which various communities and individuals can achieve levels of welfare not achievable under non-cooperative conditions. In respective areas relevant for the formulation and implementation of national and/or regional public policies, such a lack of reciprocity and the resulting inter-systemic friction would reduce effectiveness of these policies, thus reducing an

⁴⁹Young (2005), pp. 161–166 (referring to the *Thompson* judgment, 487, US 830).

⁵⁰See, e.g. Tiefenbrun (2010), pp. 263–280.

aggregate level of total global welfare which—under more concurrence and cooperation—might have reached higher levels.

5.2 *International Law Interpretation of the RLF*

In legal terms, the modern European human rights concept (including its procedural frameworks such as RLF) represents a departure from a ‘traditional bottom line’ standard defining inter-relational aspects of international law set forth in the 1927 PCIJ *Lotus* judgment⁵¹ holding that international law (and thus, the human rights-relevant international law) is essentially about relations among states. Today, international law, and especially human rights and the rule of law component of it is a law about global governance which is a concept extending well beyond the relationships amongst states. Global governance can be defined as ‘the sum of many ways individuals and institutions, public and private, manage their common affairs’.⁵² The practice follows this approach putting in the radar of both international law and human rights (being its significant element) not only states but also non-state actors (especially individuals and their more or less formalized groupings). It does so through the application of international law norms conceived not only as a result of state consent but also of general pressure resulting from a broad consent of all legitimate international law and human rights stakeholders to pursue basic common values of humankind. In modern times such a pressure has become a driving force for shaping international normative agenda.⁵³

Having said that, it is important to emphasize that states still play the most important role as international law operators and human rights guarantors (through their own substantive and procedural guarantees producing the rule of law). Thus, at the end of the day, their consent to any conceived norms in these realms still plays the dominant role in legitimating a broad enough and effective (judiciable) recourse to those values in an international scale (in state-setting). To some extent, this pronounced role of states represents an argument usually somehow less pronounced but worth mentioning that only effective assets of international relations really count in international law and human rights promotion.

The essential problem of today’s international relations, international law and thus human rights defined in broad terms (i.e. also as a source of potential inspiration for a global governance practice) is at what level of aggregation of their respective standards should be conceived and, consequently, how universally, they can or should be applied and enforced. In such a context, the EU effort to maintain some uniformity in its human rights and the rule of law context can be interpreted as an

⁵¹[1927] PCIJ 10 Series A, 18.

⁵²Commission on Global Governance (1995), *Our Global Neighbourhood: The Report of the Commission on Global Governance*.

⁵³See discussion presented in: Thirlway (2014), pp. 8–16.

effort to achieve significant 'weight' able to attract other, non-EU states to follow the European pattern or at least to become an important reference point for the international discussion on the nature, scope of application and the mode of enforcement of human rights.

6 Conclusions

1. The Rule of Law Framework (*sensu largo*) is vulnerable to unguaranteed, discretionary influences of the Member States. This vulnerability arises from its procedural format which requires high thresholds in decision making—with unanimity applicable to the decision which could make it possible for the EU institutions to effectively address any situation in a EU Member States where the rule of law standards have been considered unsatisfactory. With such a mode of the applicable decision-making, RLF procedures are prone to be terminated as a result of collusions made by EU Member States likely to be scrutinized, if at least two of them wish to cooperate with each other in order to abort the RLF procedure brought against one of them.
2. Yet, any serious breaches of an EU Member State of human rights (in the context of ineffective rule of law standards) could single it out within the Union. As a result, in breaches of significant gravity, such a state would not be able to attract cooperation needed for the collusive termination of the RLF. Thus the Framework can have some positive impact on respective EU Member States' behaviour with regard to their respect to human rights.
3. This effect is even reinforced by an active stance of the European Commission which is bound to pursue the RLF effectiveness for the sake of achieving relative uniformity of application of EU law (at large), and making the European Union a credible actor and co-creator of international legal order. The Commission is determined to play an active role also because this allows it to make an important statement on its own institutional powers *vis-à-vis* other EU institutions and the EU Member States.
4. The RLF is an important tool for the maintenance of relative stability of human rights and the rule of law in the EU despite natural divergence propensity resulting from the procedural autonomy of the EU Member States. By achieving this stability, the EU achieves significant political weight in international dialogue concerning human right and the rule of law and preserves a high level of its global credibility in this context. Thus, RLF increases the EU's effectiveness in promoting the European model of their identification and enforcement.
5. It is rather difficult to judge about the universal acceptability of the European evolving concept of human rights. Admittedly, they may be considered attractive because of the universality of their underlying axiology and their comprehensiveness as a legal concept reflexing the Western idea of broadly understood individual and collective welfare. Such general elements can be considered sufficient to serve as a low enough denominator which is widely acceptable to

serve as an element of the ‘international order’ and to enforce other elements of it. Moreover, high standards of protection of a vast catalogue of human rights in the Western world have contributed to the effectiveness and efficacy of its political and economic systems. They have done so by reinforcing largely adequate mechanisms of public choice generally based on the determination of prevailing preferences *via* political elections, protection of minority groups, and on the well-functioning system of balance of powers. As soon as the prevailing preferences are unveiled, they have to be translated into respective public policies formulated and implemented at various stages of the organization of polity. This has an important bearing on the content of public policies: in their goals, objectives and instruments which—under such a system—take a proper account of human rights.

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ANNEX A9



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF THE SUNDAY TIMES v. THE UNITED KINGDOM

(Application no. 6538/74)

JUDGMENT

STRASBOURG

26 April 1979

In the Sunday Times case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. G. BALLADORE PALLIERI, *President*,
Mr. G. WIARDA,
Mr. H. MOSLER,
Mr. M. ZEKIA,
Mr. J. CREMONA,
Mr. P. O'DONOGHUE,
Mrs. H. PEDERSEN
Mr. Thór VILHJÁLMSSON,
Mr. R. RYSSDAL,
Mr. W. GANSHOF VAN DER MEERSCH,
Sir Gerald FITZMAURICE,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. P.-H. TEITGEN,
Mr. G. LAGERGREN,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. E. GARCIA DE ENTERRIA,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private from 30 November to 2 December 1978 and from 27 to 29 March 1979,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The Sunday Times case was referred to the Court by the European Commission of Human Rights ("the Commission"). The case originated in an application against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on 19 January 1974 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the publisher (Times Newspapers Limited), the editor (Mr. Harold Evans) and a group of journalists of the British weekly newspaper The Sunday Times.

2. The Commission's request, to which was attached the report provided for under Article 31 (art. 31) of the Convention, was lodged with the registry of the Court on 15 July 1977, within the period of three months laid down by Articles 32 para. 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) of the Convention and to the declaration made by the United Kingdom recognising the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the Commission's request is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention either alone or in conjunction with Article 14 (art. 14+10) or Article 18 (art. 18+10).

3. The Chamber of seven judges to be constituted included, as ex officio members, Sir Gerald Fitzmaurice, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr G. Balladore Pallieri, the President of the Court (Rule 21 para. 3 (b) of the Rules of Court). On 28 July 1977, the President of the Court drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. H. Mosler, Mr. M. Zekia, Mr. P. O'Donoghue, Mr. R. Ryssdal and Mr. J. Pinheiro Farinha (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Mr. Balladore Pallieri assumed the office of President of the Chamber (Rule 21 para. 5).

4. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Government of the United Kingdom ("the Government") and the Delegates of the Commission regarding the procedure to be followed. By Order of 15 September 1977, he decided that the Agent should have until 7 December 1977 to file a memorial and that the Delegates should be entitled to file a memorial in reply within two months from the date of the transmission of the Government's memorial to them by the Registrar.

The Government's memorial was received at the registry on 8 December 1977. On 10 February 1978, the Delegates transmitted to the Court a memorial which had been submitted to them on behalf of the applicants; the Delegates indicated that they did not at that stage wish to express a view of their own or to comment on the applicant's memorial, but reserved the right to do so at the oral hearings.

5. After consulting, through the Deputy Registrar, the Agent of the Government and the Delegates of the Commission, the President directed by an Order of 16 March 1978 that the oral proceedings should open on 24 April 1978. By an Order of 20 March 1978, he authorised the Agent to file, not later than 7 April 1978, a supplementary memorial; this was received at the registry on 6 April.

On 13 April, the Secretary to the Commission transmitted to the Court a letter addressed to him on 10 April by the applicants, together with certain documents enclosed with that letter.

6. The oral hearings were held in public at the Human Rights Building, Strasbourg, on 24 and 25 April 1978.

There appeared before the Court:

- for the Government:

Mr. D. ANDERSON, Legal Counsellor,
Foreign and Commonwealth Office, *Agent,*

The Rt. Hon. Peter ARCHER, M.P., Q.C., Solicitor-General, *Counsel,*

Mr. N. BRATZA, Barrister-at-Law, *Counsel,*

Mr. R. RICKS, Treasury Solicitor's Department, *Advisers;*

Mr. M. SAUNDERS, Law Officers' Department, *Advisers;*

- for the Commission:

Mr. J. FAWCETT, *Principal Delegate,*

Mr. J. CUSTERS, *Delegates,*

Mr. J. FROWEIN, *Delegates,*

Mr. A. LESTER, Q.C., *Delegates,*

Mr. A. WHITAKER, Legal Manager,
Times Newspapers Ltd., assisting the Delegates under
Rule 29 para. 1, second sentence.

The Court heard the addresses and submissions of Mr. Archer for the Government and of Mr. Fawcett, Mr. Frowein and Mr. Lester for the Commission, as well as Mr. Lester's replies to questions put by certain judges. During the course of the hearing, the Commission made available to the Court other documents which it had received from the applicants.

7. The Chamber deliberated in private from 25 to 27 April.

At a meeting held in private on 27 October 1978 in Strasbourg, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court, "considering that the case raise[d] serious questions affecting the interpretation of the Convention ...".

Having obtained, through the Registrar, the agreement of the Agent of the Government and the concurring opinion of the Delegates of the Commission, the Court decided on 30 November that the proceedings would continue without any further oral hearings (Rule 26).

AS TO THE FACTS

Historical

8. Between 1958 and 1961 Distillers Company (Biochemicals) Limited ("Distillers") manufactured and marketed under licence in the United Kingdom drugs containing an ingredient initially developed in the Federal Republic of Germany and known as thalidomide. The drugs were prescribed as sedatives for, in particular, expectant mothers. In 1961 a number of women who had taken the drugs during pregnancy gave birth to children

suffering from severe deformities; in the course of time there were some 450 such births in all. Distillers withdrew all drugs containing thalidomide from the British market in November of the same year.

9. Writs against Distillers were issued, between 1962 and 1966, by the parents of seventy of the deformed children on their own and on their children's behalf. They contended that the cause of the deformities was the effect on the foetus of thalidomide administered to the mother during pregnancy, alleged that Distillers had been negligent in the production, manufacture and marketing of the drugs and claimed damages. Distillers denied negligence and put in issue the legal basis of the claims. A number of actions were also brought in respect of persons alleged to have suffered peripheral neuritis as a result of use of the drugs.

Of the seventy actions by parents, sixty-five were settled in 1968 following negotiations between the parties' legal advisers. In sixty-two of the cases, the children were still alive and the settlement therefore required court approval which was obtained. The basis of the settlement was that each plaintiff, provided he withdrew his allegation of negligence, should receive from Distillers a lump sum equal to 40 per cent of the amount he would have recovered had his action wholly succeeded. Further proceedings in the High Court in 1969 dealt with the assessment of damages in the cases settled on the above-mentioned basis and, in the event, Distillers paid out some £ 1,000,000 in respect of fifty-eight cases. Two cases were otherwise disposed of and the amount of damages in the remaining two was still under negotiation in July 1973.

10. The 1968 settlement did not cover five of the original seventy actions, since the writs in those five cases had not been issued within the three-year limitation period prescribed by English law. Leave to issue writs out of time was subsequently granted *ex parte* by the court both in those five cases and in respect of a further two hundred and sixty-one claims by the parents or guardians of other deformed children. A further one hundred and twenty-three claims had also been notified to Distillers in correspondence but formal proceedings were not started by agreement between the parties. Thus, by 1971, three hundred and eighty-nine claims in all were pending against Distillers. Apart from a statement of claim in one case and a defence delivered in 1969, no further steps were taken in those actions where writs had been issued. Distillers had announced in February 1968 that they would provide a substantial sum for the benefit of the remaining three hundred and eighty-nine claimants and both sides were anxious to arrive at a settlement out of court. The case in fact raised legal issues of considerable difficulty under English law. Had any of the actions come on for trial, they would have been heard by a professional judge sitting without a jury.

In 1971, negotiations began on a proposal by Distillers to establish a charitable trust fund for all the deformed children other than those covered by the 1968 settlement. The proposal was made subject to the condition that

all the parents accepted but five refused, one, at least, because payments out of the fund would have been based on need. An application, on behalf of the parents who would have accepted, to replace those five by the Official Solicitor as next friend was refused by the Court of Appeal in April 1972. During subsequent negotiations, the original condition was replaced by a requirement that "a substantial majority" of the parents consented. By September 1972, a settlement involving the setting up of a £ 3,250,000 trust fund had been worked out and was expected to be submitted in October to the court for approval.

11. Reports concerning the deformed children had appeared regularly in *The Sunday Times* since 1967, and in 1968 it had ventured some criticism of the settlement concluded in that year. There had also been comment on the children's circumstances in other newspapers and on television. In particular, in December 1971, the *Daily Mail* published an article which prompted complaints from parents that it might jeopardise the settlement negotiations in hand; the *Daily Mail* was "warned off" by the Attorney-General in a formal letter threatening sanctions under the law of contempt of court, but contempt proceedings were not actually instituted. On 24 September 1972, *The Sunday Times* carried an article entitled "Our Thalidomide Children: A Cause for National Shame": this examined the settlement proposals then under consideration, describing them as "grotesquely out of proportion to the injuries suffered", criticised various aspects of English law on the recovery and assessment of damages in personal injury cases, complained of the delay that had elapsed since the births and appealed to Distillers to make a more generous offer. The article contained the following passage:

"... the thalidomide children shame Distillers ... there are times when to insist on the letter of the law is as exposed to criticism as infringement of another's legal rights. The figure in the proposed settlement is to be £ 3.25 million, spread over 10 years. This does not shine as a beacon against pre-tax profits last year of £ 64.8 million and company assets worth £ 421 million. Without in any way surrendering on negligence, Distillers could and should think again."

A footnote to the article announced that "in a future article *The Sunday Times* [would] trace how the tragedy occurred". On 17 November 1972, the Divisional Court of the Queen's Bench Division granted the Attorney-General's application for an injunction restraining publication of this future article on the ground that it would constitute contempt of court (see paragraphs 17 to 35 below for a summary of the draft article and particulars of the contempt proceedings).

12. Although the proposed article was accordingly not published, *The Sunday Times* throughout October contained a number of features on "the thalidomide children" and the laws of compensation for personal injuries. There was also a considerable response from the public, the press and television. Some radio and television programmes were cancelled after

official warnings about contempt but proceedings were not actually taken except as regards a television programme, shown on 8 October 1972, concerning the plight of the children. The Attorney-General claimed that that programme was calculated to bring pressure on Distillers to pay more. On 24 November 1972, the Divisional Court decided (*Attorney-General v. London Weekend Television Ltd.*) that there had been no contempt because it was not established that the television company deliberately intended to influence the pending proceedings and, in the circumstances, a single showing of the programme did not create "a serious risk" of interference with the course of justice. The court distinguished the case concerning the proposed Sunday Times article on the basis that, there, the editor had made it plain that he was deliberately attempting to persuade Distillers to pay more.

13. In the House of Commons, the Speaker had repeatedly refused to allow any debate or questions on the issues raised by the thalidomide tragedy. However, on 29 November 1972, the matter was extensively debated in the House which had before it a motion, *inter alia*, calling on Distillers to face up to their moral responsibilities and for immediate legislation to establish a trust fund for the deformed children. Shortly before the debate, Distillers had increased the value of their proposed trust fund from £ 3,250,000 to £ 5,000,000. Much of the debate was devoted to the question whether immediate legislation would or would not take pressure off Distillers and/or the parents and to a discussion of social services for the children and the disabled in general and of official scrutinising systems for new drugs. Tributes were paid to the Sunday Times campaign and various criticisms were made of the law and lawyers. The question of Distillers' legal, as opposed to moral, responsibility was not discussed, although references were made to facts - described as "the danger flags flying" - of which little notice had been taken, and to the absence of a general practice of tests on the foetus when thalidomide was first marketed. Similar references appeared in the draft Sunday Times article. At the close of the debate, the House, "disturbed about the plight of thalidomide children, and the delay in reaching a settlement", recognised the initiatives taken by the Government to improve services for the disabled and welcomed the Government's undertaking to investigate any special cases of need and to "consider, as soon as the cases are no longer sub judice, whether a trust fund needs to be established for thalidomide children".

14. The Parliamentary debate was followed by a further wave of publications and there was a nationwide campaign in the press and among the general public directed to bringing pressure on Distillers to make a better offer. The campaign included a threat to boycott Distillers' other products and many of their shareholders publicly urged a speedy and satisfactory settlement. Two articles in the Daily Mail of 8 and 9 December

1972 referred, in particular, to many of the same test and research results as the enjoined Sunday Times article.

There were also, round about this time, a number of press articles denying Distillers' legal responsibility, but no further contempt proceedings were instituted. A public investigation of the causes of the tragedy was repeatedly demanded but never carried out; in fact, it was finally refused by the competent Minister in the summer of 1976.

Following the public criticism, the proposed settlement did not proceed and, in December 1972 and January 1973, Distillers came forward with new proposals which involved a further increase in the value of the trust fund to £ 20,000,000. Negotiations continued. In the meantime, following an appeal by Times Newspapers Ltd., the Divisional Court's injunction was discharged by the Court of Appeal on 16 February 1973, only to be restored in modified form on 24 August 1973 following the House of Lords' decision of 18 July allowing a further appeal by the Attorney-General (see paragraphs 24 to 34 below).

15. On 30 July 1973, a single judge of the Queen's Bench Division approved in the great majority of the cases the terms of a settlement, after satisfying himself that they were in the true interests of the minors involved. Under the settlement:

(a) each plaintiff, provided he withdrew his action, was to receive a lump sum equal to forty per cent of the amount he would have received had the action been successful; and

(b) a charitable trust fund was to be set up for the deformed children, including those covered by the 1968 settlement.

Distillers maintained their denial of negligence on the part of themselves or their advisers; since not all the parents accepted the proposed settlement, this issue remained sub judice.

16. On application by the Attorney-General, the injunction against Times Newspapers Ltd. was discharged on 23 June 1976 (see paragraph 35 below). Four days later, the contentious article was published. It differed in a number of respects from the original draft; in particular, it omitted certain matters based on information which had been received in confidence by the parents' advisers during the thalidomide litigation. Disclosure of this information had been forbidden by a further injunction of 31 July 1974 of which the applicants did not complain before the Commission.

By 23 June 1976, four of the parents' actions against Distillers remained outstanding: in one, the pleadings were closed but nothing had been done since 1974; in two, there had been only delivery of a statement of claim; in the fourth, only a writ had been issued. Moreover, there was still pending at that date litigation between Distillers and their insurers which also involved the issue of negligence: the insurers had contested their liability to pay for the 1973 settlement on the ground, inter alia, that Distillers had not carried

out adequate tests and research. This action had been set down for trial on 4 October 1976 but was, in fact, settled on 24 September 1976.

Summary of the draft article

17. The unpublished article which was the subject of the injunction opened with a suggestion that the manner of marketing thalidomide in Britain left a lot to be desired. It stated that Distillers:

"- relied heavily on the German tests and had not completed full trials of its own before marketing the drug;

- failed to uncover in its research into medical and scientific literature the fact that a drug related to thalidomide could cause monster births;

- before marketing the drug did no animal tests to determine the drug's effect on the foetus;

- accelerated the marketing of the drug for commercial reasons. Were not deflected by a warning from one of its own staff that thalidomide was far more dangerous than had been supposed;

- were not deflected by the discovery that thalidomide could damage the nervous system, in itself a hint that it might damage the foetus;

- continued to advertise the drug as safe for pregnant women up to a month from when it was withdrawn."

The body of the article described how, after their apparently disappointing initial ventures into pharmaceuticals, Distillers learned in 1956 that the German firm of Chemie Gruenthal had developed a sedative considered harmless and unique - thalidomide. The very large market existing at the time for sedatives was becoming overcrowded and Distillers thought it necessary to act quickly. Their decision to market the drug was taken before they had seen technical information, other than the transcript of a German symposium, and before carrying out independent tests. Indeed, they seemed to believe that thalidomide would not need elaborate tests. Distillers put in hand a search of scientific literature but failed to discover the results of research in 1950 by a Dr. Thiersch showing that a chemical related to thalidomide could cause monster births; opinions differed as to whether his work should have been found.

Sales of thalidomide began in Germany in October 1957 and Distillers were committed under their licensing agreement to commence marketing in April 1958. They put the programme for the drug's launch in hand even though clinical trials were behind. Results of the first British trials were published in January 1958: it had been found that thalidomide suppressed the work of the thyroid gland and that its method of action was unknown; the researcher warned that more tests were needed. Distillers did not rely on this advice, basing their decision on "flimsy" evidence, namely other trials in the United Kingdom and assurances concerning the results of research in

Germany. The warning about anti-thyroid effects was particularly relevant since it was known that drugs affecting the thyroid could affect unborn children; it was reasonable to argue that Distillers should have delayed launching the drug pending further tests.

On 14 April 1958, continued the article, thalidomide went on sale in Britain, advertised as "completely safe". At the end of 1959, Distillers' pharmacologist discovered that thalidomide in liquid form was highly poisonous and that an overdose might be lethal, but this report was never published and the liquid product went on sale in July 1961. In December 1960, it was reported that patients who had taken thalidomide in the tablet form in which it had first been on sale showed symptoms of peripheral neuritis; this news had the result of holding up an application to market thalidomide in the United States of America where it was, in fact, never sold. Further cases of peripheral neuritis were reported in 1961 but Distillers' advertising continued to stress the drug's safety.

Early in 1961, children were born in the United Kingdom with deformities but there was at the time nothing to connect them with thalidomide. However, between May and October, a doctor in Australia discovered that the common factor in a number of monster births was that mothers had taken thalidomide during pregnancy. This was reported to Chemie Gruenthal on 24 November who withdrew the drug two days later following newspaper disclosures. Distillers ended the public sale of thalidomide immediately afterwards. Tests on animals, published in April 1962, confirmed that thalidomide caused deformities, but sales to hospitals were not ended until December 1962.

The draft article concluded as follows:

"So the burden of making certain that thalidomide was safe fell squarely on [Distillers]. How did the company measure up to this heavy responsibility? It can be argued that:

1. [Distillers] should have found all the scientific literature about drugs related to thalidomide. It did not.
2. It should have read Thiersch's work on the effects on the nervous system of drugs related to thalidomide, have suspected the possible action on unborn babies and therefore have done tests on animals for teratogenic effect. It did not.
3. It should have done further tests when it discovered that the drug had anti-thyroid activity and unsuspected toxicity. It did not.
4. It should have had proof before advertising the drug as safe for pregnant women that this was in fact so. It did not.

For [Distillers] it could be argued that it sincerely believed that thalidomide was free from any toxicity at the time it was first put on the market in Britain; that peripheral neuritis did not emerge as a side effect until the drug had been on sale in Britain for two years; that testing for teratogenic effects was not general in 1958; that if tests had

been done on the usual laboratory animals nothing would have shown because it is only in the New Zealand white rabbit that thalidomide produces the same effects as in human beings; and, finally, that in the one clinical report of thalidomide being given to pregnant women no serious results followed (because thalidomide is dangerous only during the first 12 weeks of pregnancy).

...

There appears to be no neat set of answers ...".

Domestic law

18. English law relating to contempt of court is described by the report of the Committee on Contempt of Court (the "Phillimore report", see paragraph 36 below) as "a means whereby the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally" and as existing to protect not the dignity of the judges but "the administration of justice and 'the fundamental supremacy of the law'". Contempt of court is, with certain exceptions, a criminal offence punishable by imprisonment or a fine of unlimited duration or amount or by an order to give security for good behaviour; punishment may be imposed by summary process without trial by jury and the publication of facts or opinions constituting a criminal contempt may also be restrained by similar process. To some extent, contempt of court covers the same ground as various ordinary criminal offences against the administration of justice, such as perversion of the course of justice. Contempt of court is a creature of the common law and covers many forms of conduct. Lord Diplock remarked in his speech in the House of Lords in the Sunday Times Case:

"There is an abundance of empirical decisions upon particular instances of conduct which has been held to constitute contempt of court. There is a dearth of rational explanation or analysis of a general concept of contempt of court which is common to the cases where it has been found to exist."

The Phillimore report divides contempt of court into the following categories:

- (a) "contempt in the face of the court", for example throwing missiles at the judge, insulting persons in court, demonstrating in court;
- (b) "contempt out of court", subdivided into:
 - (i) reprisals against witnesses after the conclusion of proceedings;
 - (ii) "scandalising the court", for example, abusing a judge qua judge or attacking his impartiality or integrity;
 - (iii) disobedience to court orders;
 - (iv) conduct, whether intentional or not, liable to interfere with the course of justice in particular proceedings.

The present case concerns the last-mentioned category which includes contempt in the form of publications, reports or comments on legal

proceedings in progress. The Phillimore report states that there is a lack of a clear definition of the kind of statement, criticism or comment that will be held to amount to contempt. It adds that, until the House of Lords in the Sunday Times Case "formulated a rather different test", the tests of contempt for publications were all based on the concept of prejudice to, or improper interference with, the legal process and that the mischief which the law of contempt is and always has been designed to suppress is the risk of prejudice to the due administration of justice.

It seems that a publication may constitute contempt of court not only if it appears after the issue of a writ but also if it appears when proceedings are "imminent".

19. The Attorney-General has a right, but not an obligation, to bring before the court any matter which he thinks may amount to contempt and which he considers should, in the public interest, be so brought. Save in certain cases, contempt proceedings may also be instituted by private individuals.

20. It should be noted, in this connection, that a House of Commons rule prohibits reference in debate to matters that are sub judice. Subject to certain exceptions, no reference at all, whether prejudicial or not, may be made to civil litigation once the case has been set down for trial or otherwise brought before the court; before that time (or after it in the exceptional cases) such matters may be referred to unless the Chair considers there to be a real and substantial danger of prejudice to the trial of the case. It was under this rule that the House held its debate of 29 November 1972 (see paragraph 13 above), a report of which was published.

The domestic contempt proceedings

(a) Introduction

21. Distillers made a formal complaint to the Attorney-General that the Sunday Times article of 24 September 1972 constituted contempt of court in view of the litigation still outstanding and, on 27 September, the Solicitor-General, in the absence of the Attorney-General, wrote to the editor of The Sunday Times to ask him for his observations. The editor, in his reply, justified that article and also submitted the draft of the proposed future article for which he claimed complete factual accuracy. The Solicitor-General enquired whether the draft had been seen by any of the parties to the litigation, as a consequence of which a copy of the draft was sent by The Sunday Times to Distillers on 10 October. On the previous day, The Sunday Times had been advised that the Attorney-General had decided to take no action in respect of the matter already published in September and October; Distillers also took no action. On 11 October, the Attorney-General's Office informed The Sunday Times that, following representations by Distillers, the Attorney-General had decided to apply to the High Court in order to

obtain a judicial decision on the legality of the publication of the proposed article. On the following day, he issued a writ against Times Newspapers Ltd. in which he claimed an injunction "to restrain the defendants ... by themselves, their servants or agents or otherwise, from publishing or causing or authorising to be published or printed an article in draft dealing, inter alia, with the development, distribution and use of the drug thalidomide, a copy of which article had been supplied to the Attorney-General by the defendants".

(b) Decision of the Divisional Court

22. The Attorney-General's application was heard by three judges of the Queen's Bench Division from 7 to 9 November 1972; on 17 November the court granted the injunction.

In its judgment the court remarked:

"the article does not purport to express any views as to the legal responsibility of Distillers ... but ... is in many respects critical of Distillers and charges them with neglect in regard to their own failure to test the product, or their failure to react sufficiently sharply to warning signs obtained from the tests by others. No one reading the article could ... fail to gain the impression that the case against Distillers on the footing of negligence was a substantial one."

The editor of The Sunday Times had indicated that any libel proceedings following publication would be defended by a plea that the contents of the article were true and the court approached the article on the footing that it was factually accurate.

23. The reasoning in the court's judgment may be summarised as follows. The objection to unilateral comment, prior to conclusion of the court hearing, was that it might prevent the due and impartial administration of justice by affecting and prejudicing the mind of the tribunal itself, by affecting witnesses who were to be called or by prejudicing the free choice and conduct of a party to the litigation. It was the third form of prejudice that was relevant to the present case. If a party was subjected to pressure of a kind which raised a serious prospect that he would be denied justice because his freedom of action in the case would be affected, then a contempt of court had been established. The test of contempt was whether, in all the circumstances of the particular case, the words complained of created a serious risk that the course of justice might be interfered with, irrespective of the writer's intention or the truth of the writing.

It was not for the court, as the defendants had contended, to balance the competing interests of the protection of the administration of justice on the one hand and the right of the public to be informed on the other: comment raising a serious risk of interference with legal proceedings should be withheld until the proceedings were terminated. However, even if this were not so, there was in this case no public interest in immediate disclosure

which could outweigh the public interest in preventing pressure on the parties to the litigation.

There was no distinction in the present case between persuasion directed to a legal obligation and persuasion directed to a moral obligation. The undoubted motive of The Sunday Times was to enlist public opinion to exert pressure on Distillers and cause them to make a more generous settlement than might otherwise be the case. There was a deliberate attempt to influence the settlement of pending proceedings and, having regard to the power of public opinion, publication of the article would create a serious risk of interference with Distillers' freedom of action in the litigation and would be a clear contempt.

(c) Decision of the Court of Appeal

24. An appeal by Times Newspapers Ltd. against the Divisional Court's decision was heard by the Court of Appeal from 30 January to 2 February 1973. The court had before it an affidavit by the editor of The Sunday Times setting out developments in the intervening period both in the case itself and in public discussion thereof. With the leave of the court, counsel for Distillers made submissions on the contents of the proposed article, pointing to errors he said it contained. On 16 February, the Court of Appeal discharged the injunction. Summaries of the judgments read by the three members of the court appear below.

25. Lord Denning said that the proposed article:

"... contains a detailed analysis of the evidence against Distillers. It marshals forcibly the arguments for saying that Distillers did not measure up to their responsibility. Though, to be fair, it does summarise the arguments which could be made for Distillers."

After pointing out that the court had no affidavit from Distillers as to the effect of the proposed article on them and little knowledge of the state of the litigation and settlement negotiations, Lord Denning stated the law as follows:

"... when litigation is pending and actively in suit ... no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action, as for instance by influencing the judge, the jurors, or the witnesses, or even by prejudicing mankind in general against a party to the cause ... Even if the person making the comment honestly believes it to be true, still it is a contempt of court if he prejudges the truth before it is ascertained in the proceedings ... [Further] none shall ... bring unfair pressure to bear on one of the parties ... so as to force him to drop his complaint, or to give up his defence, or to come to a settlement on terms which he would not otherwise have been prepared to entertain."

"Trial by newspaper", continued Lord Denning, must not be allowed. However, the public interest in a matter of national concern had to be balanced against the interest of the parties in a fair trial or settlement; in the present case the public interest in discussion outweighed the potential

prejudice to a party. The law did not prevent comment when litigation was dormant and not being actively pursued. Moreover, since the law did not prevent comment on litigation which had ended or had not started, there was nothing to prevent comment on the sixty-two cases settled in 1968 or the one hundred and twenty-three cases in which writs had not been issued. Even in September 1972, the proposed article would not have amounted to contempt: it was fair comment on a matter of public interest; it did not prejudice pending litigation because that litigation had been dormant for years and still was; and the pressure the article was intended to bring to bear was legitimate. In addition, it would be discrimination of the worst kind to continue to enjoin The Sunday Times alone when Parliament and other newspaper had discussed the matter since November 1972.

26. Lord Justice Phillimore pointed out that anyone could comment freely on the cases which had been settled or in which no writ had been issued. Unfair pressure to settle a case might constitute contempt of court, but here there was no affidavit from Distillers and no evidence that there was a serious risk of the proposed article's compelling Distillers to settle for more or that the pressure was unfair. The position would have been different if there had been a real intention to bring the remaining cases to court since, in that event, an article designed to prejudice the public against a party or to put pressure on him so as to force a settlement could not have been countenanced. Moreover, since November 1972, the House of Commons had debated the matter and other newspapers, especially the Daily Mail, had commented; it would therefore be unreal to continue injunction.

27. After indicating that he agreed with Lord Denning's judgment, Lord Justice Scarman pointed out that no one expected a trial; the writs were a move towards obtaining a settlement and the mere issue of a writ could not stifle all comment. Since there was no evidence of litigation actively in suit, it was unrealistic to treat the proposed article as constituting a real or substantial prejudice to the course of justice. Moreover, the public interest in freedom of speech on a matter of great public moment had to be considered. Finally, even if the Divisional Court had been right, the state of public opinion following the House of Commons debate was such that the injunction should now be discharged.

(d) Decision of the House of Lords

28. Following the Court of Appeal's decision, The Sunday Times refrained from publishing the proposed article so as to enable the Attorney-General to appeal. The Court of Appeal refused him leave to appeal but this was granted by the House of Lords on 1 March 1973. The hearing before the House of Lords was held in May 1973. On 18 July 1973, the House gave judgment unanimously allowing the appeal and subsequently directed the Divisional Court to grant an injunction in the terms set out in paragraph 34

below. Summaries of the speeches read by the five Law Lords appear below.

29. Lord Reid said that the House must try to remove the uncertainty which was the main objection to the present law. The law of contempt had to be founded entirely on public policy: it was not there to protect the rights of parties to a litigation but to prevent interference with the administration of justice and should be limited to what was reasonably necessary for the purpose. Freedom of speech should not be limited more than was necessary but it could not be allowed where there would be real prejudice to the administration of justice.

Lord Reid turned first to the question of comment on pending proceedings which was likely to bring pressure to bear upon one of the litigants. Whilst comment likely to affect the minds of witnesses and of the tribunal had to be stopped for otherwise the trial might well be unfair, the fact that a party refrained from seeking to enforce his full legal rights in no way prejudiced a fair trial, whether the decision was or was not influenced by some third party. Accordingly, where the only matter to be considered was pressure put on a litigant, fair and temperate criticism or urging him to forgo his legal rights was legitimate and admissible; thus, the article of 24 September 1972 did not constitute contempt. Publication in 1972 of the proposed further article, which consisted "in the main of detailed argument and evidence intended to show that Distillers did not exercise due care", would not have added much to the pressure already on Distillers.

On this basis, Lord Reid could agree with the decision of the Court of Appeal, though for different reasons. However, he then pointed out:

"The question whether Distillers were negligent has been frequently referred to but, so far as I am aware, there has been no attempt to assess the evidence. If this material were released now, it appears to me to be almost inevitable that detailed answers would be published and there would be expressed various public prejudgments of this issue. That I would regard as very much against the public interest."

After noting that there was a strong and general feeling that trial by newspaper should be prevented, Lord Reid continued:

"I think that anything in the nature of prejudgment of a case or of specific issues in it is objectionable, not only because of its possible effect on that particular case but also because of its side effects which may be far-reaching. Responsible 'mass media' will do their best to be fair, but there will also be ill-informed, slapdash or prejudiced attempts to influence the public. If people are led to think that it is easy to find the truth, disrespect for the processes of the law could follow, and, if mass media are allowed to judge, unpopular people and unpopular causes will fare very badly. Most cases of prejudging of issues fall within the existing authorities on contempt. I do not think that the freedom of the press would suffer, and I think that the law would be clearer and easier to apply in practice if it is made a general rule that it is not permissible to prejudge issues in pending cases."

The Court of Appeal had wrongly described the actions as "dormant", since settlement negotiations were in hand and improper pressure on a

litigant to settle could constitute contempt. As for the Court of Appeal's balancing of competing interest, Lord Reid said:

"... contempt of court has nothing to do with the private interest of litigants. I have already indicated the way in which I think that a balance must be struck between the public interest in freedom of speech and the public interest in protecting the administration of justice from interference. I do not see why there should be any difference in principle between a case which is thought to have news value and one which is not. Protection of the administration of justice is equally important whether or not the case involves important general issues."

Lord Reid concluded that publication of the article should be postponed for the time being in the light of the circumstances then prevailing; however, if things dragged on indefinitely, there would have to be a reassessment of the public interest in a unique situation.

30. For Lord Morris of Borth-y-Gest, the law of contempt was designed to protect the authority of the courts and to prevent unjustifiable interference with recourse to them. The public interest in free speech had to be put in the balance and no limitations should be imposed beyond those which were absolutely necessary, but

"this does not mean that if some conduct ought to be stigmatised as being contempt of court it could receive absolution and be regarded as legitimate because it had been inspired by a desire to bring about a relief of some distress that was a matter of public sympathy and concern. There can be no such thing as a justifiable contempt of court."

A court would only find a contempt if the risk of prejudice were serious, real or substantial. Not only had there to be no influencing of the court or of witnesses, but it was unseemly that there should be public advocacy in favour of one side in a cause awaiting determination by the courts. Lord Morris stressed that there should be no "trial by newspaper", remarking that:

"... the courts ... owe it to the parties to protect them either from the prejudices of prejudgment or from the necessity of having themselves to participate in the flurries of pre-trial publicity."

The actions against Distillers, he continued, were not "dormant" just because the parties preferred a settlement to a trial. Whilst there would have been no objection in 1972 to a comment on the amounts paid under the 1968 settlement or on the general principles of law involved or to a temperate moral appeal to Distillers, the proposed article went further. Its avowed object was to bring public pressure on Distillers to pay more. Negligence was one of the issues arising, and the draft article, though asserting no conclusions, showed that there was a considerable case against Distillers. The time had not yet arrived to discharge the injunction.

31. Lord Diplock said that contempt of court was punishable because it undermined the confidence of the parties and of the public in the due administration of justice. The due administration of justice required that all citizens should have unhindered access to the courts; that they should be able to rely on an unbiased decision based only on facts proved in

accordance with the rules of evidence; that, once a case was submitted to a court, they should be able to rely upon there being no usurpation by any other person, for example in the form of "trial by newspaper", of the function of the court. Conduct calculated to prejudice any of these requirements or to undermine public confidence that they would be observed was contempt of court. Lord Diplock stated that:

"... contempt of court in relation to a civil action is not restricted to conduct ... calculated ... to prejudice the fair trial of that action by influencing ... the tribunal ... or witnesses; it extends also to conduct that is calculated to inhibit suitors generally from availing themselves of their constitutional right to have their legal rights and obligations ascertained and enforced in courts of law, by holding up any suitor to public obloquy for doing so or by exposing him to public and prejudicial discussion of the merits or the facts of his case before they have been determined by the court or the action has been otherwise disposed of in due course of law."

The proposed Sunday Times article, Lord Diplock considered, fell into this latter category since it discussed prejudicially the facts and merits of Distillers' defence to the charge of negligence before the actions had been determined by a court or settled. The actions could not be ignored as "dormant", as the same protection had to apply to settlement negotiations as to the actual trial. Subsequent events did not justify dissolution of the injunction although, "as [was] conceded", the wording called for some amendment. The seriousness of the risk of interference with the due administration of justice was relevant only to the question whether the court should inflict punishment: once there was a real risk, there was at least technical contempt.

The passage quoted at paragraph 11 above from the article of 24 September 1972 was also, thought Lord Diplock, a contempt though for a different reason, namely that it held Distillers up to public obloquy for relying on a defence available to them under the law; however, those parts of the September article that dealt with general principles of law were unobjectionable since, if discussion of such matters of general interest had the indirect effect of bringing pressure on a litigant, it had to be borne because of the greater public interest in upholding freedom of discussion on matters of public concern.

32. Lord Simon of Glaisdale agreed with Lord Diplock's statement of the law and with his views concerning the above-mentioned passage in the September article. He saw the proposed further article as a detailed discussion of one of the crucial issues in the actions and as designed to bring moral pressure on Distillers to settle on better terms. The law of contempt was the means by which the law vindicated the public interest in the due administration of justice. Most civil actions were settled and interference with settlement negotiations was no less contempt than interference with a procedural situation in the strictly forensic sense. The due course of justice included negotiation towards a settlement on the basis

of the ordained law and the Court of Appeal had been wrong in saying that the article would not be contempt because the litigation was dormant. Even private pressure on a litigant was generally impermissible and could be justified only within narrow limits. The law had to hold in balance two public interests - in freedom of discussion and in the due administration of justice - but would be too uncertain if the balance were to be struck anew in each case. The law had to lay down some general guidelines; as regards particular litigation, the paramount public interest *pendente lite* was that the legal proceedings should progress without interference. An exception was that public discussion of a matter of general interest which had already started before litigation began did not have to stop if it was not intended to prejudice the litigation.

33. Lord Cross of Chelsea stated that "contempt of court" meant an interference with the administration of justice. The rules of contempt should not inhibit freedom of speech more than was reasonably necessary. The proposed article examined the question whether Distillers had been negligent and any "prejudging" of issues of fact or law in pending civil or criminal proceedings was in principle such an interference. He continued:

"A publication prejudging an issue in pending litigation which is itself innocuous enough may provoke replies which are far from innocuous but which, as they are replies, it would seem unfair to restrain ... An absolute rule - though it may seem to be unreasonable if one looks only to the particular case - is necessary in order to prevent a gradual slide towards trial by newspaper or television."

This rule, added Lord Cross, applied to the outcome of settlement negotiations as much as to the result of the actual trial.

Times Newspapers Ltd. had argued that there should be an exception to this rule when matters of great public concern were involved; however, the House was only concerned with discussion of the issue whether Distillers had been negligent and discussion of the wider issues, such as the scope of producers' liability and the assessment of damages, was not inhibited. Reliance had also been placed by the publisher on the lapse of time since the births and the absence of any public inquiry; however, neither side was to blame for the delay, the Court of Appeal had wrongly described the actions as "dormant" since settlement negotiations were being actively pursued and the absence of a public inquiry did not justify allowing the press to conduct an inquiry while proceedings were in progress. The position had not altered since the Divisional Court hearing: the House of Commons debate had concentrated on the moral issues and, although Distillers had come forward with an offer which made an overall settlement likely - so that publication of the article could not now harm them -, it was not certain that no claims would come to court. Accordingly, the injunction should be restored but with liberty to apply for its discharge whenever Times Newspapers Ltd. considered that they could persuade a court that its continuation was not warranted in the light of the facts then existing.

The article of 24 September 1972 was not a contempt: prejudging an issue was contempt of court but a fairly and accurately expressed comment that might bring even great pressure on a litigant was not.

34. On 25 July 1973, the House of Lords ordered that the cause be remitted to the Divisional Court with a direction to grant the following injunction:

"That ... Times Newspapers Ltd., by themselves, their servants, agents or otherwise, be restrained from publishing, or causing or authorising or procuring to be published or printed, any article or matter which prejudices the issues of negligence, breach of contract or breach of duty, or deals with the evidence relating to any of the said issues arising in any actions pending or imminent against Distillers ... in respect of the development, distribution or use of the drug 'thalidomide'."

The defendants were granted liberty to apply to the Divisional Court for discharge of the injunction.

The Divisional Court implemented the above direction on 24 August 1973.

(e) Decision of the Divisional Court discharging the injunction

35. On 23 June 1976, the Divisional Court heard an application by the Attorney-General for the discharge of the injunction. It was said on behalf of the Attorney-General that the need for the injunction no longer arose: most of the claims against Distillers had been settled and there were only four extant actions which could by then have been brought before the courts if they had been pursued diligently. As there was a conflicting public interest in The Sunday Times being allowed to publish "at the earliest possible date", the Attorney-General submitted the matter to the court as one where the public interest no longer required the restraint. The court, considering that the possibility of pressure on Distillers had completely evaporated, granted the application.

Proposals for reform of the law of contempt of court

36. One particular aspect of the law had been considered by the Interdepartmental Committee on the Law of Contempt as it affects Tribunals of Inquiry, which reported in 1969. On 8 June 1971, the Lord Chancellor and the Lord Advocate appointed a committee under the chairmanship of Lord Justice Phillimore to consider whether any changes were required in the law of contempt as a whole. The Phillimore report was presented to Parliament in December 1974, having been delayed by the Sunday Times contempt litigation. The report discussed the various judgments in that case and described it as well illustrating the uncertainty of the present state of the law regarding publications dealing with legal proceedings. Whilst it might be that the right to issue such publications had on occasion to be overridden by the public interest in the administration of justice, the committee was of the opinion that the balance had moved too far against the freedom of the press. It therefore made various proposals for

reform, both to redress the balance and in order to achieve greater certainty in the law. In particular, it doubted whether a "prejudgment" test such as that proposed in the House of Lords was the right one, considering that it went both too far and not far enough. The Committee preferred the following test, to be applied in the light of the circumstances existing at the time of publication: "whether the publication complained of creates a risk that the course of justice will be seriously impeded or prejudiced." One member of the committee remarked that, despite the suppression of the Sunday Times article, the campaign of protest and pressure over the talidomide tragedy made a mockery of the law of contempt.

The committee concluded, in particular, that the law of contempt was required as a means of maintaining the rights of the citizen to a fair and unimpeded system of justice and protecting the orderly administration of the law; however, the operation of that law should be confined to circumstances where the offending act was not within the definition of any other criminal offence and where the achievement of that law's objectives required a summary procedure. The law as it stood contained uncertainties impeding and restricting reasonable freedom of speech and should be amended and clarified so as to allow as much freedom of speech as was consistent with the achievement of the above-mentioned objectives.

The committee recommended, *inter alia*, that a publication should be subject to the law of contempt if it created a risk of serious prejudice (whether intentionally or not) but that this strict liability should only apply:

(a) if the publication created a risk that the course of justice would be seriously impeded or prejudiced;

(b) when, in the case of civil proceedings in England and Wales, the case had been set down for trial;

(c) subject to the availability of a defence that the publication formed part of a discussion of matters of general public interest and only incidentally or unintentionally created a risk of serious prejudice to particular proceedings.

It was also recommended that bringing influence or pressure to bear upon a party to proceedings should not be held to be a contempt unless it amounted to intimidation or unlawful threats to his person, property or reputation.

37. The recommendations contained in the Phillimore report have not yet been implemented and the Government have made no proposals for legislation. However, in March 1978, they issued a Green Paper, intended to provide a basis for Parliamentary and public discussion, and invited comments which would be taken into account in a decision on policy. The Green Paper, which draws no conclusions, rehearses the recommendations of the Phillimore Committee and sets out arguments for and against certain of them, for example, those relating to the provision of a defence of "discussion of matters of general public interest" and to bringing influence

or pressure to bear upon a party. The document does not call in question the suggestion that the "prejudgment" test referred to in the House of Lords should be reconsidered.

PROCEEDINGS BEFORE THE COMMISSION

38. In their application, lodged with the Commission on 19 January 1974, the applicants claimed that the injunction, issued by the High Court and upheld by the House of Lords, to restrain them from publishing an article in *The Sunday Times* dealing with thalidomide children and the settlement of their compensation claims in the United Kingdom constituted a breach of Article 10 (art. 10) of the Convention. They further alleged that the principles upon which the decision of the House of Lords was founded amounted to a violation of Article 10 (art. 10) and asked the Commission to direct or, alternatively, to request the Government to introduce legislation overruling the decision of the House of Lords and bringing the law of contempt of court into line with the Convention.

39. In its decision of 21 March 1975, the Commission, after describing the question before it as "whether the rules of contempt of court as applied in the decision of the House of Lords granting the injunction are a ground justifying the restriction under Article 10 para. 2 (art. 10-2)", declared admissible and accepted the application.

40. In their submissions on the merits, the applicants made the following additional allegations:

- that there had been discrimination contrary to Article 14 (art. 14) of the Convention by reason of the fact that similar press publications had not been restrained and by reason of the difference between the rules applicable in Parliament in relation to comment on pending litigation and the rules of contempt of court applied to the press;

- that, contrary to Article 18 (art. 18) of the Convention, the principles of contempt of court, which should be limited to the maintenance of the independence and impartiality of the judiciary, had in the applicants' case in fact been applied for the protection of a litigant and in such a way as to prevent the applicants from exercising their duties as journalists.

41. In its report of 18 May 1977, the Commission, after deciding that it could and must deal with the applicants additional allegations, expressed the opinion:

- by eight votes to five, that the restriction imposed on the applicants' right to freedom of expression was in breach of Article 10 (art. 10) of the Convention;

- unanimously, that there had been no breach of Articles 14 and 18 read in conjunction with Article 10 (art. 14+10, art. 18+10).

The report contains a joint dissenting opinion by five members of the Commission.

AS TO THE LAW

I. ON ARTICLE 10 (art. 10)

42. The applicants claim to be the victims of a violation of Article 10 (art. 10) of the Convention which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The applicants allege that this violation arises by reason, firstly, of the injunction granted by the English courts and, secondly, of the continuing restraints to which they are subjected as a result of the over-breadth and lack of precision of the law of contempt of court.

The Commission, in its report, expresses the opinion that there has been a violation on the first ground. As regards the second ground, the Principal Delegate submitted also, at the hearing on 24 April 1978, that the injunction was not the only matter which the Court had to consider under Article 10 (art. 10) and that, despite the judgment of the House of Lords and indeed because of its ambiguities, the applicants and other media were continuing victims of the uncertainty of the law of contempt of court.

The Government maintain that there has been no breach of Article 10 (art. 10).

43. With respect to the second ground, the Court recalls that "its jurisdiction in contentious matters is limited to applications which have first of all been lodged with and accepted by the Commission": "The Commission's decision declaring an application admissible determines the object of the case brought before the Court; it is only within the framework so traced that the Court, once a case is duly referred to it, may take cognisance of all questions of fact or of law arising in the course of the

proceedings" (judgment of 18 January 1978 in the case of Ireland v. the United Kingdom, Series A no. 25, p. 63, para. 157). In the present case, the Commission, in its decision of 21 March 1975 on the admissibility of the application, specified that the question before it was "whether the rules of contempt of court as applied in the decision of the House of Lords granting the injunction are a ground justifying the restriction under Article 10 (2) (art. 10-2)". The Commission's examination of the merits of the case was limited to that very question.

The Court thus concludes that it has to examine only whether there has been a violation of the Convention by reason of the judgment of the House of Lords.

44. Originally, the injunction in question was granted by the Divisional Court and concerned only the draft Sunday Times article (see paragraph 21 above). It was discharged by the Court of Appeal (see paragraph 24 above) but the House of Lords restored it and considerably widened its scope by directing the Divisional Court to order

"That ... Times Newspapers Ltd., by themselves, their servants, agents or otherwise, be restrained from publishing, or causing or authorising or procuring to be published or printed, any article or matter which prejudices the issues of negligence, breach of contract or breach of duty, or deals with the evidence relating to any of the said issues arising in any actions pending or imminent against Distillers ... in respect of the development, distribution or use of the drug 'thalidomide'."

45. It is clear that there was an "interference by public authority" in the exercise of the applicants' freedom of expression, which is guaranteed by paragraph 1 of Article 10 (art. 10-1). Such an interference entails a "violation" of Article 10 (art. 10) if it does not fall within one of the exceptions provided for in paragraph 2 (art. 10-2) (Handyside judgment of 7 December 1976, Series A no. 24, p. 21, para. 43). The Court therefore has to examine in turn whether the interference in the present case was "prescribed by law", whether it had an aim or aims that is or are legitimate under Article 10 (2) (art. 10-2) and whether it was "necessary in a democratic society" for the aforesaid aim or aims.

A. Was the interference "prescribed by law"?

46. The applicants argue, inter alia, that the law of contempt of court, both before and after the decision of the House of Lords, was so vague and uncertain and the principles enunciated by that decision so novel that the restraint imposed cannot be regarded as "prescribed by law". The Government maintain that it suffices, in this context, that the restraint was in accordance with the law; they plead, in the alternative, that on the facts of the case the restraint was at least "roughly foreseeable". This latter test had been referred to by the Commission in its report, although there it merely proceeded on the assumption that the principles applied by the House of

Lords were "prescribed by law". However, at the hearing on 25 April 1978, the Commission's Principal Delegate added that, in view of the uncertainties of the law, the restraint was not "prescribed by law", at least when the injunction was first granted in 1972.

47. The Court observes that the word "law" in the expression "prescribed by law" covers not only statute but also unwritten law. Accordingly, the Court does not attach importance here to the fact that contempt of court is a creature of the common law and not of legislation. It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to the Convention of the protection of Article 10 (2) (art. 10-2) and strike at the very roots of that State's legal system.

In fact, the applicants do not argue that the expression "prescribed by law" necessitates legislation in every case; their submission is that legislation is required only if - as in the present case - the common-law rules are so uncertain that they do not satisfy what the applicants maintain is the concept enshrined in that expression, namely, the principle of legal certainty.

48. The expression "prescribed by law" appears in paragraph 2 of Articles 9, 10 and 11 (art. 9-2, art. 10-2, art. 11-2) of the Convention, the equivalent in the French text being in each case "prévues par la loi". However, when the same French expression appears in Article 8 (2) (art. 8-2) of the Convention, in Article 1 of Protocol No. 1 (P1-1) and in Article 2 of Protocol No. 4 (P4-2), the English text as "in accordance with the law", "provided for by law" and "in accordance with law", respectively. Thus confronted with versions of a law-making treaty which are equally authentic but not exactly the same, the Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty (see the *Wemhoff* judgment of 27 June 1968, Series A no. 7, p. 23, para. 8, and Article 33 para. 4 of the Vienna Convention of 23 May 1969 on the Law of Treaties).

49. In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law

must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

50. In the present case, the question whether these requirements of accessibility and foresee ability were satisfied is complicated by the fact that different principles were relied on by the various Law Lords concerned. The Divisional Court had applied the principle that a deliberate attempt to influence the settlement of pending proceedings by bringing public pressure to bear on a party constitutes contempt of court (the "pressure principle"; see paragraph 23 above). Certain members of the House of Lords also alluded to this principle, whereas others preferred the principle that it is contempt of court to publish material which prejudices, or is likely to cause public prejudgment of, the issues raised in pending litigation (the "prejudgment principle"; see paragraphs 29 to 33 above).

51. The applicants do not claim to have been without an indication that was adequate in the circumstances of the "pressure principle". Indeed, the existence of this principle had been recognised by counsel for Times Newspapers Ltd. who is reported as saying before the Divisional Court: "Even if it applies pressure to a party, the article is not contempt at all because [the higher public interest] overcomes any question of wrongdoing. Alternatively, if the article is prima facie contempt, the higher public interest provides a defence against what would otherwise be contempt." Again, Lord Justice Phillimore in the Court of Appeal referred to "the mass of authority ... showing that an attempt to stir up public feeling against a party is a serious contempt".

The Court also considers that there can be no doubt that the "pressure principle" was formulated with sufficient precision to enable the applicants to foresee to the appropriate degree the consequences which publication of the draft article might entail. In *Vine Products Ltd. v. Green* (1966), Mr. Justice Buckley had formulated the law in this way: "It is a contempt of this court for any newspaper to comment on pending legal proceedings in any way which is likely to prejudice the fair trial of the action. That may arise in various ways. It may be that the comment is one which is likely in some way or other to bring pressure to bear upon one or other of the parties to the action, so as to prevent that party from prosecuting or from defending the action, or encourage that party to submit to terms of compromise which he otherwise might not have been prepared to entertain, or influence him in some other way in his conduct in the action, which he ought to be free to prosecute or to defend, as he is advised, without being subject to such pressure."

52. The applicants contend, on the other hand, that the prejudgment principle was novel and that they therefore could not have had an adequate indication of its existence. Support for this view is to be found in several authorities cited by the applicants, including the Phillimore report, which

stated that the House of Lords "formulated a rather different test" (see paragraph 18 above). Nevertheless, the Court has also noted the following:

- in the applicants' memorial, it is submitted (paragraph 2.54): "the 'prejudgment principle' as applied by the House of Lords to the facts of the present case has never before constituted the 'ratio' of an English judicial decision in a comparable case" (emphasis added);

- in 1969, the Interdepartmental Committee on the Law of Contempt as it affects Tribunals of Inquiry (see paragraph 36 above) stated in paragraph 26 of its report: "There is no reported case or anyone being found guilty of contempt of court in respect of comment made about the subject matter of a trial before a judge alone ... There are however dicta which support the view that such comment may amount to contempt";

- the third edition (current in 1972) of Halsbury's Laws of England (vol. 8, pp. 7 et seq., paragraphs 11-13) contains the following passages which are accompanied by references to previous case-law: "... writings ... prejudicing the public for or against a party are contempts ... there [is nothing] of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard ... It is a contempt to publish an article in a newspaper commenting on the proceedings in a pending ... civil action ... In such cases the mischievous tendency of a trial by the newspapers when a trial by one of the regular tribunals of the country is going on is to be considered ... On the other hand, the summary jurisdiction [to punish contempt] ought only to be exercised when it is probable that the publication will substantially interfere with a fair trial."

As regards the formulation of the "prejudgment principle", the Court notes that reference was made in the House of Lords to various authorities and, in particular, to *Hunt v. Clarke* (1889), where Lord Cotton had stated the law in this way: "If any one discusses in a paper the rights of a case or the evidence to be given before the case comes on, that, in my opinion, would be a very serious attempt to interfere with the proper administration of justice. It is not necessary that the court should come to the conclusion that a judge or jury will be prejudiced, but if it is calculated to prejudice the proper trial of a cause, that is a contempt, and would be met with the necessary punishment in order to restrain such conduct." Moreover, the editor of *The Sunday Times* said in his affidavit filed in the Divisional Court proceedings: "... I was given legal advice that the [proposed] article ... was in a category different from that of the articles published hitherto in that in addition to presenting information which strengthened the moral argument for a fairer settlement it included evidence which related to the issue of liability in the pending thalidomide proceedings."

To sum up, the Court does not consider that the applicants were without an indication that was adequate in the circumstances of the existence of the "prejudgment principle". Even if the Court does have certain doubts

concerning the precision with which that principle was formulated at the relevant time, it considers that the applicants were able to foresee, to a degree that was reasonable in the circumstances, a risk that publication of the draft article might fall foul of the principle.

53. The interference with the applicants' freedom of expression was thus "prescribed by law" within the meaning of Article 10 (2) (art. 10-2).

B. Did the interference have aims that are legitimate under Article 10 para. 2 (art. 10-2)?

54. In the view of the applicants, the Government and the minority of the Commission, the law of contempt of court serves the purpose of safeguarding not only the impartiality and authority of the judiciary but also the rights and interests of litigants.

The majority of the Commission, on the other hand, whilst accepting that the law of contempt has the general aim of securing the fair administration of justice and that it thereby seeks to achieve purposes similar to those envisaged in Article 10 (2) (art. 10-2) where it speaks of maintaining the authority and impartiality of the judiciary, considered that it was not called upon to examine separately whether that law has the further purpose of protecting the rights of others.

55. The Court first emphasises that the expression "authority and impartiality of the judiciary" has to be understood "within the meaning of the Convention" (see, *mutatis mutandis*, the König judgment of 28 June 1978, Series A no. 27, pp. 29-30, para. 88). For this purpose, account must be taken of the central position occupied in this context by Article 6 (art. 6), which reflects the fundamental principle of the rule of law (see, for example, the Golder judgment of 21 February 1975, Series A no. 18, p. 17, para. 34).

The term "judiciary" ("pouvoir judiciaire") comprises the machinery of justice or the judicial branch of government as well as the judges in their official capacity. The phrase "authority of the judiciary" includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes relative thereto; further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function.

It suffices, in this context, to adopt the description of the general purposes of the law of contempt given by the Phillimore report. As can be seen from paragraph 18 above, the majority of the categories of conduct covered by the law of contempt relate either to the position of the judges or to the functioning of the courts and of the machinery of justice: "maintaining the authority and impartiality of the judiciary" is therefore one purpose of that law.

56. In the present case, the Court shares the view of the majority of the Commission that, in so far as the law of contempt may serve to protect the rights of litigants, this purpose is already included in the phrase "maintaining the authority and impartiality of the judiciary": the rights so protected are the rights of individuals in their capacity as litigants, that is as persons involved in the machinery of justice, and the authority of that machinery will not be maintained unless protection is afforded to all those involved in or having recourse to it. It is therefore not necessary to consider as a separate issue whether the law of contempt has the further purpose of safeguarding "the rights of others".

57. It remains to be examined whether the aim of the interference with the applicants' freedom of expression was the maintenance of the authority and impartiality of the judiciary.

None of the Law Lords concerned based his decision on the ground that the proposed article might have an influence on the "impartiality" of the judiciary. This ground was also not pleaded before the Court and can be left out of account.

The reasons why the draft article was regarded as objectionable by the House of Lords (see paragraphs 29 to 33 above) may be briefly summarised as follows:

- by "prejudging" the issue of negligence, it would have led to disrespect for the processes of the law or interfered with the administration of justice;
- it was of a kind that would expose Distillers to public and prejudicial discussion of the merits of their case, such exposure being objectionable as it inhibits suitors generally from having recourse to the courts;
- it would subject Distillers to pressure and to the prejudices of prejudgment of the issues in the litigation, and the law of contempt was designed to prevent interference with recourse to the courts;
- prejudgment by the press would have led inevitably in this case to replies by the parties, thereby creating the danger of a "trial by newspaper" incompatible with the proper administration of justice;
- the courts owe it to the parties to protect them from the prejudices of prejudgment which involves their having to participate in the flurries of pre-trial publicity.

The Court regards all these various reasons as falling within the aim of maintaining the "authority ... of the judiciary" as interpreted by the Court in the second sub-paragraph of paragraph 55 above.

Accordingly, the interference with the applicants' freedom of expression had an aim that is legitimate under Article 10 (2) (art. 10-2).

C. Was the interference "necessary in a democratic society" for maintaining the authority of the judiciary?

58. The applicants submit and the majority of the Commission is of the opinion that the said interference was not "necessary" within the meaning of Article 10 (2) (art. 10-2). The Government contend that the minority of the Commission was correct in reaching a contrary conclusion and rely, in particular, on the margin of appreciation enjoyed by the House of Lords in the matter.

59. The Court has already had the occasion in its above-mentioned *Handyside* judgment to state its understanding of the phrase "necessary in a democratic society", the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions.

The Court has noted that, whilst the adjective "necessary", within the meaning of Article 10 (2) (art. 10-2), is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" and that it implies the existence of a "pressing social need" (p. 22, para. 48).

In the second place, the Court has underlined that the initial responsibility for securing the rights and freedoms enshrined in the Convention lies with the individual Contracting States. Accordingly, "Article 10 (2) (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ... and to the bodies, judicial amongst others that are called upon to interpret and apply the laws in force" (p. 22, para. 48).

"Nevertheless, Article 10 (2) (art. 10-2) does not give the Contracting States an unlimited power of appreciation": "The Court ... is empowered to give the final ruling on whether a 'restriction' ... is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision" which "covers not only the basic legislation but also the decision applying it, even one given by an independent court" (*ibid.*, p. 23, para. 49).

The Court has deduced from a combination of these principles that "it is in no way [its] task to take the place of the competent national courts but rather to review under Article 10 (art. 10) the decisions they delivered in the exercise of their power of appreciation" (*ibid.*, p. 23, para. 50).

This does not mean that the Court's supervision is limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith. Even a Contracting State so acting remains subject to the Court's control as regards the compatibility of its conduct with the engagements it has undertaken under the Convention. The Court still does not subscribe to the contrary view which, in essence, was advanced by the Government and the majority of the Commission in the *Handyside* case (pp. 21-22, para. 47).

Again, the scope of the domestic power of appreciation is not identical as regards each of the aims listed in Article 10 (2) (art. 10-2). The Handyside case concerned the "protection of morals". The view taken by the Contracting States of the "requirements of morals", observed the Court, "varies from time to time and from place to place, especially in our era", and "State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements" (p. 22, para. 48). Precisely the same cannot be said of the far more objective notion of the "authority" of the judiciary. The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. This is reflected in a number of provisions of the Convention, including Article 6 (art. 6), which have no equivalent as far as "morals" are concerned. Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation.

In the different, but to a certain extent comparable, contexts of Articles 5 (3) and 6 (1) (art. 5-3, art. 6-1), the Court has on occasion reached conclusions different from those of the national courts on matters in respect of which the latter were also competent and qualified to make the initial assessment (Neumeister judgment of 27 June 1968, Series A no. 8, pp. 9-15 and 38-40; Stögmüller judgment of 10 November 1969, Series A no. 9, pp. 11-24, 39 and 43-44; Ringeisen judgment of 16 July 1971, Series A no. 13, pp. 24-34 and 42-44; König judgment of 28 June 1978, Series A no. 27, pp. 16 in fine, 22, 23-24 and 33-40).

60. Both the minority of the Commission and the Government attach importance to the fact that the institution of contempt of court is peculiar to common-law countries and suggest that the concluding words of Article 10 (2) (art. 10-2) were designed to cover this institution which has no equivalent in many other member States of the Council of Europe.

However, even if this were so, the Court considers that the reason for the insertion of those words would have been to ensure that the general aims of the law of contempt of court should be considered legitimate aims under Article 10 (2) (art. 10-2) but not to make that law the standard by which to assess whether a given measure was "necessary". If and to the extent that Article 10 (2) (art. 10-2) was prompted by the notions underlying either the English law of contempt of court or any other similar domestic institution, it cannot have adopted them as they stood: it transposed them into an autonomous context. It is "necessity" in terms of the Convention which the Court has to assess, its role being to review the conformity of national acts with the standards of that instrument.

In addition, the Court exercises its supervision in the light of the case as a whole (above-mentioned Handyside judgment, p. 23, para. 50). Accordingly, it must not lose sight of the existence of a variety of reasoning and solutions in the judicial decisions summarised at paragraphs 22 to 35 above, of extensive debates in England on the law of contempt of court and

of proposals for reform. As regards the latter, the Court observes that, although the Government Green Paper sets out arguments for and against certain of the recommendations of the Phillimore Committee, it does not call in question the suggestion that the "prejudgment" test referred to in the House of Lords should be reconsidered (see paragraph 37 above).

61. Again, the Court cannot hold that the injunction was not "necessary" simply because it could or would not have been granted under a different legal system. As noted in the judgment of 9 February 1967 in the "Belgian Linguistic" case, the main purpose of the Convention is "to lay down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction" (Series A no. 5 p. 19). This does not mean that absolute uniformity is required and, indeed, since the Contracting States remain free to choose the measures which they consider appropriate, the Court cannot be oblivious of the substantive or procedural features of their respective domestic laws (see, *mutatis mutandis*, judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, pp. 34-35).

62. It must now be decided whether the "interference" complained of corresponded to a "pressing social need", whether it was "proportionate to the legitimate aim pursued", whether the reasons given by the national authorities to justify it are "relevant and sufficient under Article 10 (2) (art. 10-2)" (above-mentioned Handyside judgment, pp. 22-24, paras. 48-50). In this connection, the Court has examined the subject-matter of the injunction, then the state of the thalidomide case at the relevant time and, finally, the circumstances surrounding that case and the grant of the injunction.

63. The injunction, in the form ordered by the House of Lords, was not directed against the draft Sunday Times article alone (see paragraph 44 above). The applicants allege that it also prevented them from passing the results of their research to certain Government committees and to a Member of Parliament and from continuing their research, delayed plans for publishing a book and debarred the editor of The Sunday Times from commenting on the matter or replying to criticism aimed at him. In fact, the injunction was couched in terms wide enough to cover such items; its very breadth calls for a particularly close scrutiny of its "necessity".

The draft article was nonetheless the principal subject-matter of the injunction. It must therefore be ascertained in the first place whether the domestic courts' views as to the article's potential effects were relevant in terms of the maintenance of the "authority of the judiciary".

One of the reasons relied on was the pressure which the article would have brought to bear on Distillers to settle the actions out of court on better terms. However, even in 1972, publication of the article would probably not have added much to the pressure already on Distillers (see paragraph 29, second sub-paragraph, above). This applies with greater force to the position obtaining in July 1973, when the House of Lords gave its decision: by that date, the thalidomide case had been debated in Parliament and had been the

subject not only of further press comment but also of a nationwide campaign (see paragraphs 13 and 14 above).

The speeches in the House of Lords emphasised above all the concern that the processes of the law may be brought into disrespect and the functions of the courts usurped either if the public is led to form an opinion on the subject-matter of litigation before adjudication by the courts or if the parties to litigation have to undergo "trial by newspaper". Such concern is in itself "relevant" to the maintenance of the "authority of the judiciary" as that expression is understood by the Court (see paragraph 55 above). If the issues arising in litigation are ventilated in such a way as to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in the courts. Again, it cannot be excluded that the public's becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes.

Nevertheless, the proposed Sunday Times article was couched in moderate terms and did not present just one side of the evidence or claim that there was only one possible result at which a court could arrive; although it analysed in detail evidence against Distillers, it also summarised arguments in their favour and closed with the words: "There appears to be no neat set of answers ...". In the Court's opinion, the effect of the article, if published, would therefore have varied from reader to reader. Accordingly, even to the extent that the article might have led some readers to form an opinion on the negligence issue, this would not have had adverse consequences for the "authority of the judiciary", especially since, as noted above, there had been a nationwide campaign in the meantime.

On the other hand, publication of the proposed article might well have provoked replies. However, the same is true, to a greater or lesser extent, of any publication that refers to the facts underlying or the issues arising in litigation. As items in that category do not inevitably impinge on the "authority of the judiciary", the Convention cannot have been intended to permit the banning of all of them. Moreover, although this particular reason for the injunction might possibly have been "relevant" under Article 10 (2) (art. 10-2), the Court cannot decide whether it was "sufficient" without examining all the surrounding circumstances.

64. At the time when the injunction was originally granted and at the time of its restoration, the thalidomide case was at the stage of settlement negotiations. The applicants concur with the Court of Appeal's view that the case was "dormant" and the majority of the Commission considers it unlikely that there would have been a trial of the issue of negligence. For the Government and the minority of the Commission, on the other hand, such a trial was a real possibility.

An assessment of the precise status of the case during the relevant period is not needed for the Court's decision: preventing interference with

negotiations towards the settlement of a pending suit is a no less legitimate aim under Article 10 (2) (art. 10-2) than preventing interference with a procedural situation in the strictly forensic sense. The same applies to the procedure for judicial approval of a settlement (see paragraph 9 above). What is to be retained is merely that the negotiations were very lengthy, continuing for several years, and that at the actual moment when publication of the article was restrained the case had not reached the stage of trial.

Nevertheless, the question arises as to how it was possible to discharge the injunction in 1976 - by reference, incidentally, to the "pressure principle" rather than the "prejudgment principle" (see paragraph 35 above). At that time, there were still outstanding not only some of the parents' actions but also an action between Distillers and their insurers involving the issue of negligence; the latter action, moreover, had been set down for trial (see paragraph 16 above). Discharge of the injunction in these circumstances prompts the question whether the injunction was necessary in the first place.

65. The Government's reply is that it is a matter of balancing the public interest in freedom of expression and the public interest in the fair administration of justice; they stress that the injunction was a temporary measure and say that the balance, on being struck again in 1976 when the situation had changed, fell on the other side.

This brings the Court to the circumstances surrounding the thalidomide case and the grant of the injunction.

As the Court remarked in its *Handyside* judgment, freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population (p. 23, para. 49).

These principles are of particular importance as far as the press is concerned. They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them (see, *mutatis mutandis*, the *Kjeldsen, Busk Madsen and Pedersen* judgment of 7 December 1976, Series A no. 23, p. 26, para. 52).

To assess whether the interference complained of was based on "sufficient" reasons which rendered it "necessary in a democratic society", account must thus be taken of any public interest aspect of the case. The Court observes in this connection that, following a balancing of the conflicting interests involved, an absolute rule was formulated by certain of the Law Lords to the effect that it was not permissible to prejudge issues in pending cases: it was considered that the law would be too uncertain if the balance were to be struck anew in each case (see paragraphs 29, 32 and 33 above). Whilst emphasising that it is not its function to pronounce itself on an interpretation of English law adopted in the House of Lords, (see, *mutatis mutandis*, the *Ringeisen* judgment of 16 July 1971, Series A no. 13, p. 40, para. 97), the Court points out that it has to take a different approach. The Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted (see, *mutatis mutandis*, the *Klass and others* judgment of 6 September 1978, Series A no. 28, p. 21, para. 42). In the second place, the Court's supervision under Article 10 (art. 10) covers not only the basic legislation but also the decision applying it (see the *Handyside* judgment, p. 23, para. 49). It is not sufficient that the interference involved belongs to that class of the exceptions listed in Article 10 (2) (art. 10-2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.

66. The thalidomide disaster was a matter of undisputed public concern. It posed the question whether the powerful company which had marketed the drug bore legal or moral responsibility towards hundreds of individuals experiencing an appalling personal tragedy or whether the victims could demand or hope for indemnification only from the community as a whole; fundamental issues concerning protection against and compensation for injuries resulting from scientific developments were raised and many facets of the existing law on these subjects were called in question.

As the Court has already observed, Article 10 (art. 10) guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed (see paragraph 65 above).

In the present case, the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared absolutely certain that its diffusion would have presented a threat to the "authority of the judiciary".

Being called upon to weigh the interests involved and assess their respective force, the Court makes the following observations:

In September 1972, the case had, in the words of the applicants, been in a "legal cocoon" for several years and it was, at the very least, far from certain that the parents' actions would have come on for trial. There had also been no public enquiry (see paragraph 14 above).

The Government and the minority of the Commission point out that there was no prohibition on discussion of the "wider issues", such as the principles of the English law of negligence, and indeed it is true that there had been extensive discussion in various circles especially after, but also before, the Divisional Court's initial decision (see paragraphs 11, 12 and 14 above). However, the Court considers it rather artificial to attempt to divide the "wider issues" and the negligence issue. The question of where responsibility for a tragedy of this kind actually lies is also a matter of public interest.

It is true that, if the Sunday Times article had appeared at the intended time, Distillers might have felt obliged to develop in public, and in advance of any trial, their arguments on the facts of the case (see paragraph 63 above); however, those facts did not cease to be a matter of public interest merely because they formed the background to pending litigation. By bringing to light certain facts, the article might have served as a brake on speculative and unenlightened discussion.

67. Having regard to all the circumstances of the case and on the basis of the approach described in paragraph 65 above, the Court concludes that the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention. The Court therefore finds the reasons for the restraint imposed on the applicants not to be sufficient under Article 10 (2) (art. 10-2). That restraint proves not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary.

68. There has accordingly been a violation of Article 10 (art. 10).

II. ON ARTICLE 14 (art. 14)

69. The applicants also claim to be victims of a violation of Article 10, taken in conjunction with Article 14 (art. 14+10), which provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

They maintain that such violation arose by reason of:

- the fact that allegedly similar press publications were not subjected to restraints similar to those imposed on the applicants' publications or activities;

- the difference between the rules applied in Parliament in relation to comment on pending litigation and the rules of contempt of court applied to the press.

In the view of the Government and the Commission, there was in this case no breach of Article 14 read in conjunction with Article 10 (art. 14+10).

70. According to the Court's established case-law, Article 14 (art. 14) safeguards individuals, or groups of individuals, placed in comparable situations, from all discrimination in the enjoyment of the rights and freedoms set forth in the other normative provisions of the Convention and Protocols (see the above-mentioned judgment of 23 July 1968 in the "Belgian Linguistic" case, p. 34, para. 10; National Union of Belgian Police judgment of 27 October 1975, Series A no. 19, p. 19, para. 44).

71. The fact that no steps were taken against other newspapers, for example the Daily Mail, is not sufficient evidence that the injunction granted against Times Newspapers Ltd. constituted discrimination contrary to Article 14 (art. 14).

72. With respect to the rules applicable in Parliament (see paragraph 20 above), the Court notes that the members of the Court of Appeal mentioned the undesirability, and perhaps even dangers, of there being a substantial difference, as regards the treatment of matters sub judice, between the practice of Parliament, whose proceedings are published, and the practice of the courts. Nevertheless, the Court is of the opinion that the press and parliamentarians cannot be considered to be "placed in comparable situations" since their respective "duties and responsibilities" are essentially different. Furthermore, the Parliamentary debate of 29 November 1972 (see paragraph 13 above) did not cover exactly the same ground as the proposed Sunday Times article.

73. There has thus been no violation of Article 14 taken together with Article 10 (art. 14+10).

III. ON ARTICLE 18 (art. 18)

74. Before the Commission, the applicants had additionally raised a claim based on Article 18 (art. 18) which provides:

"The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

However, they did not maintain this claim before the Court: in their memorial of 10 February 1978, they accepted the Commission's opinion that

there had been no breach of Article 18 taken in conjunction with Article 10 (art. 18+10).

Neither the Government nor the Commission adverted to this matter during the oral hearings, although the latter did refer to it in its request bringing the case before the Court.

75. The Court notes the position taken by the applicants and, in the circumstances of the case, does not consider that it is necessary for it to examine this question.

IV. ON ARTICLE 50 (art. 50)

76. Under Article 50 (art. 50) of the Convention, if the Court finds "that a decision or a measure taken" by any authority of a Contracting State "is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said [State] allows only partial reparation to be made for the consequences of this decision or measure", the Court "shall, if necessary, afford just satisfaction to the injured party".

The Rules of Court specify that when the Court "finds that there is a breach of the Convention, it shall give in the same judgment a decision on the application of Article 50 (art. 50) of the Convention if that question, after being raised under Rule 47 bis, is ready for decision; if the question is not ready for decision, the [Court] shall reserve it in whole or in part and shall fix the further procedure" (Rule 50 para. 3, first sentence, read in conjunction with Rule 48 para. 3).

77. In their memorial of 10 February 1978, the applicants request the Court to declare that the Government should pay to them a sum equivalent to the costs and expenses which they had incurred in connection with the contempt litigation in the English courts and the proceedings before the Commission and the Court. However, the applicants did not quantify their claim and, at the hearing on 24 April 1978, their counsel stated that they hoped that the amount of damage suffered by them could be agreed "without troubling the Court".

At the hearing on the following day, the Court, pursuant to Rule 47 bis, invited the Government to present their observations on the question of the application of Article 50 (art. 50) in the present case. The Solicitor-General's closing submission was that this was an issue which the Court would not have to consider.

78. The Court notes that the applicants limit their claim to the above-mentioned costs and expenses but do not for the moment indicate their amount. In these circumstances, the question of the application of Article 50 (art. 50) of the Convention is not ready for decision; the Court must therefore reserve the question and fix the further procedure, taking due account of the eventuality contemplated in Rule 50 (5) of the Rules of Court.

FOR THESE REASONS, THE COURT

1. holds by eleven votes to nine that there has been a breach of Article 10 (art. 10) of the Convention;
2. holds unanimously that there has been no breach of Article 14 taken together with Article 10 (art. 14+10);
3. holds unanimously that it is not necessary to examine the question of a breach of Article 18 (art. 18);
4. holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) invites those appearing before the Court to notify it, within three months from the delivery of this judgment, of any settlement at which the Government and the applicants may have arrived;

(c) reserves the further procedure to be followed on this question.

Done in English and in French, the English text being authentic, at the Human Rights Building, Strasbourg, this twenty-sixth day of April, one thousand nine hundred and seventy-nine.

Giorgio BALLADORE PALLIERI
President

Marc-André EISSEN
Registrar

The separate opinions of the following judges are annexed to the present judgment in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 50 para. 2 of the Rules of Court:

- dissenting opinion of Mr. Wiarda, Mr. Cremona, Mr. Thór Vilhjálmsson, Mr. Ryssdal, Mr. Ganshof van der Meersch, Sir Gerald Fitzmaurice, Mrs. Bindschedler-Robert, Mr. Liesch and Mr. Matscher;

- concurring opinion of Mr. Zekia;

- concurring opinion of Mr O'Donoghue;
- concurring opinion of Mr. Evrigenis.

G. B. P.
M.-A. E.

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CREMONA, THÓR VILHJÁLMSOON, RYSSDAL,
GANSHOF VAN DER MEERSCH, SIR GERALD
FITZMAURICE, BINDSCHEDLER-ROBERT, LIESCH AND
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(Translation)

1. With respect, we are unable to share the opinion of the majority of our colleagues that the contested interference with freedom of expression was contrary to the Convention because it could not be deemed necessary in a democratic society for maintaining the authority and impartiality of the judiciary, within the meaning of Article 10 (2) (art. 10-2) of the Convention.

2. The House of Lords restrained publication of the draft article in question because it considered that by publishing the article *The Sunday Times* would be committing a contempt of court.

It should be noted that it was clearly with a view to covering this institution, which is peculiar to the legal traditions of the common-law countries, that the restriction on freedom of expression aimed at maintaining the authority and impartiality of the judiciary was introduced into the Convention. A similar restriction is unknown in the law of most of the member States; absent in the original draft of the Convention, it was inserted on the proposal of the British delegation.

We would recall, as both the majority and the minority in the Commission acknowledged, that the general aim of the law on contempt of court is to ensure the due administration of justice.

This law involves, amongst other things, the possibility of restraining or punishing such conduct, in particular on the part of the press, as is likely to interfere with the course of justice whilst proceedings are still *sub judice*.

Whatever differences of opinion might exist as to the objectionable character of a publication, it is often considered that there should be a prohibition on the kind of publication that threatens to engender so-called "trial by newspaper" (see, for instance, the speeches of Lord Reid, Lord Morris of Borth-y-Gest, Lord Diplock and Lord Cross of Chelsea in the House of Lords, paragraphs 29, 30, 31 and 33 of the Court's judgment in the present case; the judgment of Lord Denning in the Court of Appeal, paragraph 25 of the Court's judgment in the present case; the Phillimore report, para. 110, and the Green Paper, para. 11).

The law of contempt is intended to prevent, in relation to *sub judice* litigation, the growth of an attitude which finds expression in a prejudgment arrived at without the benefit of the guarantees of impartiality afforded in judicial proceedings and which, consequently, brings about a climate of

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opinion liable to prejudice the due administration of justice. On the other hand, the aim of the law of contempt is not to make the judiciary immune from all criticism. Thus, it was hardly necessary to state in this connection, as does the judgment, that "the courts cannot operate in a vacuum" (see paragraph 65 of the judgment). No one has ever thought of putting this in doubt.

Account must be taken of the above in the interpretation and application of the restriction made on freedom of expression for the purpose of maintaining "the authority and impartiality of the judiciary" within the meaning of Article 10 (2) (art. 10-2).

3. The Law Lords gave a variety of reasons why they considered the article should be banned. For the majority of their Lordships, the principal reasons were, in our opinion, the following:

- the proposed article introduced into the press campaign on the thalidomide affair a wealth of facts concerning the issue as to whether Distillers had been guilty of negligence in the development, distribution and use of thalidomide;

- the article did so in a manner whereby the information given painted a picture clearly suggesting that Distillers had in fact been negligent;

- hence, through publication of the projected article, the issue of negligence, crucial for the outcome of the actions then pending between the parents of the deformed children and Distillers, would be prejudged, that is to say, judged by the press although the court of law hearing the case had not yet given a ruling attended by the guarantees afforded to the parties in judicial proceedings;

- such prejudgment by the press, which would inevitably provoke replies from the parties and give rise to the risk of a "trial by newspaper", is incompatible with the due administration of justice;

- the courts owe it to the parties to protect them from the prejudices of prejudgment and from the resultant necessity of having themselves to participate in the flurries of pre-trial publicity.

These reasons are consistent with the aim embodied in the guarantee of the due administration of justice, which guarantee is expressed in the Convention by the notion of the maintenance of "the authority and impartiality of the judiciary".

It must also be noted that, in so far as these reasons concerned the protection of the interests of the parties, they were in conformity with the aim of "the protection of the rights of others", an aim likewise provided for in Article 10 (2) (art. 10-2).

4. The difference of opinion separating us from our colleagues concerns above all the necessity of the interference and the margin of appreciation which, in this connection, is to be allowed to the national authorities.

5. With reference to the question whether, in order to guarantee the due administration of justice, it was necessary to restrain publication of the contested article and of other articles of the same kind, it can be seen from the reasoning of the House of Lords that the Law Lords put this very question to themselves when applying the rules on contempt of court. Thus, Lord Reid stated ([1974] A.C. 294): "[The law on contempt of court] is there to prevent interference with the administration of justice and it should, in my judgment, be limited to what is reasonably necessary for that purpose". Similarly, Lord Cross of Chelsea made the following observation (ibid. 322): "When the alleged contempt consists in giving utterance either publicly or privately to opinions with regard to or connected with legal proceedings, whether civil or criminal, the law of contempt constitutes an interference with freedom of speech, and I agree with my noble and learned friend [Lord Reid] that we should be careful to see that the rules as to 'contempt' do not inhibit freedom of speech more than is reasonably necessary to ensure that the administration of justice is not interfered with."

6. When the House of Lords addressed itself to the question of the necessity of the restraint, it did so with a view to applying the national law. When, on the other hand, our Court deals with this question, it does so with reference to Article 10 (art. 10) of the Convention, which pursues two objectives relevant for the present case. Those two objectives are "freedom of expression", guaranteed as a fundamental principle in a democratic society, and "the authority and impartiality of the judiciary", guaranteed in so far as their maintenance proves necessary in such a society. The Court must take account of these two objectives in connection with the respect of the principle of proportionality.

In order to ascertain whether in the circumstances it was necessary for freedom of expression, guaranteed by the first paragraph of Article 10 (art. 10) of the Convention, to be limited in the interests of justice, mentioned in the second paragraph of that Article (art. 10-2), one should therefore weigh, on the one hand, the consequences for the freedom of the press of restraining the publication in question or similar publications and, on the other hand, the extent to which this publication could prejudice the due administration of justice in relation to the actions pending at the time. In the context of Article 10 (art. 10), this means that a balance must be sought between the exercise by the press of the right guaranteed to it under paragraph 1 (art. 10-1) and the necessity under paragraph 2 (art. 10-2) to impose a restriction on the exercise of this right in order to maintain "the authority and impartiality of the judiciary" (see, *mutatis mutandis*, the *Klass and others* judgment of 6 September 1978, Series A no. 28, p. 28, para. 59 *in fine*). There is surely no need to recall the essential role that the judiciary play in English law in the protection of fundamental rights and freedoms.

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7. The Court has already had the occasion, notably in the Handyside judgment of 7 December 1976 (Series A no. 24), to state the correct approach to the interpretation and application of the phrase "necessary in a democratic society", within the meaning of Article 10 (2) (art. 10-2), and to indicate both what its obligations are when faced with issues relating to the interpretation or application of this provision and the manner in which it means to perform those obligations.

The Court stated in that judgment that it is for the national authorities to make the initial assessment of the reality of the pressing social need implied in each case by the notion of necessity and that, accordingly, Article 10 (2) (art. 10-2) leaves to the Contracting States a margin of appreciation which "is given both to the domestic legislator ... and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force" (see the Handyside judgment, loc. cit., p. 22, para. 48).

This margin of appreciation involves a certain discretion and attaches primarily to the evaluation of the danger that a particular exercise of the freedom safeguarded by Article 10 (1) (art. 10-1) could entail for the interests listed in Article 10 (2) (art. 10-2) and to the choice of measures intended to avoid that danger (see the Klass and others judgment, loc. cit., p. 23, para. 49). For the purposes of such an evaluation - to be made with due care and in a reasonable manner, and which of necessity will be based on facts and circumstances prevailing in the country concerned and on the future development of those facts and circumstances - the national authorities are in principle better qualified than an international court.

8. Nevertheless, Article 10 (2) (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which with the Commission is responsible for ensuring the observance of those States' engagements (Article 19) (art. 19), is empowered to rule on whether a "restriction" or a "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision (see the Handyside judgment, loc. cit., p. 23, para. 49). This supervision is concerned, in the first place, with determining whether the national authorities have acted in good faith, with due care and in a reasonable manner when evaluating those facts and circumstances, as well as the danger that might thereby be occasioned for the interests listed in Article 10 (2) (art. 10-2); further and above all, it seeks to ensure that, in a society that means to remain democratic, the measures restricting freedom of expression are proportionate to the legitimate aim pursued (see the Handyside judgment, loc. cit., p. 23, para. 49, and the Klass and other judgment, loc. cit., p. 23, para. 49).

We wish to recall at this juncture that there can be no democratic society unless "pluralism, tolerance and broad-mindedness" (see the Handyside judgment, loc. cit., p. 23, para. 49) find effective expression in the society's institutional system, and unless this system is subject to the rule of law, makes basic provision for an effective control of executive action to be exercised, without prejudice to parliamentary control, by an independent judiciary (see the Klass and others judgment, loc. cit., pp. 25-26, para. 55), and assures respect of the human person.

Accordingly, although it is in no way its task to take the place of the competent domestic courts, the Court must review under Article 10 (art. 10), so construed, the decisions delivered by those courts in the exercise of their power of appreciation (see the Handyside judgment, loc. cit., p. 23, para. 50).

9. In the Handyside case, which concerned a publication whose prohibition was adjudged by the national courts to be necessary "for the protection of morals", the Court considered that the competent domestic courts "were entitled ... to think" at the relevant time that this publication would have pernicious effects on the morals of the children or adolescents who would read it.

In the instant case, the Court has to examine whether the House of Lords was "entitled to think" that publication of the article in question would have detrimental effects upon the due administration of justice in relation to actions pending before the courts at the relevant time.

For the majority of our colleagues, the national authorities' margin of appreciation as to issues concerning the maintenance of the authority of the judiciary should be narrower than the margin of appreciation which, according to the Handyside judgment, has to be allowed to them in relation to issues concerning the protection of morals. Our colleagues maintain that the notion of the "authority of the judiciary" is far more objective than the notion of "morals"; that the domestic law and practice of the Contracting States reveal a fairly broad measure of common ground as regards the former notion; and that this common ground is reflected in a number of provisions of the Convention, including Article 6 (art. 6), which have no equivalent as far as morals are concerned (see paragraph 59 of the judgment).

We are unable to share this view.

Even though there might exist a fairly broad measure of common ground between the Contracting States as to the substance of Article 6 (art. 6), it nevertheless remains the fact that the judicial institutions and the procedure can vary considerably from one country to another. Thus, contrary to what the majority of the Court holds, the notion of the authority of the judiciary is by no means divorced from national circumstances and cannot be

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determined in a uniform way. It is, moreover, to be noted that the instant case does not bear upon a matter governed by Article 6 (art. 6) but is concerned with whether or not the publication of certain specific appraisals and statements regarding sub judice litigation could interfere with the due administration of justice. The due administration of justice depends, in addition to what is mentioned in Article 6 (art. 6), upon other rules of procedure and upon the satisfactory functioning of the judicial institutions.

The above reasoning is no less valid for acts or situations capable of prejudicing the proper functioning of the courts - acts or situations which can only be appraised at a given moment in the national context. It is thus for the national authorities to make the initial assessment of the danger threatening the authority of the judiciary and to judge what restrictive measures are necessary to deal with that danger. The relevant restrictions may vary according to the legal system and the traditions of the country in question. Within the limits reconcilable with the requirements of a democratic society, the State concerned is free to determine what method is most suitable for maintaining the authority of the judiciary. (cf., *mutatis mutandis*, the judgment of 23 July 1968 on the merits of the "Belgian Linguistic" case, Series A no. 6, pp. 34-35).

10. In the United Kingdom, the law of contempt constitutes one of the means designed to safeguard the proper functioning of the courts. As has been said above, the authors of the Convention had this law in mind when they introduced the notion of maintaining "the authority and impartiality of the judiciary" (see paragraph 2 above).

The task of ensuring that the law of contempt is observed falls to the domestic courts. In this respect, it would appear undeniable to us that the House of Lords is in principle better qualified than our Court to decide whether, in factual circumstances which are for the House to assess, a given form of restriction on freedom of expression is necessary for maintaining, in a democratic society, the judiciary's authority within the United Kingdom itself.

This cannot be taken to the point of allowing that every restriction on freedom of expression adjudged by the domestic courts to be necessary for observance of the law of contempt must also be considered necessary under the Convention.

While the domestic courts' assessment of the prejudicial consequences that a given publication might have on the due administration of justice in the United Kingdom should in principle be respected, it is nevertheless possible that the measures deemed necessary to avert such consequences overstep the bounds of what is "necessary in a democratic society" within the meaning of Article 10 (2) (art. 10-2) (see paragraph 7 above). The Court,

in its consideration of the matter, must pay particular heed to this fundamental factor in the Convention system.

11. As emerges from the facts set out at paragraphs 11 to 14 of the judgment, the banned draft article was one of a number of reports on the tragedy of deformed children, published at intervals since 1967 by The Sunday Times and other newspapers. These reports were intended partly to inform the public and partly, at least as far as The Sunday Times was concerned, to bring pressure on Distillers to improve their offer of compensation to the victims.

Although a certain number of actions brought by the parents against Distillers to recover damages were pending at the relevant time, this press campaign did not provoke any reaction leading to restrictions or penalties ordered by the courts. The sole injunction to be granted was that made in respect of the article - the subject of the present proceedings - which was communicated in draft by The Sunday Times to the Solicitor-General for the purpose of making sure that its publication would not constitute contempt of court. According to the House of Lords which sat as the court of last instance, it was because of the very special character of this article - an article differing in this respect from the earlier reports - that its publication had to be deemed objectionable as a contempt of court. In the opinion of the Law Lords, this special character derived from the fact that the article mentioned a wealth of previously unpublished facts concerning the issue whether Distillers had been guilty of negligence. The article tended to review the evidence and did so in such a manner that conveyed an impression clearly suggesting that Distillers had been negligent. Thus, publication of the article was liable to give rise to "prejudgment" of this issue crucial to sub judice litigation. Such "prejudgment", which would inevitably provoke replies from Distillers and bring about a "trial by newspaper", would interfere with the normal course of proceedings pending before the courts.

According to certain of the Law Lords, the article would likewise have constituted an act of contempt on the separate ground that it brought pressure to bear on Distillers with a view to persuading them to settle the case and to refrain from relying on a defence available to them under the law. Several of their Lordships also expressed the opinion that during the pendency of litigation, any "prejudgment" would be objectionable, quite apart from the concrete prejudice that such "prejudgment" could actually cause. We do not deem it necessary to examine these grounds because, in our view, they do not seem to have been decisive for the judgment. In the present case, the publication in question dealt especially with factual issues material to the determination of the charge of negligence and to the evidence adduced in support of that allegation. It is notably publications of

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this kind that constitute the risk which it was the object of the decision of the House of Lords to avoid.

This is why we consider that the House of Lords, acting on the basis of the factors which it was evaluating, was "entitled to think" that the publication of the article in question would have repercussions on pending litigation that would prejudice the due administration of justice and the authority of the judiciary. The national judge is certainly better placed than the Court to determine whether, in a given instance, a publication concerning sub judice litigation involves a "prejudgment" and the risk of "trial by newspaper".

12. The applicants submitted before the Court that the actions brought by the parents against Distillers were "dormant" at the relevant time. In its report on the present case, the European Commission of Human Rights considered firstly that it was somewhat improbable that the great majority of the actions, then subject to negotiation, would eventuate in a court judgment and secondly that, as regards the actions brought by the parents who as a matter of principle were not willing to opt for settlement, no court decision could be anticipated in the foreseeable future.

Assessment of the state of the actions in question depended on what could be expected at the relevant time in relation to the development of the negotiations, on the probability of a settlement, on the eventuality that certain of the parents would accept a settlement and discontinue their actions whilst others would pursue them, and in general on what were the more or less immediate prospects either of a settlement or of judgment in court.

For the purposes of such an assessment which covered a wealth of contemporary facts and points of procedure, the national judge must, in this respect also, be taken as being in principle in a better position than the Court (see the Handyside judgment, *loc. cit.*, p. 22, para. 48). In our view, the House of Lords was "entitled to think" that in the circumstances then obtaining the actions concerned could not be regarded as "dormant".

13. The considerations set out above lead us to conclude that the domestic courts' evaluation of the risk of seeing the article concerned interfere with the due administration of justice, as well as their assessment of the necessity of the measure to be taken within the context of the domestic law, must be regarded as reasonable.

As has already been pointed out (see paragraphs 8 and 10 above), it is nevertheless for the Court to determine whether, on the strength of this evaluation, the restraint on the publication was proportionate to the legitimate aim pursued and can be deemed necessary in a democratic society for the maintenance of the authority and impartiality of the judiciary, within the meaning of Article 10 (2) (art. 10-2).

This determination involves that the Court should take into account not only the interests of justice, which according to the domestic courts made it necessary to impose the restraint at the relevant time, but also the consequences of this measure for the freedom of the press, a freedom which figures amongst those guaranteed by the Convention as one of the essential foundations of a "democratic society" and as one of the basic conditions for that society's progress and development (see, *mutatis mutandis*, the Handyside judgment, *loc. cit.*, p. 23, para. 49).

The object of the banned publication related to a tragedy affecting in the highest degree the general interest. As the Commission rightly pointed out, in such a situation assessment of negligence becomes a matter of public concern: the examination of the responsibilities involved and the process of informing the public undoubtedly constitute legitimate functions of the press.

However, it cannot be overlooked that the restriction on the freedom of the press consequent upon the decision of the House of Lords did not amount to a general restraint on discussing the thalidomide disaster. The scope of the restraint was limited as to both its subject-matter and its duration.

14. The subject-matter of the restraint imposed on The Sunday Times was an injunction against publishing articles that "prejudged" the issue of negligence or dealt with the evidence relating to the actions then pending.

Freedom to publish other information or to pass judgments on other aspects of the case remained unaffected, and there was nothing to prevent The Sunday Times from continuing its publications while refraining from making any "prejudgment" of the issue of negligence or from dealing with the evidence related thereto. In particular, this applied both to criticism of the English law of products liability and to appreciation of the moral side of the case. It would seem difficult to sustain the view expressed in the judgment that this limitation is artificial (see paragraph 66 of the judgment).

Moreover, the suggestion contained in the judgment to the effect that the publication of the Sunday Times article was needed as being the only way in which the families of the victims could be fully informed of the facts seems to us incorrect, since it appears that they were advised by a firm of solicitors who must have been aware of most of what was essential. Indeed, there is good reason to think that The Sunday Times itself obtained its information from these solicitors (see paragraph 16 of the judgment).

15. As regards the duration of the restraint, it should be noted that the sole aim of the injunction granted was to ensure that for a certain time premature publications should not be able to prejudice the due administration of justice in relation to specific litigation. According to the House of Lords, the necessity to restrain publication of the article stemmed

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from the state, at the time of its decision, of the actions pending. Their Lordships foresaw the possibility that the situation might change, that, even before the proceedings had been finally terminated, the balance between the interests of justice and those of the freedom of the press might shift, and that the injunction might be discharged.

In this connection, the statement of Lord Reid is instructive ([1974] A.C. 301): "The purpose of the law is not to prevent publication of such material but to postpone it. The information set before us gives us hope that the general lines of a settlement of the whole of this unfortunate controversy may soon emerge. It should then be possible to permit this material to be published. But if things drag on indefinitely so that there is no early prospect either of a settlement or of a trial in court then I think that there will have to be a reassessment of the public interest in a unique situation." Note should also be taken of the observation by Lord Cross of Chelsea (*ibid.* 325) that "the respondents [The Sunday Times] will be at liberty to apply to have [the injunction] discharged if they consider that in the light of the facts then existing they can persuade the court that there is no longer any warrant for continuing it".

It does not appear from the evidence that The Sunday Times made any such application before the injunction was actually discharged at the request of the Attorney-General on the ground that the public interest no longer required the restraint. In fact, the situation regarding the thalidomide affair had changed by then. Following the approval of the settlement between the majority of the parents and Distillers, the injunction had remained in force only in relation to the few extant actions, but it had become clear after a certain time that these actions were no longer being actively pursued.

We have no sufficient reason to suppose that the situation would have justified the injunction being discharged earlier. As has already been pointed out, it does not seem that the applicants themselves sought a decision to this effect.

16. In the light of the considerations set out above, we conclude that the interference with freedom of expression, adjudged by the national courts in the instant case to be necessary according to the law of contempt in the interests of the due administration of justice, did not overstep the limits of what might be deemed necessary in a democratic society for the maintenance of "the authority and impartiality of the judiciary" within the meaning of Article 10 (2) (art. 10-2).

On the basis of the material before the Court, we consider that no infringement of the requirements of Article 10 (art. 10) has been established.

CONCURRING OPINION OF JUDGE ZEKIA

First part

In the instant case, in interpreting and applying Article 10 paras. 1 and 2 (art. 10-1, art. 10-2) of the Convention to the intended publication of the proposed article of The Sunday Times, relating to the plight of the thalidomide drug victims, we have to lay emphasis on the object and scope of the relevant provisions contained in the Convention.

Full account of the facts was given before us. Relevant documents were produced. Reference was made to the relevant legal points and judicial decisions. The views of the parties participating in the proceedings were exhaustively put forward by their memorials and counter memorials as well as by their submissions in the oral hearings. The Court had this advantage before embarking on the discharge of its judicial task.

The basic issues under Article 10 (art. 10) which have to be determined are two. I propose to formulate them in two questions.

Question no. 1

Was the restriction, imposed by an injunction, on the right to freedom to publish the draft article in The Sunday Times "prescribed by law" within the ambit and object of the Convention in general and of Article 10 (art. 10) in particular?

Question no. 2

Was such restriction "necessary", as required by Article 10 (2) (art. 10-2), in a democratic society for maintaining the authority and impartiality of the judiciary and/or for protecting the reputation or rights of others?

An answer in the affirmative to question 1 is a sine qua non for a possible similar answer to question 2.

My answer to question 1 is in the negative. I proceed to give as briefly as possible my reasons:

(1) Article 1 (art. 1) of the Convention reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." In Section I, Article 10 (1) (art. 10-1) reads: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...".

In ascertaining the meaning, scope and object of restrictions to be prescribed by law occurring in paragraph 2 of the same Article 10 (art. 10-2), one must not lose sight of the fact that the right to freedom of expression accorded to everyone by the previous paragraph has to be reasonably secured, enjoyed or exercised. Both paragraphs are interdependent. Any restriction affecting the exercise of the right to freedom of expression must be reasonably foreseeable or predictable. You cannot enjoy or exercise the right to freedom of expression if the enjoyment of such right is made

conditional and subject to a law or a rule or principle abounding in uncertainties. This would be tantamount to an undue restriction, even to a denial, of such freedom of expression. I am of the opinion therefore that the phrase prescribed by law or "prévues par la loi" in French means a law imposing restrictions which is reasonably ascertainable. The enactment might be made by statute or by common law consistently established.

I am in agreement with the applicants that the branch of the common law of contempt of court dealing with publications relating to pending civil proceedings is not prescribed by law within the framework and object of paragraphs 1 and 2 of Article 10 (art. 10-1, art. 10-2) of the Convention. I note that the Commission in its report merely proceeded on the assumption that the restriction imposed on the applicants was prescribed by law and that doubt was cast on this assumption by the Commission's Principal Delegate during the oral hearings.

(2) Whether or not a particular publication in the press and other mass media amounts to a contempt of court in relation to pending civil proceedings depends on the criteria or test to be applied. There are a number of criteria and kinds of tests available. There is no settled or uniform practice as to which criterion is to be adopted in a given case and the result may differ according to the test applied.

(3) The tests and criteria applied in the enforcement of the law of contempt against publications in the press are so varied and subjective in nature that it is very difficult to foresee in a particular case what test is going to be applied and with what result.

A glaring example of the uncertainty and the unsatisfactory state of the law of contempt touching pending civil proceedings vis-a-vis press publications is to be found in the conflicting opinions expressed by the Law Lords on the Sunday Times article of 24 September 1972 about the thalidomide tragedy.

According to Lord Diplock and Lord Simon, the offence of contempt of court was committed, whereas Lord Reid and Lord Cross held, on the contrary, that there was no contempt of court.

Disputable legal points might arise even in the interpretation of a statute law as well as in the case of a rule of common law. But the position is not the same when we are dealing with a branch of the common law - contempt of court - which is not established to the extent of being reasonably regarded as a settled part of the common law. We have a number of principles referring to such a branch of the law. These principles might be useful to interpret an existing law but not to substitute a law which is not enacted or established at common law. But I doubt very much whether the principles alone put together would amount to a law.

(4) Eminent judges of high standing in England describe the branch of the common law that concerns contempt of court as being uncertain, inconsistent and lacking the clarity badly needed. Lord Reid in his judgment

in the present case in the House of Lords stated (see page 294): "I cannot disagree with a statement in a recent report of Justice on 'The Law and the Press' (1965) that the main objection to the existing law of contempt is its uncertainty."

Lord Denning M.R., in giving evidence before the Phillimore Committee in connection with the starting point of pending civil proceedings affecting publications in the press, stated: "I am all in favour of it being clarified. At present the press hesitate when they ought to make comment in the public interest. The reason is that they are apprehensive because the law is so uncertain. I think they ought to know where they stand."

Lord Salmon, when asked about the point at which contempt should start to apply in civil proceedings, stated (*ibid.*): "Nowhere, because I would not have any contempt. I say never. Certainly never in a judge-alone case. I think the law of libel takes care of anything you may say about a civil case, and if a judge is going to be affected by what is written or said, he is not fit to be a judge."

In Part V of the Phillimore Committee report, dealing with the summary of conclusions and recommendations, it is stated on page 92: "(4) The law as it stands contains uncertainties which impede and restrict reasonable freedom of speech ... (5) One area of uncertainty concerns the period of operation of the law of contempt, as to whether publications are at risk when proceedings are imminent and, if so, what period that expression covers."

At what stage of civil proceedings the subject-matter in dispute is to be considered as *sub judice* or the trial of the matters in dispute is to be considered as imminent are questions which cannot be answered with accuracy owing to lack of clarity in the law of contempt.

(5) It has to be borne in mind that the contempt of court under consideration is a criminal offence, a misdemeanour which entails imprisonment and fine and/or an order to give security for good behaviour. This being so, the fundamental principle requiring clear and unambiguous definition of an offence or crime applies also to the offence of contempt of court under review. The summary procedure adopted in contempt of court cases creates another difficulty, namely to what extent this procedure is compatible with Article 6 (art. 6) of the Convention.

(6) The right of the press to freedom of expression is undoubtedly one of the fundamental characteristics of a democratic society and indispensable for maintaining freedom and democracy in a country. Under Article 1 (art. 1) of the Convention, the High Contracting Parties undertook to secure to everyone within their jurisdiction the rights enumerated in Section I of the Convention, and the liberty of the press is covered in the said Section. The exercise and enjoyment of this right cannot reasonably be attained or achieved if they are handicapped and restricted by legal rules or principles which are not predictable or ascertainable even by a qualified lawyer.

The prejudgment principle evolved by the House of Lords in this case does not solve the problem we face under Article 10 (art. 10) of the Convention. There are two reasons:

(a) Even if we assume that the House of Lords settled the law, the material date for ascertaining whether the branch of the common law that concerns contempt of court was prescribed by law or not is the date the Sunday Times draft article was put before the Divisional Court and not before the Law Lords. In the oral submissions made by the parties during the hearings, reference was made to the authority of the House of Lords in dealing with the case as a final court of appeal. According to the applicants' submission, the Law Lords, by their judgment in the present case, gave to the branch of the law of contempt of court concerning pending civil proceedings a definition which was quite novel. The respondent Government did not agree.

It is not the business of this Court to enquire whether the House of Lords, sitting as a final court of the land, has the power to amend, supplement, consolidate, shape or improve the common law according to the demands of the time and circumstances.

It is not admitted that the Law Lords make laws but claimed that they simply declare the law. However, the applicants' counsel in his submission said that this was a fiction and that the House was making new law.

It may, however, become our business to find out whether the House of Lords, by their judgment in the present case, have amended or supplemented the branch of the common law of contempt of court we are dealing with. This is because, if the judgment in effect amounted to an amendment or supplementing of such law, then Article 7 (art. 7) of the Convention becomes relevant for consideration. Personally, I incline to the view expressed by the applicants, but I am content to refer to this aspect of the case as another source of uncertainty in the branch of contempt of court under review and nothing more.

(b) The prejudgment principle does not provide the press with a reasonably safe guide for their publications. The absolute rule indicated by Lord Cross in applying the prejudgment test - not taking into account whether a real risk of interference with or prejudice to the course of justice exists - inhibits innocuous publications dealing incidentally with issues and evidence in pending cases in order to avoid a gradual slide towards trial by newspapers or other mass media. This appears to me to be a very restrictive absolute rule which is difficult to reconcile with the liberty of the press. In a matter of public concern such as the national tragedy of thalidomide it would be very difficult to avoid, in one way or another, reference to the issues and evidence involved in a pending case.

The diversity of the criteria adopted in this case by Chief Justice Widgery in the Divisional Court and Lord Denning and his colleagues in the Court of Appeal and the criterion evolved by the majority of the House of

Lords illustrate the unsatisfactory and unsettled state of the rules or principles of contempt of court dealing with press publications in pending civil matters. This is especially so when such publications are made in good faith without misrepresentation and are not calculated to interfere with or prejudice the course of justice and, furthermore, when factual accuracy is claimed and the subject matter is of public concern.

Conclusion as to question no. 1

In my view, the branch of the common law that concerns contempt of court dealing with publications in the press and other media in connection with pending civil proceedings was - at any rate on the material date - uncertain and unsettled - and unascertainable even by a qualified lawyer - to such an extent that it could not be considered as a prescribed law within the purview and object of Articles 1 and 10 (1) and (2) (art. 1, art. 10-1, art. 10-2) of the Convention. The phrase "prescribed by law" in its context does not simply mean a restriction "authorised by law" but necessarily means a law that is reasonably comprehensive in describing the conditions for the imposition of restrictions on the rights and freedoms contained in Article 10 (1) (art. 10-1). As we said earlier, the right to freedom of the press would be drastically affected unless pressmen, with a reasonable degree of care and legal advice, can inform and warn themselves of the risks and pitfalls lying ahead due to the uncertainties of contempt of court.

Second part

Question no. 2

Was the injunction restraining The Sunday Times from publishing the draft article "necessary" in a democratic society for maintaining the authority and impartiality of the judiciary and/or for protecting the rights of others?

Independently of any answer to question no. 1, my answer to this question is also a negative one. I have, however, less to say on the second issue because I respectfully associate myself with the main reasons enunciated in the majority judgment of the Court.

As I have already stated, the right of the press to freedom of expression is indispensable in a democratic society; equally, it is of paramount importance to maintain the authority and the impartiality of the law courts and to safeguard the rights of the parties who have recourse to such courts. On this aspect I can usefully quote from the judgment of Lord Morris in the House of Lords (at page 302):

"In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: it is because the very structure of ordered life is at risk if the recognised courts of the land are so flouted that their authority wanes and is supplanted. But as the purpose and existence of courts of law is to preserve freedom

within the law for all well disposed members of the community, it is manifest that the courts must never impose any limitations upon free speech or free discussion or free criticism beyond those which are absolutely necessary" (my italics).

While I am in agreement with the above statements of Lord Morris, in applying the directions contained therein to the facts of the instant case I, as a Member of this Court, arrive, however, at a different conclusion.

The criteria of the European Court of Human Rights in weighing the necessity required for imposing restrictions on the rights to freedoms enumerated in Article 10 (art. 10) of the Convention might differ at times from those adopted by national courts.

Undoubtedly, the principle of margin of appreciation already embodied in the jurisprudence of this Court has to be borne in mind and applied in favour of the national judicial system. But the gap between the two systems and the standards adopted for the exercise of the rights to freedoms covered by the Convention might be too wide to be bridged by the aforesaid principle.

Whenever it considers it reasonable and feasible, this Court should work out a uniform international European standard for the enjoyment of the rights and freedoms included in the Convention. This could be done gradually when the occasion arises and after giving the appropriate full consideration to national legal systems.

The Preamble to the European Convention on Human Rights and Fundamental Freedoms contains references to this end. It states that the Governments signatory thereto:

"...

Considering that [the Universal Declaration of Human Rights] aims at securing the universal and effective recognition and observance of the Rights therein declared;

...

Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved as the Government of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the

collective enforcement of certain of the Rights stated in the Universal Declaration;

Have agreed as follows:"

- then follow the Articles of the Convention.

In the legal systems of those continental States which are the original signatories of the Convention, there is, as far as my information and

knowledge go, nothing similar to the branch of the common law of contempt of court - with its summary procedure - touching publications which refer to pending civil proceedings. Notwithstanding this fact these countries manage to maintain the authority and impartiality of their judiciary. Am I to accept any submission to the effect that conditions in England are different and that they have to keep alive unaltered the common law of contempt of court under discussion, which is over two centuries old, in order to safeguard the authority and impartiality of the judiciary? My knowledge and experience gained from long years of association with English judges and courts prompt me to say unreservedly that the standard of the judiciary in England is too high to be influenced by any publication in the press. I confess I may be considered as biased in making this statement. In the present case, we are in all probability only concerned with a professional judge. In this connection, I associate myself with the remarks made by Lord Salmon quoted above.

Undoubtedly, the supreme judicial authority in England is fully entitled to judge about the legal measures to be taken in order to secure the independence and the authority of the courts and rights of the parties and to keep the streams of justice clear and pure, but, in the light of the criteria and tests applied, I feel unable, as a judge of the European Court, to agree that the grant of an injunction to restrain publication of the draft Sunday Times article was necessary under Article 10 (2) (art. 10-2) of the Convention.

Publication of the proposed article was not intended or calculated to interfere with or prejudice the course of justice or the rights of the parties involved. The article was admittedly written for publication in good faith and with a proper motive. Factual accuracy of the facts stated therein was claimed by the publisher and this was not in effect disputed. The subject-matter of the article was the thalidomide drug victims. The magnitude of their plight was amply described as a national tragedy. The imputation of negligence to Distillers for not properly testing the drug before marketing it was made in the article and, in fact, the most objectionable part of the article seems to be this aspect. However, discussions and comments relating to the issue of negligence were directly or indirectly ventilated in the press for ten years and had recently been commented on in Parliament which did not treat the issues involved as sub judice. I do not therefore accept that Distillers would have been improperly brought under pressure to desist from their defence if the proceedings had come on for trial. If there had been a proper testing of the drug before marketing, they could easily have proved it and rebutted the allegation of negligence.

Whether the trial in the pending proceedings was imminent or not having regard to the long inactivity in the proceedings is a matter open to serious doubts.

Measures for the prevention of a slide towards trial by newspaper should no doubt be taken when necessity arises. But, in the absence of evidence of

an existing trend towards such a slide, I would not agree to be guided by abstract possibilities or to act for the sake of a principle when no sufficient grounds exist to make its application expedient. Furthermore, as is stated in the summary of Lord Denning's judgment in the Court of Appeal (paragraph 25 of the European Court's judgement): "Trial by newspaper' must not be allowed. However, the public interest in a matter of national concern had to be balanced against the interest of the parties in a fair trial or settlement; in the present case the public interest in discussion outweighed the potential prejudice to a party ... Even in September 1972, the proposed article would not have amounted to contempt: it was fair comment on a matter of public interest ...". If the intended publication of the article in question was likely to create a real and substantial risk of interference with or prejudice to the administration of justice my answer to question no. 2 would have been in the affirmative.

No doubt one has, when circumstances so require, to strike a balance between the freedom of the press and other mass media and maintaining the authority and impartiality of the judiciary. Both are fundamental organs in a democratic society and vital for the public interest. Any clash between them should be avoided. The primary duty to avoid such a clash and keep the balance lies with the judiciary and on the criteria to be indicated by law and enforced by the courts. This is why I lay emphasis on the tests applied for the enforcement of the branch of common law of contempt of court that concerns the press.

I may be repeating myself in saying that this Court should not hesitate to lay down when the occasion requires a set of principles to serve as guidelines and a common denominator in the observance of the freedoms and the permissible limitations on such freedoms within the terms and ambit of the Convention.

I cannot restrain myself from stating that the traditional standard of the newspaper publishers in England, in discharging their duties and responsibilities towards the public and the national authorities and in imparting accurate information to their readers, can safely be compared with that of their continental colleagues. Therefore, it is difficult to understand the expediency of imposing a greater degree of limitation on the liberty of the press in England by keeping an anachronistic branch of the law of contempt alive.

Again going out of my way, I venture to take the liberty and conclude my separate opinion with the following remarks:

The birthplace of the Magna Carta, the Bill of Rights and the basic principles of justice - embodied in the Anglo-Saxon judicial system and the substantial part of them already incorporated into the articles of the European Convention on Human Rights and Fundamental Freedoms - in my humble opinion can easily afford either to do away altogether with the branch of the common law of contempt of court under review or to amend

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this part of the law of contempt of court on the lines indicated in the
Phillimore Committee report.

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CONCURRING OPINION OF JUDGE O'DONOGHUE

I agree with the conclusions in the separate opinion of Judge Zekia and with his reasoning on questions 1 and 2.

CONCURRING OPINION OF JUDGE EVRIGENIS

(Translation)

Although I voted with the majority of the Court on all the items in the operative provisions of the judgment, I consider that the interference, as grounded in law by the decision of the House of Lords, could not be regarded as "prescribed by law" within the meaning of the Convention.

The restrictions on the right to freedom of expression which are provided for in paragraph 2 of Article 10 (art. 10-2) constitute exceptions to the exercise of that right. As such, they not only must be narrowly interpreted (Klass and others judgment of 6 September 1978, Series A no. 28, p. 21, para. 42, cited at paragraph 65 of the judgment in the present case) but also presuppose a definition in domestic law which is sufficiently clear and unambiguous, thus permitting anyone exercising his freedom of expression to act with reasonable certainty as to the consequences in law of his conduct.

It would be difficult to affirm that the action taken against the applicants fulfilled this condition. In the United Kingdom, the uncertainty of the law of contempt of court often gives rise to criticism in literature and judicial decisions, as well as in the reports of various commissions of enquiry or reform (see Report of the Committee on Contempt of Court, 1974, Cmnd. 5794, para. 216, sub-paragraphs (4) and (5)); this feature was highlighted by the application of that law by the House of Lords in the present case, through the "prejudgment principle" (see the direction issued by the House following its judgment). It is significant, firstly, that the majority of the Commission hesitated to give a direct ruling on the merits of this question (Commission's report, paragraph 205) and, secondly, that the references appearing in the Court's judgment in support of the view that the interference based on the decision of the House of Lords was "prescribed by law" are not very convincing. The Court's judgment cites, in particular, two precedents (see paragraphs 51 and 52). The first, *Vine Products Ltd. v. Green* (1966), which was based on the "pressure principle", was criticised several times by the Law Lords in the context of the present case. The second, *Hunt v. Clarke* (1889), does not appear to have motivated the decision of the House of Lords when defining the "prejudgment principle". Again, it is striking that the latter principle was not the legal basis for any of the decisions rendered in this case by the other English courts, including the decision of the Divisional Court which in 1976, three years after the judgment of the House of Lords, discharged the injunction. If, consequently, one has to conclude that the principle justifying the interference under domestic law appears new (see C.J. Miller, in *The Modern Law Review*, vol. 37 (1974), p. 98), its implementation by the highest national court

proves to be incompatible with the requirements of Article 10 (2) (art. 10-2) of the Convention.

Of course, no one can disregard the special features of a domestic legal system in whose formation case-law is traditionally called upon to play a prominent role; neither can anyone lose sight of the fact that the delimitation of the restrictions mentioned in Article 10 (2) (art. 10-2) of the Convention employs indeterminate concepts which do not always sit well with the existence of legal rules of conduct that are quite precise, certain and foreseeable in their identification by the judge. Nevertheless, there was an obligation on the Court to be more prudent before adopting a generous interpretation of the phrase "prescribed by law"; the consequence of such an interpretation would be to weaken the principle of the rule of law and to expose a fundamental freedom, which is vital to the democratic society envisaged by the drafters of the Convention, to the risk of interferences that cannot be reconciled with the letter and spirit of that instrument.

ANNEX A10



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF SILVER AND OTHERS v. THE UNITED KINGDOM

*(Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75;
7136/75)*

JUDGMENT

STRASBOURG

25 March 1983

In the case of Silver and others,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court*, as a Chamber composed of the following judges:

Mr. G. WIARDA, *President*,

Mr. Thór VILHJÁLMSÓN,

Mr. F. GÖLCÜKLÜ,

Mr. F. MATSCHER,

Mr. L.-E. PETTITI,

Sir Vincent EVANS,

Mr. C. RUSSO,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 23 and 24 September 1982 and 24 and 25 February 1983,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case of Silver and others was referred to the Court by the European Commission of Human Rights ("the Commission"). The case originated in seven applications (nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on various dates between 1972 and 1975 by Mr. Reuben Silver, Mr. Clifford Dixon Noe, Mrs. Judith Colne, Mr. James Henry Tuttle, Mr. Gary Cooper, Mr. Michael McMahon and Mr. Desmond Roy Carne under Article 25 (art. 25) of the Convention. The Commission ordered the joinder of the applications on 11 March 1977.

2. The Commission's request was lodged with the registry of the Court on 18 March 1981, within the period of three months laid down by Articles 32 § 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 § 1, 8 and 13 (art. 6-1, art. 8, art. 13).

* Note by the registry: In the version of the Rules applicable when proceedings were instituted. A revised version of the Rules of Court entered into force on 1 January 1983, but only in respect of cases referred to the Court after that date.

3. The Chamber of seven judges to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 § 3 (b) of the Rules of Court). On 25 April 1981, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mrs. D. Bindschedler-Robert, Mr. F. Matscher, Mr. L.-E. Pettiti, Mr. C. Russo and Mr. R. Bernhardt (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

Subsequently, Mr. F. Gölcüklü and Mr. Thór Vilhjálmsson, substitute judges, took the respective places of Mrs. Bindschedler-Robert, whom the President had exempted from sitting on the case, and Mr. Bernhardt, who was prevented from taking part in the further consideration of the case (Rules 22 § 1 and 24 §§ 1 and 4).

4. Mr. Wiarda, who had assumed the office of President of the Chamber (Rule 21 § 5), ascertained, through the Registrar, the views of the Agent of the Government of the United Kingdom ("the Government") and the Delegates of the Commission regarding the procedure to be followed. He decided on 4 May that the Agent should have until 4 September 1981 to file a memorial and that the Delegates should be entitled to file a memorial in reply within two months from the date of the transmission of the Government's memorial to them by the Registrar. The President agreed on 13 August to extend the first of these time-limits until 2 October 1981.

The Government's memorial was received at the registry on 2 October 1981. On 4 December, the Secretary to the Commission, who had informed the Registrar on 14 October that the Delegates did not themselves wish to reply in writing, transmitted to the Court observations on the memorial, which had been submitted to the Delegates by the applicants' lawyers.

5. The Court held a preparatory meeting on 27 January 1982 when it formulated certain proposals with a view to the limitation of the scope of the hearings to be held before it. On the same occasion, the Court drew up a list of questions and requests which were communicated by the Registrar on 10 February to the Government and the Commission; replies thereto were received from the Government on 14 June and, as regards one question, from the Commission on 6 August.

6. After consulting, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President directed, on 17 May, that the hearings should open on 22 September 1982 and, on 22 July that their scope should be limited in the manner set out in his Order of the last-mentioned date.

7. The hearings were held in public at the Human Rights Building, Strasbourg, on 22 September 1982.

There appeared before the Court:

- for the Government:

Mrs. A. GLOVER, Legal Adviser,

Foreign and Commonwealth Office,	<i>Agent,</i>
Mr. S. BROWN,	
Mr. N. BRATZA, Barristers-at-Law,	<i>Counsel,</i>
Mrs. S. EVANS,	
Mr. C. OSBORNE,	
Miss V. DEWS, Home Office,	
Mr. R. PHILLIPS, Treasury Solicitor's Office,	<i>Advisers;</i>
- for the Commission:	
Mr. J. FAWCETT,	
Mr. F. ERMACORA,	<i>Delegates,</i>
Mr. A. LESTER, Q.C.,	
Mr. M. BELOFF, Q.C.,	
Mr. B. RAYMOND,	
Mr. S. GROSZ, Solicitors,	
assisting the Delegates (Rule 29 § 1, second sentence, of the Rules of Court).	

The Court heard addresses by Mr. Brown for the Government and by Mr. Fawcett, Mr. Ermacora and Mr. Lester for the Commission, and also replies to questions put by two of its members.

8. On 22 September, the Commission filed a number of documents, including a memorial which they had received from the applicants regarding the application of Article 50 (art. 50) of the Convention in the event that the Court should find a violation to have occurred.

On the same date, the President directed that the Government should have until 22 November to reply in writing to the said memorial, a time-limit which he subsequently extended at the Government's request to 14 January 1983. The reply was received at the registry on the last-mentioned date.

On 25 January 1983, the President directed that the Delegates of the Commission should have until 14 March 1983 to file any observations which they or the applicants might wish to make on the aforesaid reply.

AS TO THE FACTS

9. The principal complaint of all seven applicants was that the control of their mail by the prison authorities constituted a breach of their right to respect for correspondence and of their freedom of expression, guaranteed by Articles 8 and 10 (art. 8, art. 10) of the Convention, respectively. They also alleged that, contrary to Article 13 (art. 13), no effective domestic remedy existed for the aforesaid breaches. In addition, Mr. Silver claimed that he had been denied access to the courts, in violation of Article 6 § 1

(art. 6-1), on account of the refusal of two petitions for permission to seek legal advice.

I. FACTS PARTICULAR TO THE INDIVIDUAL APPLICANTS

A. Mr. Silver

10. The first applicant, Mr. Reuben Silver, was born in 1915 and was a United Kingdom citizen. When he lodged his application with the Commission (20 November 1972), he was detained in prison in England. He was released from prison in February 1974 and died in March 1979.

11. In the period from January 1972 to March 1973, 7 of Mr. Silver's letters were stopped by the prison authorities for the reasons indicated in paragraphs 59, 62, 63, 66, 68 and 69 below.

This applicant did not complain through the internal prison channels (see paragraphs 51-53 below) of the stopping of his correspondence; he claimed that the prison governor prevented him from raising each incident by way of petition to the Home Secretary because he, Mr. Silver, already had petitions outstanding at the material times.

12. On 20 November 1972, Mr. Silver petitioned the Home Secretary for permission to seek legal advice concerning allegedly negligent treatment in prison and also complained, inter alia, about his medical and dental treatment. Permission was refused on 18 April 1973. On 30 July 1973, he submitted another petition in which he referred to his earlier petition and requested leave to seek legal advice about his dental treatment. The second petition was apparently granted on 1 October 1973, but Mr. Silver claimed that he was never so informed. At the time of both petitions, prisoners could not seek legal advice about prospective civil proceedings without the Home Secretary's leave (see paragraph 32 below).

B. Mr. Noe

13. The second applicant, Mr. Clifford Dixon Noe, is a citizen of the United States of America, born in 1930. When he lodged his application with the Commission (1 February 1973), he was serving a sentence of imprisonment in England after being convicted of fraud. He was released from prison on 31 January 1977 and subsequently deported from the United Kingdom.

14. In the period from May 1972 to April 1975 and for the reasons indicated in paragraphs 60, 61, 67 and 71 below, 4 of Mr. Noe's letters were stopped by the prison authorities and the posting of a further letter was delayed for three weeks.

This applicant apparently complained through the internal prison channels of this action, other than the stopping of his letter no. 9, but without success.

C. Mrs. Colne

15. The third applicant, Mrs. Judith Colne, is an Australian citizen, born in 1927. She is a schoolteacher and resides in London.

16. Around May 1974, Mrs. Colne began correspondence with a Mr. Michael Williams, the brother of an imprisoned friend of hers. Mr. Williams was then detained in H.M. Prison Albany and was a "category A" prisoner, this being the security category reserved for persons who, if they escaped, would be highly dangerous to the public or the police or to the security of the State. Following his transfer in July 1974 to H.M. Prison Hull, their correspondence was noticed and stopped for the reason indicated in paragraph 59 below. It resumed, unnoticed, following his further transfer to H.M. Prison Wakefield in August 1974 but was discovered during the following month; thereafter, and for the same reason, all correspondence between them was prevented.

This applicant raised the matter, both directly and through a Member of Parliament, with the Home Secretary, but without success.

D. Mr. Tuttle

17. The fourth applicant, Mr. James Henry Tuttle, is a United Kingdom citizen, born in 1914. When he lodged his application with the Commission (20 March 1975), he was detained in prison in England. He was released on licence on 5 January 1981.

18. In March 1975, 2 of Mr. Tuttle's letters were stopped by the prison authorities for the reasons indicated in paragraphs 62, 64 and 68 below.

This applicant apparently complained, in a petition to the Home Secretary, of the stopping of his correspondence, but without success.

E. Mr. Cooper

19. The fifth applicant, Mr. Gary Cooper, is a United Kingdom citizen, born in 1946. When he lodged his application with the Commission (28 October 1974), he was serving a sentence of imprisonment in England. He was released on 14 December 1981, but was later imprisoned again.

20. In the period from April 1974 to March 1976, 14 of Mr. Cooper's letters were stopped by the prison authorities for the reasons or in the circumstances indicated in paragraphs 60, 65, 67 and 71 below.

This applicant apparently complained unsuccessfully through the internal prison channels of the stopping of 6 of the 14 letters, namely nos. 20, 22, 23, 24, 26 and 27.

F. Mr. McMahon

21. The sixth applicant, Mr. Michael McMahon, is a United Kingdom citizen, born in 1944. When he lodged his application with the Commission (8 July 1975), he was serving a sentence of imprisonment in England, as a "category A" prisoner, after being convicted of murder. He was released on 18 July 1980.

22. In the period from March 1975 to February 1976, 11 of Mr. McMahon's outgoing letters were stopped by the prison authorities and one letter to him was withheld.

This applicant submitted three petitions to the Home Secretary, of which one was successful: it was admitted that a letter to the Archbishop of Canterbury (no. 33) should not have been stopped as the addressee was a Member of Parliament; the letter was accordingly sent and Mr. McMahon withdrew his complaint in this respect. The reasons for the stopping or withholding of the remaining 11 letters are indicated in paragraphs 59, 61, 66 and 70 below.

G. Mr. Carne

23. The seventh applicant, Mr. Desmond Roy Carne, is a United Kingdom citizen, born in 1945. When he lodged his application with the Commission (5 April 1975), he was serving a sentence of imprisonment in England after being convicted of theft. He was released on 30 August 1977.

24. In the period from November 1974 to May 1976, 22 of Mr. Carne's letters were stopped by the prison authorities for the reasons indicated in paragraphs 59, 60, 64, 66, 67 and 68 below.

This applicant apparently complained, either through the internal prison channels or by having the matter raised with the Parliamentary Commissioner for Administration, of the stopping of each of these letters, but to no avail.

II. DOMESTIC LAW AND PRACTICE

25. The control over and responsibility for prisons and prisoners in England and Wales is vested by the Prison Act 1952 in the Home Secretary. He is empowered by section 47(1) of that Act to make rules "for the regulation and management of prisons ... and for the classification, treatment, employment, discipline and control of persons required to be detained therein". Such rules are contained in statutory instruments laid

before Parliament and made in accordance with the negative resolution procedure, that is, they come into operation unless Parliament otherwise resolves.

The rules made by the Home Secretary currently in force, a number of which relate to prisoners' correspondence, are the Prison Rules 1964, as amended ("the Rules").

26. With a view to securing uniformity of practice throughout prison establishments, the Home Secretary also issues to prison governors management guides or directives in the form of Standing Orders ("Orders") and Circular Instructions ("Instructions"). Unless otherwise authorised, governors are required to comply with these directives, but they do not have, or purport to have, the force of law.

At the time of the events giving rise to this case and until 30 November 1981, both Orders and Instructions contained, in addition to directives on the control of prisoners' correspondence, internal rules and guidance of a general nature concerning the day to day administration of the prison. The Orders and Instructions were made available to Members of both Houses of Parliament for reference but not to the public or prisoners, although the latter received, by means of cell cards, information about certain aspects of the control of correspondence.

With effect from 1 December 1981, the directives on prisoners' correspondence were substantially revised. In addition, revised Orders relating to correspondence have been published in their entirety, matters of a management or administrative nature which do not concern a prisoner's entitlement to correspond and were considered inappropriate for publication having been eliminated from the Orders and embodied in Instructions. The Rules themselves have not been amended, although the Government indicated at the hearing before the Court that as soon as practicable Rule 34(8) (see paragraph 29 below) would be repealed in so far as it affected correspondence.

27. As far as prisoners' correspondence is concerned, the Home Secretary's directives to governors were and are intended to serve a dual function: on the one hand, to circumscribe the discretion conferred on governors by the Rules, and, on the other, to state the manner in which the Home Secretary has decided in certain respects to exercise his own discretionary powers thereunder. The principal provisions which the Rules contain on the subject are set out below, accompanied by a summary of:

(a) the relevant Orders and Instructions in force until 30 November 1981; and

(b) the changes that took effect after that date.

A. General provisions

28. The following Rules, containing general provisions on the control of correspondence, came into operation on 25 March 1964 and are still in force:

"33(1) The Secretary of State may, with a view to securing discipline and good order or the prevention of crime or in the interests of any persons, impose restrictions, either generally or in a particular case, upon the communications to be permitted between a prisoner and other persons.

...

(3) Except as provided by these Rules, every letter or communication to or from a prisoner shall" (or, with effect from 1 June 1974, "may") "be read or examined by the governor or an officer deputed by him, and the governor may, at his discretion, stop any letter or communication on the ground that its contents are objectionable or that it is of inordinate length."

B. Provisions concerning the identity of correspondents

29. The following basic Rules, both concerning the identity of persons with whom a prisoner may correspond, came into effect on 25 March 1964 and are still in force:

"33(2) Except as provided by statute or these Rules, a prisoner shall not be permitted to communicate with any outside person, or that person with him, without the leave of the Secretary of State.

34(8) A prisoner shall not be entitled under Rule 34" - which regulates the quantity of correspondence - "to communicate with any person in connection with any legal or other business, or with any person other than a relative or friend, except with the leave of the Secretary of State."

1. Position prior to 1 December 1981

30. Under Rule 34(8), as supplemented by Orders 5A 22, 5A 23 and 5A 30, prisoners had to seek the Home Secretary's leave to correspond with any person other than a close relation; they were, however, also normally allowed, without the necessity to seek such leave, to correspond with other relatives or existing friends, but the governor had discretion to forbid such correspondence on grounds of security or good order and discipline or in the interests of the prevention or discouragement of crime. Governors had a discretion - which they would have been unlikely to exercise in favour of a "category A" prisoner, such as Mr. Williams or Mr. McMahon - to allow communications with other persons not personally known to the prisoner before he came into custody, but generally he could not write to other

prisoners, ex-prisoners, marriage bureaux, "Monomark addresses" or specified categories of pen friends.

In addition, standing leave had been granted for correspondence falling into certain special categories, as explained in paragraphs 31-36 below.

(a) Correspondence with legal advisers

31. With effect from 1 January 1973, uncensored correspondence relating to civil or criminal proceedings to which the prisoner was already a party was permitted under Rule 37A(1), which is still in force and reads:

"A prisoner who is a party to any legal proceedings may correspond with his legal adviser in connection with the proceedings and unless the Governor has reason to suppose that any such correspondence contains matter not relating to the proceedings it shall not be read or stopped under Rule 33(3) of these Rules."

32. Until 6 August 1975, inmates had to petition the Home Secretary for permission to seek advice about, or give instructions for, the institution of civil proceedings (with the exception of certain divorce cases). On that date, Instruction 45/1975 introduced changes which were subsequently reflected in Rule 37A(4) and directions made by the Secretary of State thereunder, in the shape of Order 17A. Rule 37A(4), which came into operation on 26 April 1976 and is still in force, reads:

"Subject to any directions of the Secretary of State, a prisoner may correspond with a solicitor for the purpose of obtaining legal advice concerning any cause of action in relation to which the prisoner may become a party to civil proceedings or for the purpose of instructing the solicitor to issue such proceedings."

Order 17A provided, inter alia, that:

(i) the inmate had to have sought a solicitor's advice before he would be permitted to institute proceedings;

(ii) at each stage a written application, with reasons, had first to be made to the prison governor for the necessary facilities; they had to grant immediately, except that, in the case of prospective civil proceedings against the Home Office "arising out of or in connexion with" the imprisonment, the "prior ventilation rule" (see paragraph 47 below) generally applied.

Correspondence in this category was otherwise subject to the restrictions on contents mentioned at paragraphs 41-47 below.

(b) Correspondence with Members of Parliament

33. Prisoners were free to communicate with their Members of Parliament, subject to the restrictions on contents mentioned at paragraphs 41-47 below.

(c) Correspondence with Consular and Commonwealth officials

34. Prisoners who were foreign nationals or citizens of the Irish Republic or a Commonwealth country were free to communicate with the accredited representatives of their countries in the United Kingdom, subject to the restrictions on contents mentioned at paragraphs 41-47 below.

(d) Correspondence with certain organisations

35. Under Order 5A 31(2) b., a prisoner could, without first seeking leave from the Home Secretary or the prison governor, write to the National Council for Civil Liberties, "Justice", "Release" or the Howard League for Penal Reform to seek legal advice about his conviction and sentence, or about general matters. He could, in addition, write to these organisations to ask for legal proceedings to be instituted and, although originally he could not seek legal advice from them about any matter relating to his prison treatment, this was subsequently allowed by Instruction 38/1977, subject however to the "prior ventilation rule" (see paragraph 47 below). In the two latter cases, however, the prisoner had first to follow the procedures introduced by Instruction 45/1975 and then enshrined in Order 17A (application to the governor for facilities; see paragraph 32 above).

Correspondence in this category was otherwise subject to the restrictions on contents mentioned at paragraphs 41-47 below.

(e) Applications to the European Commission of Human Rights

36. Special provisions applied to applications to the Commission; in particular, the Home Secretary's leave was required neither for their submission nor for correspondence with legal advisers relative thereto, and the "prior ventilation rule" did not apply.

2. Position with effect from 1 December 1981

37. Most of the restrictions which the earlier Orders and Instructions contained on the identity of correspondents have now been abolished. Although the relevant Rules have not themselves been amended, the revised Orders (nos. 5B23-5B30) state that, provided the provisions concerning the contents of correspondence (see paragraph 48 below) are observed, a prisoner may communicate with any person or organisation, subject to certain exceptions of which the principal are:

(a) recipients of correspondence (other than spouses) who have requested that no further letters be sent;

(b) other prisoners, who are not relatives, where there is reason to believe that correspondence would seriously impede rehabilitation or where the prevention of communication is desirable in the interests of security or good order or discipline;

(c) ex-prisoners, where there is reason to believe that correspondence would seriously impede rehabilitation;

(d) a person (other than a close relative) or organisation believed to be planning or engaged in activities that seriously threaten the security or good order of a prison establishment.

C. Provisions concerning the quantity of correspondence

38. The following basic Rules concerning the amount of correspondence which a prisoner may conduct came into operation on 25 March 1964 and are still in force:

"34(1) An unconvicted prisoner may send and receive as many letters ... as he wishes within such limits and subject to such conditions as the Secretary of State may direct, either generally or in a particular case.

(2) A convicted prisoner shall be entitled

(a) to send and to receive a letter on his reception into a prison and thereafter once a week;

...

(3) The governor may allow a prisoner an additional letter ... where necessary for his welfare or that of his family.

(4) The governor may allow a prisoner entitled to a visit to send and to receive a letter instead.

...

(6) The visiting committee or board of visitors" (or, with effect from 1 January 1972, "The board of visitors") "may allow a prisoner an additional letter ... in special circumstances ...

(7) The Secretary of State may allow additional letters ... in relation to any prisoner or class of prisoners."

1. Position prior to 1 December 1981

39. In addition to his entitlement under Rule 34(2) to send - at public expense - and to receive one letter per week, a convicted prisoner was allowed to send at his own expense at least one extra letter per week, and to receive a reply (Order 5A 3(8) and Instruction 155/1968).

The prison authorities' discretion under Rules 34(3), (6) and (7) to allow further letters was exercised where possible.

These quantitative restrictions did not apply to remand prisoners (Rule 34(1)), but they were in most other respects subject to the same regulations on correspondence as convicted prisoners.

2. Position with effect from 1 December 1981

40. The revised Orders (nos. 5B7 and 5B14) do not alter the basic entitlement but specify that additional extra letters should be allowed as far as practicable.

D. Provisions concerning the contents of correspondence

41. In addition to Rule 33(3), the text whereof appears at paragraph 28 above, the following basic Rule concerning the contents of prisoners' correspondence came into operation on 25 March 1964 and is still in force:

"34(8) A prisoner shall not be entitled under Rule 34" - which regulates the quantity of correspondence - "to communicate with any person in connection with any legal or other business ... except with the leave of the Secretary of State."

1. Position prior to 1 December 1981

42. Rules 33(3) and 34(8) were supplemented as follows by various Orders and Instructions.

43. Under Order 5A 31, a convicted prisoner was specifically prohibited from making representations on matters connected with his trial, conviction or sentence to any judge, public authority, representative of any Commonwealth or foreign government (subject to certain exceptions for prisoners who were foreign nationals or citizens of another Commonwealth country) or unofficial organisation (subject again to certain specific exceptions). Such representations could, however, be made to the Home Secretary.

44. Under Order 5A 24, prisoners were not allowed to send letters requesting anyone to make on their behalf a communication which they would not be permitted to make directly, or certain other letters which would circumvent the regulations.

45. (a) Orders 5A 26(4) a. and b. and 5A 29 prohibited the inclusion in outgoing letters (other than those to Members of Parliament or Consular or Commonwealth officials, to which special rules applied) of any of the following matters:

- (i) objectionable references to persons in public life;
- (ii) discussion of crime and criminal methods or of the offences of others;
- (iii) any complaint about the courts, the police and the prison authorities that was a deliberate and calculated attempt to hold them up to contempt;
- (iv) threats of or incitement to violence;
- (v) material intended for publication or for use on wireless or television (this rule was relaxed as regards certain specialised publications);
- (vi) grossly improper language;

(vii) statements about private individuals which were patently scandalous or libellous or otherwise deliberately calculated to do them harm;

(viii) begging requests for money or valuable property;

(ix) complaints about prison treatment;

(x) allegations against prison officers;

(xi) attempts to stimulate public agitation or petition.

Similar regulations applied to incoming letters (Order 5A 26(4) d.).

As recorded in paragraphs 32 and 35 above, the prohibition on the inclusion of complaints about prison treatment or allegations against prison officers did not apply to certain correspondence with legal advisers (after 6 August 1975) and with specified organisations (after 26 August 1977), provided always that the "prior ventilation rule" (see paragraph 47 below) had been satisfied.

(b) Until 28 November 1975, a broadly similar list of prohibited contents applied to letters to Members of Parliament, except that they could contain complaints about prison treatment or against prison staff in respect of which the "prior ventilation rule" had been observed. Thereafter, a letter to a Member of Parliament would have been stopped only if it included an unventilated complaint of that kind (Order 5C, as amended by Instruction 62/1975). At the time of the change of practice, a notice summarising the regulations concerning letters to Members of Parliament was issued for the information of prisoners. It contained the following passage:

"A complaint or request about prison treatment should be made to the Governor, Board of Visitors or visiting officer, or by petition to the Home Secretary A complaint against a member of staff should be made to the Governor. A complaint on these matters may not be made to a Member of Parliament before official action is complete."

(c) Letters from convicted prisoners who were foreign nationals or citizens of the Irish Republic or a Commonwealth country to Consular or Commonwealth officials were subject to the same rules as to contents as letters to Members of Parliament until 3 September 1975. On that date this restriction was abolished (Order 5A 20, as amended by the Instruction of 3 September 1975).

46. With the exception of certain correspondence in connection with legal business for which standing leave had been granted as explained in paragraphs 31, 32 and 35 above, Rule 34(8) prohibited any communications on any legal or other business without the prior leave of the Home Secretary. The conduct of business by prisoners was further dealt with by Orders 1C 4-6, the basic provision being that "an inmate" - whether convicted or not - "may not conduct any business activity in prison, but should be allowed reasonable facilities for arranging its conduct on his behalf". However, subject to this general rule, governors had discretion to allow an inmate to deal with certain limited personal business matters, in

particular to dispose of private property, to sign a cheque or to make or sign a will or other document. The broad effect of the regulations was that, although a prisoner could not participate personally on a continuing basis in a business concern, he was allowed to make arrangements to protect the value, for his own and his family's benefit, of his personal property and any business interests.

47. A complaint about prison treatment or an allegation against a prison officer could be contained or referred to only in correspondence with legal advisers, specified organisations, Members of Parliament or Consular or Commonwealth officials, as indicated in paragraph 45 above. Moreover, under the "prior ventilation rule" - set out, in particular, in Order 17A - a letter in any of these categories which alluded to such a matter would, with certain exceptions, be stopped unless and until the prisoner had ventilated his complaint through the normal internal channels (petition to the Home Secretary, or application to the Board of Visitors, a visiting officer of the Home Secretary or the prison governor) and been given a definitive reply. Thereafter, and in general irrespective of the outcome, the correspondence could proceed.

2. Position with effect from 1 December 1981

48. Rules 33(3) and 34(8) are now supplemented by the new Orders 5B34 and 5B40. The current position is as follows.

(a) The prohibition on representations about trial, conviction or sentence (see paragraph 43 above) is abolished.

(b) Provisions similar to the earlier Order 5A 24 (designed to prevent the evasion or circumvention of the regulations - see paragraph 44 above) remain in force.

(c) The list of prohibited contents (see paragraph 45 (a) above) has been revised; the main items which may now not be included in incoming or outgoing letters may be summarised as follows:

- (i) material which would jeopardise prison security;
- (ii) material which would assist or encourage the commission of a disciplinary or criminal offence;
- (iii) material which could jeopardise national security;
- (iv) descriptions of the making of certain destructive devices;
- (v) certain obscure or coded messages;
- (vi) threats of violence or damage to property likely to induce fear in the recipient;
- (vii) blackmail or extortion;
- (viii) certain indecent or obscene material;
- (ix) information which would create a clear threat or present danger of violence or physical harm to any person;

(x) complaints about prison treatment, in respect of which the "simultaneous ventilation rule" (see paragraph 49 below) has not been observed;

(xi) material initiating a private prosecution;

(xii) certain specified material intended for publication or for use by radio or television;

(xiii) in the case of a convicted prisoner, material constituting the conduct of a business activity, which expression is defined so as to exclude certain specified personal transactions.

The foregoing list does not apply to correspondence with Consular and Commonwealth officials or, with the exception of item (x), to correspondence with Members of the United Kingdom Parliament (new Orders 5D5 and 5E6).

As regards item (xiii) above, it remains the basic rule that inmates may not conduct any business activity from prison, but this no longer applies to unconvicted prisoners who may correspond without restriction about such matters (revised Orders 1C 4 and 1C 5).

49. The "prior ventilation rule" (see paragraph 47 above) has now been replaced by the "simultaneous ventilation rule", set out in Order 5B34 j. A complaint about prison treatment may be referred to in correspondence as soon as it has been raised through the prescribed procedures and without the prisoner's having to await the outcome of the internal enquiry. The rule does not apply to complaints not requiring investigation or to general complaints in respect of which no corrective or remedial action is possible (for example, regarding overcrowding): these may be mentioned in correspondence without any internal ventilation. Moreover, the effect of the new Orders is that, in contrast to the earlier position, a duly ventilated complaint may now be referred to in any letter, irrespective of the identity of the correspondent.

E. Censorship practice (before and after 1 December 1981)

50. Except as otherwise provided by the Rules (for example, Rule 37A(1); see paragraph 31 above) and until 1 June 1974, all communications to or from a prisoner had, according to Rule 33(3), to be read and examined, although Order 5A 26 gave prison governors a discretion to subject specified domestic correspondence to no more than a cursory examination. With effect from that date, Rule 33(3) was amended to make reading and examination optional, but governors remained and remain subject to the Home Secretary's directives in this respect. Thus, at the present time, outgoing domestic correspondence is normally not to be read or examined at open establishments; elsewhere, all correspondence is to be examined but not necessarily read (new Order 5B32).

A prisoner whose letter is stopped on account of its contents will be given the opportunity of rewriting it. Where the cause of the stoppage is the addressee's identity, the prisoner may use his entitlement to that letter to write to another person.

F. Complaints concerning censorship (before and after 1 December 1981)

1. Internal channels of complaint

51. An inmate who is aggrieved by a decision to stop or censor his correspondence may complain to the prison governor, the Board of Visitors or a visiting officer of the Home Secretary or he may petition the Home Secretary himself. A prisoner may ventilate his complaint through any or all of these channels and, if more than one is utilised, in such sequence as he wishes.

(a) The Board of Visitors

52. As far as the Board of Visitors is concerned, it may examine the compatibility of the decision complained of with the Rules and the Home Secretary's directives. It will draw the governor's attention to any irregularity, or report to the Home Secretary; although its powers are advisory in character, its advice will be implemented save in exceptional circumstances.

(b) Petitions to the Home Secretary

53. Inmates have the right to submit petitions to the Home Secretary about any matter, for example to seek a permission which the local prison management is not empowered to grant or has refused, or to complain of prison treatment.

On a petition being made by a prisoner, complaining of a decision of the prison authorities to stop or censor his correspondence, the Home Secretary would, if he concluded that the relevant Orders had not been properly interpreted or applied by the prison authorities, issue directions to them to secure compliance. Although it is possible for him to depart from the Orders in particular cases, this is likely to occur only rarely, if at all, since their very purpose is to ensure uniformity of practice and to avoid arbitrary interference with correspondence.

Prior to 1 December 1981, directives concerning the submission of petitions were contained in Orders 5B 1-16. It was, in particular, provided that, with certain exceptions, a prisoner could not petition if and so long as he was awaiting a reply to an earlier petition (Order 5B 12(2)).

With effect from 1 December 1981, the provisions of Order 5B 12(2) have been relaxed by new Orders 5C9 and 5C10. A further petition may now be submitted if a month has elapsed since the submission of the previous petition. Moreover, even though an earlier petition be outstanding, a prisoner may petition forthwith on certain specified matters, including interference with his correspondence.

2. The Parliamentary Commissioner for Administration

54. Complaints concerning the control of correspondence may also be raised with the Parliamentary Commissioner for Administration (the Ombudsman). Under section 5 of the Parliamentary Commissioner Act 1967, this officer, who is appointed by the Crown, may, if so requested by a member of the House of Commons, investigate any action taken in the exercise of administrative functions by specified authorities (including the Home Office) where a complaint has been made by a member of the public who claims to have sustained injustice in consequence of "maladministration". Such an investigation may generally not be conducted where court proceedings are available. Section 12 of the Act expressly provides that the Ombudsman may not question the merits of a discretionary decision taken without maladministration; accordingly, his jurisdiction does not extend to interferences with a prisoner's correspondence effected pursuant to a correct exercise of a discretion conferred by the Rules or the Home Secretary's directives. Moreover, he cannot grant direct relief for maladministration since he is limited to reporting the results of his investigation to the Member of Parliament who requested it, the authority concerned and, in certain circumstances, each House of Parliament (section 10).

Until 23 August 1979, prisoners could communicate with the Ombudsman only through a Member of Parliament who was willing to assist. Although this remains the normal method of approach, they may now write directly; however, their letters to the Ombudsman are subject to the same restriction with regard to the simultaneous ventilation of complaints about prison treatment as correspondence with Members of Parliament (see paragraphs 48 and 49 above) and he still cannot proceed with an investigation unless the prisoner's constituency Member so requests.

3. Application to the domestic courts

55. The exercise by the prison authorities of their powers under the Rules to control correspondence is subject to the supervisory control of the English courts by way of proceedings for judicial review. In the exercise of this jurisdiction the courts will intervene to secure compliance by the prison authorities with the Rules in so far as they confer on prisoners an entitlement to send or receive correspondence (for example, Rule 37(A)1;

see paragraph 31 above), and to ensure that the discretion to restrict correspondence, conferred on the authorities by the Rules, is not exercised arbitrarily, in bad faith, for an improper motive or in an ultra vires manner.

The Court notes in this context that in *Raymond v. Honey* 1982 1 All England Law Reports 759, Lord Wilberforce pointed out that it was a principle of English law that "a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication".

4. Malicious or groundless complaints

56. Sanctions may be imposed on prisoners who commit disciplinary offences. Under Rule 47, the latter include making "any false and malicious allegation against an officer" and repeatedly making "groundless complaints", be it in a petition, correspondence or otherwise. An inmate who makes an allegation against a member of the prison staff is to be warned accordingly (Instruction 88/1961, now replaced by unpublished Instruction 14/1980).

III. THE APPLICATION IN THE PRESENT CASE OF DOMESTIC LAW AND PRACTICE ON THE CONTROL OF CORRESPONDENCE

57. The present case arises from the stopping of 62 letters written by the applicants, that is to say 7 by Mr. Silver, 4 by Mr. Noe, 3 by Mrs. Colne, 2 by Mr. Tuttle, 14 by Mr. Cooper, 10 by Mr. McMahon and 22 by Mr. Carne; in the case of Mrs. Colne, the 3 letters are examples of the correspondence which she was prevented from continuing with Mr. Williams. In addition, Mr. Noe complained of delay in posting one of his outgoing letters and Mr. McMahon of the withholding of one of his incoming letters.

The Government informed the Court that the total number of letters sent and received by prisoners in England and Wales in a year was of the order of ten million. An indication of the total volume of the correspondence of the applicants in this case who were in prison is given by the fact that, in the under-mentioned periods (being periods for which records are most readily available), the number of letters written by them and posted by the prison authorities in the form in which they were written was: Mr. Silver - 419 (20 March 1968 to 2 August 1973); Mr. Noe - 149 (14 November 1972 to 15 April 1975, during which time he was at liberty for almost two years); Mr. Tuttle - 94 (2 January to 29 December 1975); Mr. Cooper - 299 (8 August 1974 to 24 June 1976); Mr. McMahon - 492 (5 December 1974 to 9 February 1977); Mr. Carne - 480 (14 October 1974 to 16 June 1976).

58. The provisions under which, pursuant to the law and practice applicable before 1 December 1981, the 64 letters in question were stopped

or delayed are indicated below. In those cases where a letter was stopped for more than one reason, the subsidiary ground or grounds are also stated.

The texts of 59 of these letters are set out in Appendix III to the Commission's report, copies of the remaining 5 not being available. The available letters are those hereinafter referred to by number, the others those referred to solely by date.

A. Provisions concerning the identity of correspondents

Restriction on correspondence other than with a relative or friend (see paragraphs 29-30 above)

59. The following letters were stopped on the ground that they were not sent by or addressed to a relative or existing friend:

(a) Mrs. Colne's letters nos. 13, 14 and 15 to Mr. Williams (see also paragraph 16 above);

(b) Mr. McMahon's letters nos. 35, 36, 37, 38, 39, 40 and 41 (addressed respectively to a broadcasting association, a barrister, the presenter of a television programme, a journalist, the police officer who had been in charge of the investigation of Mr. McMahon's case, a professor of law and the Mayor of Islington) and a letter of 31 December 1975 from the same journalist to Mr. McMahon. The applicant had previously exchanged three letters with the barrister in question, who was not known to him, but their correspondence was prohibited when it appeared that it would go further than a general enquiry. Although letter no. 41 was stopped, Mr. McMahon was apparently allowed to write to a local borough councillor.

This restriction was also a subsidiary ground for stopping Mr. Silver's letter no. 4 and Mr. Carne's letter no. 48 (see paragraph 68 below).

B. Provisions concerning the contents of correspondence

1. Restriction on communications in connection with any legal or other business (see paragraphs 32, 35, 41 and 46 above)

60. (a) Mr. Carne's letter no. 57 to a solicitor and his letter of 15 September 1975 to the National Council for Civil Liberties were stopped as he had not previously applied to the prison governor for facilities to seek legal advice. Both of these letters were written after the entry into force of Instruction 45/1975 (see paragraph 32 above).

(b) Mr. Cooper's letter no. 27 to a solicitor concerning a pending prosecution, which letter also post-dated Instruction 45/1975, was stopped as it was considered that he had already had sufficient facilities to seek legal advice.

(c) The following letters were stopped on the ground of failure to seek the Home Secretary's prior leave:

(i) Mr. Noe's letter no. 10 to a solicitor, which included the following passage: "... the property is going to be lost if you don't come quickly - It is worth 100 to £125,000 - the equity - after refinancing and allowing good solicitor's fees - will be £50 to £75,000 - of which you will have a piece also";

(ii) Mr. Carne's letter no. 49 to the Devon Crown Court, which contained a request that medical reports produced at his trial be sent to his Member of Parliament.

2. Prohibition on representations connected with the prisoner's trial, conviction or sentence (see paragraph 43 above)

61. This prohibition led to the stopping of Mr. Noe's letter no. 8, which was addressed to the Lord Chancellor but actually concerned legal representation at the applicant's appeal. Permission to send the letter was later granted by the Home Office, apparently after the appeal had been heard.

It was also a subsidiary ground for the stopping of Mr. McMahon's letters nos. 35 and 37 (see paragraph 59 above).

3. Prohibition on letters evading or circumventing the regulations (see paragraph 44 above)

62. Mr. Silver's letter no. 1 and Mr. Tuttle's letter no. 18 (see paragraph 68 below), which pre-dated Instruction 45/1975 and Instruction 38/1977 respectively (see paragraphs 32 and 35 above), were also stopped on the subsidiary ground that they therein asked their wives to do what they were not allowed to do themselves: in the first case, to contact a solicitor concerning an injunction against the Home Office in respect of prison treatment and, in the second, to seek legal advice from the National Council for Civil Liberties concerning control of correspondence.

4. Prohibition on discussion of the offences of others (see paragraph 45 (a), item (ii), above)

63. Mr. Silver's letter no. 7, to his wife, was stopped as it contained the following passage: "... one of my close neighbours in the prison is one of the train robbers ... Another one who arrived here last Wednesday is one of the two Asian brothers who reputedly killed McKay ..."

5. Prohibition on complaints calculated to hold the authorities up to contempt (see paragraph 45 (a), item (iii), above)

64. Mr. Tuttle's letter no. 17, addressed to his wife, was stopped on the ground that it contained material deliberately calculated to hold the prison authorities up to contempt.

This was also a subsidiary ground for stopping Mr. Carne's letter no. 51 (see paragraph 68 below).

*6. Prohibition on threats of violence and grossly improper language
(see paragraph 45 (a), items (iv) and (vi), above)*

65. Mr. Cooper's letters nos. 28, 29, 30 and 31, all addressed to his parents were stopped on two grounds: that they contained threats of violence and that they employed grossly improper language.

*7. Prohibition on material intended for publication (see paragraph 45
(a), item (v), above)*

66. The following letters were stopped on the ground that they contained material intended for publication:

(a) Mr. Silver's letter no. 5, addressed to the Advisory Rabbi, The Jewish Chronicle, and seeking dietary advice. The letter was stopped although it was marked "Not for publication" and contained an express request that, because of the rules of the prison, no part of it be published;

(b) Mr. McMahon's letters nos. 32, 34 and 42, the first two being addressed to the producer of a television programme and the third to a newspaper.

This was also a subsidiary ground for stopping Mr. McMahon's letter no. 37 (see paragraph 59 above) and Mr. Carne's letters nos. 60 and 61 (see paragraph 68 below).

*8. Prohibition on the inclusion in letters to legal advisers and Members
of Parliament of unventilated complaints about prison treatment
(see paragraphs 45 (a) and (b) and 47 above)*

67. The following letters, all addressed to Members of Parliament, were stopped on the ground that they contained complaints about prison treatment, in respect of which the "prior ventilation rule" had not been observed:

(a) Mr. Noe's letters nos. 9 and 11;

(b) Mr. Cooper's letters nos. 20, 22, 23, 24 and 26, and a further letter of 3 April 1974;

(c) Mr. Carne's letters nos. 43, 45, 53, 54, 58 and 59, and further letters of 27 December 1974 and 11 January 1975.

The stopping of letter no. 43, written whilst Mr. Carne was detained on remand, was the subject of an unsuccessful petition to the Home Secretary; the Government subsequently conceded before the Commission that the

ensorship was erroneous, as the letter could not be said to contain a complaint.

The same prohibition also led to the stopping of Mr. Carne's letter no. 56, to a solicitor.

Mr. Noe's letters nos. 9 and 11 were stopped under this rule for the additional reason that the addressee was a barrister as well as a Member of Parliament.

9. Prohibition on the inclusion in general correspondence of complaints about prison treatment (see paragraph 45 (a), item (ix), above)

68. The following letters were stopped because they included complaints about prison treatment:

(a) Mr. Silver's letters nos. 1, 2, 3, 4 and 6, no. 4 being addressed to the Chief Rabbi and the remainder to the applicant's wife. It appears that, one week after the stopping of letter no. 4, which concerned dietary grievances, Mr. Silver was allowed to send a similar letter to the Rabbi;

(b) Mr. Tuttle's letter no. 18, to his wife;

(c) Mr. Carne's letters nos. 44, 46, 47, 48, 50, 51, 52, 55, 60 and 61, addressed respectively to a Mr. McAndrew (nos. 44 and 50), the National Council for Civil Liberties (nos. 46 and 55), the Howard League for Penal Reform (no. 47), a medical practitioner (no. 48), the Health Service Commissioner (no. 51), the Secretary of the National Association for Mental Health (no. 52) and journalists (nos. 60 and 61). Letters nos. 46, 55 and 47 all pre-dated Instruction 38/1977 (see paragraph 35 above).

10. Prohibition on allegations against prison officers (see paragraph 45 (a), item (x), above)

69. This prohibition was a subsidiary ground for stopping Mr. Silver's letter no. 6 (see paragraph 68 above).

11. Prohibition on attempts to stimulate public agitation or petition (see paragraph 45 (a), item (xi), above)

70. A subsidiary ground for stopping Mr. McMahon's letters nos. 32 and 34 (see paragraph 66 above) was that they attempted to stimulate public petition.

12. Miscellaneous

71. The posting of Mr. Noe's letter no. 12, addressed to the United States Consul and containing complaints about the control of correspondence, was delayed for three weeks as it was referred to the Home Office for instructions. The letter was written before the abolition of

restrictions on the contents of letters to Consular officials (see paragraph 45 (c) above).

Mr. Cooper's letters nos. 19, 21 and 25, all addressed to relatives, were stopped on grounds of the general control of "objectionable" letters under Rule 33(3) but without an official explanation being given. The Commission observed that the authority for this action was not clear, beyond the general discretion under the said Rule.

PROCEEDINGS BEFORE THE COMMISSION

72. Mr. Silver, Mr. Noe, Mrs. Colne, Mr. Tuttle, Mr. Cooper, Mr. McMahon and Mr. Carne applied to the Commission on 20 November 1972, 1 February 1973, 2 June 1975, 20 March 1975, 28 October 1974, 8 July 1975 and 5 April 1975, respectively. They alleged that the control of their correspondence by the prison authorities had given rise to violations of Articles 8 and 10 (art. 8, art. 10) of the Convention. Mr. Silver also asserted that the refusal of two petitions to the Home Secretary seeking permission to obtain legal advice constituted a denial of his right of access to the courts, guaranteed by Article 6 § 1 (art. 6-1).

On 5 March 1976, 19 December 1975 and 4 October 1977, respectively, the Commission declared inadmissible the applications of Mr. Silver, Mr. Noe and Mr. Cooper in so far as they contained certain additional complaints. On the last-mentioned date, it declared admissible the remainder of those applications and the whole of the other four; previously, on 11 March 1977, it had ordered the joinder of the seven applications in pursuance of Rule 29 of its Rules of Procedure. Subsequently, each applicant also contended that there had been breach of Article 13 (art. 13) on account of the absence of an effective remedy before a national authority in respect of the alleged violations of his or her Convention rights.

73. On 3 April 1979, Mr. Silver's legal representative notified the Commission of his client's death. In view of the wishes, expressed by Mr. Silver's next of kin, to continue the case and of the issues of general interest raised, the Commission decided on 8 May 1979 to retain the application. Although the next of kin are today to be regarded as having the status of "applicants" (see the Deweer judgment of 27 February 1980, Series A no. 35, pp. 19-20, § 37), for the sake of convenience the present judgment will continue to refer to Mr. Silver as an "applicant".

74. In its report of 11 October 1980 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion:

- by a series of votes (with one exception unanimous), that, save in respect of six letters (namely, Mr. Silver's letter no. 7, Mr. Cooper's letters nos. 28-31 and Mr. Noe's letter no. 12), the censorship of the applicants'

mail by the prison authorities constituted a violation of their right to respect for correspondence, ensured by Article 8 (art. 8) of the Convention;

- that it was not necessary to pursue a further examination of the matter in the light of Article 10 (art. 10);

- unanimously, that there had been a violation of Mr. Silver's right of access to the civil courts, ensured by Article 6 § 1 (art. 6-1);

- by fourteen votes to one, that the absence of effective domestic remedies for the applicants' claims under Article 8 (art. 8) constituted a violation of Article 13 (art. 13).

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

75. At the hearings on 22 September 1982, the Government maintained in substance the submissions set out in their memorial of 2 October 1981, whereby they had requested the Court:

"(1) With regard to Article 8 (art. 8)

(i) in so far as the Commission concluded that the facts found disclosed no breach by the United Kingdom of its obligations under Article 8 (art. 8) of the Convention, to confirm and uphold the Commission's conclusions;

(ii) in so far as the Commission's conclusions in respect of the issues under Article 8 (art. 8) of the Convention are contested by the United Kingdom Government, to make findings in accordance with the submissions set out in the Government's memorial;

(iii) in so far as the Commission's findings of breaches of the Convention are not contested by the United Kingdom Government on the grounds of the changes made by the revised Standing Orders to the practice in the United Kingdom relating to prisoners' correspondence:

(a) to decide and declare that the facts found disclose no breaches otherwise than as set forth in the report of the Commission;

(b) to take express note in its judgment of the changes made by the revised Standing Orders as remedying the breaches so found by the Commission;

(2) With regard to Article 6 (art. 6)

(i) to take express note in its judgment of the changes made to the law and practice in the United Kingdom relating to the control of correspondence between prisoners and their legal advisers since the judgment of the Court in the Golder case;

(a) in light of such changes to decline to examine further the claims of breaches of Article 6 (art. 6) of the Convention;

alternatively

(b) to decide and declare that the facts found disclose no breaches by the United Kingdom of its obligations under Article 6 (art. 6) of the Convention otherwise than as set forth in the report of the Commission;

(3) With regard to Article 13 (art. 13)

to decide and declare that the facts found do not disclose a breach by the United Kingdom of its obligations under Article 13 (art. 13) of the Convention, alternatively that such facts would not disclose any such breach after the coming into effect of the revised Standing Orders relating to prisoners' correspondence."

AS TO THE LAW

I. THE SCOPE OF THE PRESENT CASE

76. The applicants complained principally of the stopping or delaying of particular letters, but they also alleged that in this area practices in breach of the Convention continued to exist.

77. The Court does not have to examine this additional allegation. This is because the Commission's decision declaring an application admissible determines the object of the case brought before the Court (see, *inter alia*, the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 63, § 157). And, in the present case, the Commission, in its decisions on the admissibility of the applications, stated that the questions which necessitated an examination on the merits were whether the interference constituted by the censorship of correspondence in a number of instances was justified under Article 8 § 2 (art. 8-2) and whether it involved other issues under the Convention. The Commission's subsequent consideration of the case did not extend beyond those questions.

78. As is recorded in paragraphs 25-56 above, the practice in England and Wales on the control of prisoners' correspondence has undergone substantial modification since the date of the Commission's report. For this reason, the Government did not contest many of the Commission's findings; they emphasised that the revised Orders had now been published and that the majority of the letters involved in this case would not have been stopped under the new regime. These circumstances enabled the President to make his Order of 22 July 1982 limiting the scope of the hearings to the issues still in dispute (see paragraph 6 above).

The applicants criticised the new control system in various respects. The Government, for their part, asked the Court to take note of the changes effected in 1981 and also in 1975 (see paragraph 32 above); although their

submissions suggested that the Court should at least take the new regime into account as remedying breaches of the Convention which had previously existed, they stated at the hearings that they were not seeking a ruling on its compatibility with the Convention.

79. In general, it is not the Court's task to rule on legislation in abstracto; indeed, at the time of the events giving rise to this case, the new regime was not yet in force. Its compatibility with the Convention therefore cannot be examined by the Court (see notably, *mutatis mutandis*, the National Union of Belgian Police judgment of 27 October 1975, Series A no. 19, p. 17, § 36, and the above-mentioned *Ireland v. the United Kingdom* judgment, Series A no. 25, p. 72, § 189). However, the Court notes with satisfaction that, following its *Golder* judgment of 21 February 1975 (Series A no. 18) on the one hand and as a result of the applications in which this case originated on the other, substantial changes have been made by the United Kingdom with a view to ensuring the observance of the engagements undertaken by it in the Convention.

II. THE ALLEGED VIOLATION OF ARTICLE 6 § 1 (art. 6-1)

80. Mr. Silver claimed that the refusal of his 1972 and 1973 petitions to the Home Secretary for permission to seek legal advice (see paragraph 12 above) constituted a denial of access to the courts, in violation of Article 6 § 1 (art. 6-1) of the Convention, as interpreted by the Court in its above-mentioned *Golder* judgment. The Article (art. 6-1), so far as is relevant, reads:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The Court will confine itself to the 1972 petition: the Commission found it not to have been established that the 1973 petition had been refused and the point was not pursued before the Court.

81. The Government's principal plea was that the Court should decline to rule on the matter in light of the changes made to the law and practice since the *Golder* judgment (see, *inter alia*, paragraph 32 above).

The Court is unable to accept this plea. The changes in question were introduced, firstly, to give effect to the terms of that judgment and, secondly, as a result of the proceedings before the Commission in the present case. Nevertheless, dating as they do from 1975 and 1981, they clearly could not have restored the right claimed by Mr. Silver under Article 6 § 1 (art. 6-1); it is therefore not possible to speak of a "solution", even partial, "of the matter" (see, *mutatis mutandis*, Rule 47 § 2 of the Rules of Court and the *X v. the United Kingdom* judgment of 5 November 1981, Series A no. 46, p. 27, § 64). In addition, the memorial of 22 September

1982 (see paragraph 8 above) contains a claim in the name of this applicant for just satisfaction under Article 50 (art. 50) and a determination by the Court of the Article 6 § 1 (art. 6-1) issue may be of relevance in this connection.

82. The Government, in the alternative, stated that in light of the Golder judgment they did not contest the Commission's finding that there had been a violation of Article 6 § 1 (art. 6-1). There being no material difference between the facts of Mr. Silver's case and those of Mr. Golder's, the Court confirms that finding.

III. THE ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

83. In the applicants' submission, the stopping or delaying of the 64 letters in question constituted a violation of Article 8 (art. 8), which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

84. It is clear - and indeed this was not disputed - that there were "interferences by a public authority" with the exercise of the applicants' right to respect for their correspondence, which is guaranteed by paragraph 1 of Article 8 (art. 8-1). Such interferences entail a violation of that Article if they do not fall within one of the exceptions provided for in paragraph 2 (art. 8-2). The Court therefore has to examine in turn whether the interferences in the present case were "in accordance with the law", whether they had an aim or aims that is or are legitimate under Article 8 § 2 (art. 8-2) and whether they were "necessary in a democratic society" for the aforesaid aim or aims (see notably, *mutatis mutandis*, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 29, § 45).

A. Were the interferences "in accordance with the law"?

1. General principles

85. In its Sunday Times judgment of 26 April 1979, the Court examined the meaning of the expression "prescribed by law", noting in this connection certain differences which exist between the French and English versions of Articles 8, 9, 10 and 11 (art. 8, art. 9, art. 10, art. 11) of the Convention,

Article 1 of Protocol No. 1 (P1-1) and Article 2 of Protocol No. 4 (P4-2) (ibid., p. 30, § 48).

The Government accepted that the principles enounced in the said judgment concerning the expression "prescribed by law/prévues par la loi" in Article 10 (art. 10) were also applicable to the expression "in accordance with the law/ prévue par la loi" in Article 8 (art. 8). Indeed, this must be so, particularly because the two provisions overlap as regards freedom of expression through correspondence and not to give them an identical interpretation could lead to different conclusions in respect of the same interference.

86. A first principle that emerges from the Sunday Times judgment is that the interference in question must have some basis in domestic law (ibid., p. 30, § 47). In the present case, it was common ground between Government, Commission and applicants that a basis for the interferences was to be found in the Prison Act and the Rules, but not in the Orders and Instructions which lacked the force of law (see paragraph 26 above). There was also no dispute that the measures complained of were in conformity with English law.

87. A second principle is that "the law must be adequately accessible: the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case" (ibid., p. 31, § 49). Clearly, the Prison Act and the Rules met this criterion, but the Orders and Instructions were not published.

88. A third principle is that "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" (ibid.).

A law which confers a discretion must indicate the scope of that discretion. However, the Court has already recognised the impossibility of attaining absolute certainty in the framing of laws and the risk that the search for certainty may entail excessive rigidity (ibid.). These observations are of particular weight in the "circumstances" of the present case, involving as it does, in the special context of imprisonment, the screening of approximately ten million items of correspondence in a year (see paragraph 57 above). It would scarcely be possible to formulate a law to cover every eventuality. Indeed, the applicants themselves did not deny that some discretion should be left to the authorities.

In view of these considerations, the Court points out once more that "many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice" (ibid.). And in the present case the operation of the correspondence control system was not merely a question of practice that varied in each individual instance: the Orders and Instructions established a

practice which had to be followed save in exceptional circumstances (see paragraphs 26 and 27 above). In these conditions, the Court considers that although those directives did not themselves have the force of law, they may - to the admittedly limited extent to which those concerned were made sufficiently aware of their contents - be taken into account in assessing whether the criterion of foreseeability was satisfied in the application of the Rules.

89. For this reason, the Court cannot accept the applicants' additional contention that the conditions and procedures governing interferences with correspondence - and in particular the directives set out in the Orders and Instructions - should be contained in the substantive law itself.

90. The applicants further contended that the law itself must provide safeguards against abuse.

The Government recognised that the correspondence control system must itself be subject to control and the Court finds it evident that some form of safeguards must exist. One of the principles underlying the Convention is the rule of law, which implies that an interference by the authorities with an individual's rights should be subject to effective control (see, *inter alia*, the *Klass and others* judgment of 6 September 1978, Series A no. 28, pp. 25-26, § 55). This is especially so where, as in the present case, the law bestows on the executive wide discretionary powers, the application whereof is a matter of practice which is susceptible to modification but not to any Parliamentary scrutiny (see paragraph 26 above).

However, the Court does not interpret the expression "in accordance with the law" as meaning that the safeguards must be enshrined in the very text which authorises the imposition of restrictions. In fact, the question of safeguards against abuse is closely linked with the question of effective remedies and the Court finds it preferable to take this issue into account in the wider context of Article 13 (art. 13) (see paragraphs 111-119 below).

2. Application in the present case of the above-mentioned principles

(a) Non-contested items

91. The Commission expressed the opinion that the stopping on the following principal or subsidiary grounds of the following letters was not foreseeable and, hence, was not "in accordance with the law":

(a) restriction on correspondence with legal adviser, on the ground that the applicant had already had sufficient facilities to seek legal advice (see paragraphs 32 and 60 above): Mr. Cooper's letter no. 27;

(b) prohibition on representations connected with the prisoner's trial, conviction or sentence (see paragraphs 43 and 61 above): Mr. Noe's letter no. 8 and Mr. McMahon's letters nos. 35 and 37;

(c) prohibition of grossly improper language (see paragraphs 45 (a), item (vi), and 65 above): Mr. Cooper's letters nos. 28-31;

(d) prohibition on material intended for publication (see paragraphs 45 (a), item (v), and 66 above): Mr. Silver's letter no. 5, Mr. McMahon's letters nos. 32, 34, 37 and 42 and Mr. Carne's letters nos. 60 and 61;

(e) prohibition on the inclusion in letters to legal advisers and Members of Parliament of unventilated complaints about prison treatment (see paragraphs 45 (a) and (b), 47 and 67 above): Mr. Noe's letters nos. 9 and 11, Mr. Cooper's letters nos. 20, 22, 23, 24 and 26 and his further letter of 3 April 1974, and Mr. Carne's letters nos. 43, 45, 53, 54 and 56 and his further letters of 27 December 1974 and 11 January 1975;

(f) prohibition on the inclusion in general correspondence of complaints about prison treatment (see paragraphs 45 (a), item (ix), and 68 above): Mr. Silver's letters nos. 1, 2, 3, 4 and 6, Mr. Tuttle's letter no. 18 and Mr. Carne's letters nos. 44, 46, 47, 48, 50, 51, 52, 55, 60 and 61;

(g) prohibition on allegations against prison officers (see paragraphs 45 (a), item (x), and 69 above): Mr. Silver's letter no. 6;

(h) the petition aspect of the prohibition on attempts to stimulate public agitation or petition (see paragraphs 45 (a), item (xi), and 70 above): Mr. McMahon's letters nos. 32 and 34;

(i) the general control of "objectionable" letters (no official explanation having been given - see paragraph 71 above): Mr. Cooper's letters nos. 19, 21 and 25.

As regards items (a) and (i), the Commission considered that the actual measure of interference complained of was not foreseeable; in the remaining cases, it considered that the rule under which the stopping was effected could not itself be foreseen.

The Government did not contest these findings on the part of the Commission, and the Court sees no reason to disagree. It therefore holds that the stopping of these letters on the grounds indicated above was not "in accordance with the law".

(b) Contested items

92. The Government or the applicants contested the Commission's findings on the "in accordance with the law" issue as regards three separate groups of letters. In accordance with the President's Order of 22 July 1982 (see paragraph 6 above), argument was presented to the Court at the hearings on these items, which will be considered in turn.

93. The first group comprises Mrs. Colne's letters nos. 13-15, Mr. McMahon's letters nos. 35-41 and a letter of 31 December 1975 to him from a journalist, all of which were stopped on the ground that they were not sent by or addressed to a relative or existing friend (see paragraphs 29-30 and 59 above). The Government contested the Commission's view that the relevant practice, by excluding correspondence with persons of good character, went further than could reasonably be deduced from Rule 34(8) in

conjunction with Rule 33(1) and that the stopping of these letters was accordingly not "in accordance with the law".

In determining whether the foreseeability criterion was satisfied in this instance, account cannot be taken of the Orders which supplemented Rule 34(8): they were not available to prisoners nor do their contents appear to have been explained in cell cards (see paragraphs 26, 30 and 88 above). However, the wording of Rule 34(8) (see paragraph 29 above) is itself quite explicit: a reader would see not that correspondence with persons other than friends or relatives is allowed subject to certain exceptions but rather that it is prohibited save where the Secretary of State gives leave. Moreover, the Court considers that account should also be taken of Rule 33(2) - which contains a prohibition similar to that found in Rule 34(8) - and of Rule 34(2), from which it would be apparent that there were limits on the quantity of the correspondence of convicted prisoners (see paragraphs 29 and 38 above).

For these reasons, the Court concludes that the interferences in question were "in accordance with the law".

94. The second group comprises Mr. Carne's letters nos. 58 and 59, dated 12 December 1975 and 2 January 1976 and addressed to a Member of Parliament, which were stopped on the ground that they contained complaints about prison treatment, in respect of which the "prior ventilation rule" had not been observed (see paragraphs 45 (b), 47 and 67 above). Whilst not contesting the Commission's view that the stopping of certain other letters in the same category was not foreseeable since the "prior ventilation rule" was not contained in the Rules themselves, the Government submitted that the position was otherwise as regards these two items. They relied on the explanatory notice which was issued for the information of prisoners in November 1975, that is before the two letters were written (see paragraph 45 (b) above).

The Court considers that the terms of the notice in question were such as to make those concerned sufficiently aware of the practice in the matter (see paragraph 88 above). The stopping of these letters was therefore a foreseeable application of the Rules and, hence, "in accordance with the law".

95. The third group comprises the following letters which were stopped or delayed on the principal or subsidiary grounds indicated:

(a) restrictions on communications in connection with any legal or other business (see paragraphs 32, 35, 41, 46 and 60 above): Mr. Noe's letter no. 10, and Mr. Carne's letters nos. 49 and 57 and his letter of 15 September 1975 to the National Council for Civil Liberties;

(b) prohibition on letters evading or circumventing the regulations (see paragraphs 44 and 62 above): Mr. Silver's letter no. 1 and Mr. Tuttle's letter no. 18;

(c) prohibition on discussion of the offences of others (see paragraphs 45 (a), item (ii), and 63 above): Mr. Silver's letter no. 7;

(d) prohibition on complaints calculated to hold the authorities up to contempt (see paragraphs 45 (a), item (iii), and 64 above): Mr. Tuttle's letter no. 17;

(e) prohibition on threats of violence (see paragraphs 45 (a), item (iv), and 65 above): Mr. Cooper's letters nos. 28-31;

(f) Mr. Noe's letter no. 12, which was delayed pending receipt of instructions from the Home Office (see paragraph 71 above).

The Commission found that each of the above interferences was foreseeable from the text of the Rules and was therefore "in accordance with the law". The applicants disputed this on the ground that the two further requirements which, in their submission, flowed from that expression (see paragraphs 89 and 90 above) had not been satisfied.

In view of the position which the Court has taken in those paragraphs on the applicants' said submission, it concurs with the Commission's finding.

B. Did the interferences have aims that are legitimate under Article 8 § 2 (art. 8-2)?

96. The applicants did not allege that the restrictions at issue in the present case were designed or applied for a purpose other than those listed in paragraph 2 of Article 8 (art. 8-2). The Government pleaded before the Commission that the aim pursued was "the prevention of disorder", "the prevention of crime", "the protection of morals" and/or "the protection of the rights and freedoms of others", and the Commission considered whether each interference was "necessary" for one or more of those purposes.

This matter was not discussed or questioned before the Court. It sees no reason to doubt that each interference had an aim that was legitimate under Article 8 (art. 8).

C. Were the interferences "necessary in a democratic society"?

1. General principles

97. On a number of occasions, the Court has stated its understanding of the phrase "necessary in a democratic society", the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions. It suffices here to summarise certain principles:

(a) the adjective "necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary",

"useful", "reasonable" or "desirable" (see the Handyside judgment of 7 December 1976, Series A no. 24, p. 22, § 48);

(b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention (*ibid.*, p. 23, § 49);

(c) the phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued" (*ibid.*, pp. 22-23, §§ 48-49);

(d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted (see the above-mentioned *Klass and others* judgment, Series A no. 28, p. 21, § 42).

98. The Court has also held that, in assessing whether an interference with the exercise of the right of a convicted prisoner to respect for his correspondence was "necessary" for one of the aims set out in Article 8 § 2 (art. 8-2), regard has to be paid to the ordinary and reasonable requirements of imprisonment (see the above-mentioned *Golder* judgment, Series A no. 18, p. 21, § 45). Indeed, the Court recognises that some measure of control over prisoners' correspondence is called for and is not of itself incompatible with the Convention.

2. Application in the present case of the above-mentioned principles

(a) Non-contested items

99. The Commission expressed the opinion that the stopping on the following principal or subsidiary grounds of the following letters was not "necessary in a democratic society":

(a) restriction on correspondence other than with a relative or friend (see paragraphs 29-30 and 59 above): Mrs. Colne's letters nos. 13-15, Mr. McMahon's letters nos. 35-41 and a letter of 31 December 1975 to him from a journalist, Mr. Silver's letter no. 4 and Mr. Carne's letter no. 48;

(b) restriction on communications in connection with any legal or other business (see paragraphs 32, 35, 41, 46 and 60 above): Mr. Cooper's letter no. 27, and Mr. Carne's letters nos. 49 and 57 and his letter of 15 September 1975 to the National Council for Civil Liberties;

(c) prohibition on complaints calculated to hold the authorities up to contempt (see paragraphs 45 (a), item (iii), and 64 above): Mr. Tuttle's letter no. 17 and Mr. Carne's letter no. 51;

(d) prohibition on the inclusion in letters to legal advisers and Members of Parliament of unventilated complaints about prison treatment (see paragraphs 45 (a) and (b), 47 and 67 above): Mr. Noe's letters nos. 9 and 11, Mr. Cooper's letters nos. 20, 22, 23, 24 and 26 and his further letter of 3

April 1974, and Mr. Carne's letters nos. 43, 45, 53, 54, 56, 58 and 59 and his further letters of 27 December 1974 and 11 January 1975;

(e) the petition aspect of the prohibition on attempts to stimulate public agitation or petition (see paragraphs 45 (a), item (xi), and 70 above): Mr. McMahon's letters nos. 32 and 34;

(f) prohibition on letters evading or circumventing the regulations (see paragraphs 44 and 62 above): Mr. Silver's letter no. 1 and Mr. Tuttle's letter no. 18.

As regards item (f), the Commission considered that the measure, although taken on an intrinsically legitimate ground, was excessive. In the remaining cases, on the other hand, it was the ground itself as well as the measure which did not correspond to a necessity, within the meaning of Article 8 § 2 (art. 8-2); the Commission expressed the same opinion as regards the stopping, on the principal or subsidiary grounds indicated in sub-paragraphs (b), (c), (d), (f) and (g) of paragraph 91 above, of the letters listed in those sub-paragraphs. Finally, the Commission considered that the stopping of Mr. Cooper's letters nos. 19, 21 and 25 (see paragraph 71 above) was not "necessary".

The Government did not contest these findings on the part of the Commission, and the Court sees no reason to disagree. It therefore holds that the stopping of the letters in question was not "necessary in a democratic society".

(b) Contested items

100. As regards certain letters, the Government or the applicants contested the Commission's findings on the "necessity" issue. In accordance with the President's Order of 22 July 1982 (see paragraph 6 above), argument was presented to the Court at the hearings on these items, which will be considered in turn.

101. Mr. Noe's letter no. 10 to a solicitor was stopped as it contained a reference to a business transaction (see paragraphs 41, 46 and 60 above). The Commission found it not to be established that the interference was "necessary in a democratic society", notably because there was no supporting evidence to that effect. The Government contested this conclusion.

The Court notes that this letter - written by a prisoner convicted of fraud (see paragraph 13 above) - did not simply concern legal problems but interpretations (see paragraph 60 above). Without expressing any opinion on the restrictions in force at the relevant time on the conduct by prisoners of business activities in general, the Court considers, making due allowance for the United Kingdom's margin of appreciation, that the authorities were entitled to think that the stopping of this particular letter was necessary "for the prevention of disorder or crime", within the meaning of Article 8 § 2 (art. 8-2) of the Convention.

102. Mr. Silver's letter no.7 was stopped because it alluded to the presence in his prison of certain other criminals (see paragraphs 45 (a), item (ii), and 63 above). The Commission considered that the interference could be regarded as "necessary", notably since Mr. Silver could have rewritten the letter without the offending passage. His counsel claimed that the Government had not established that the opportunity to rewrite had been provided and that their statement that the letter would not be stopped under the regime in force since December 1981 demonstrated that the measure taken in 1973 was not "necessary".

In the absence of evidence to the contrary, the Court must assume that Mr. Silver was given the aforesaid opportunity, in accordance with the usual procedure (see paragraph 50 above). Bearing in mind that the other criminals referred to were "category A" prisoners (see paragraph 16 above), the Court finds that the authorities were entitled to think that the stopping of this particular letter was necessary "in the interests of public safety" and "for the prevention of disorder or crime", within the meaning of Article 8 § 2 (art. 8-2).

103. Mr. Cooper's letters nos. 28-31 were stopped not only for employing grossly improper language but also for containing threats of violence (see paragraphs 45 (a), item (iv), and 65 above). His counsel contested the Commission's view that the interference was "necessary" on the second ground.

The Court agrees with the Commission. Letters nos. 28-30 contained clear threats and letter no. 31 can be regarded as a continuation thereof. In the Court's judgment, the authorities had sufficient reason for concluding that the stopping of these letters was necessary "for the prevention of disorder or crime", within the meaning of Article 8 § 2 (art. 8-2).

104. Finally, Mr. Noe's letter no. 12, to the United States Consul, was delayed for three weeks before being posted (see paragraph 71 above). His counsel questioned the necessity for this interference, whereas the Commission, in arriving at its conclusion that there had here been no violation of Article 8 (art. 8), found that there was no evidence that the interference was not justified as being "necessary" for one or more of the aims set out in paragraph 2 (art. 8-2) thereof.

The Court is of the view that when in any particular instance subordinate prison authorities are in doubt as to how they should exercise their supervisory functions regarding prisoners' correspondence, they must be able to seek instructions from higher authority. In the case of Mr. Noe's letter no. 12, the prison authorities found it necessary in the light of the law and practice applicable at the time to refer the letter to the Home Secretary for instructions; he decided that it should not be stopped. In these circumstances and bearing in mind that the subject-matter of the letter was not really urgent, the Court does not consider that the resultant delay of

three weeks in despatching the letter was so serious as to constitute a violation of Article 8 (art. 8).

D. Conclusions on Article 8 (art. 8)

105. To sum up, the stopping of Mr. Silver's letter no. 7, Mr. Noe's letter no. 10 and Mr. Cooper's letters nos. 28-31 was both "in accordance with the law" and justifiable as "necessary in a democratic society" (see paragraphs 95, 102, 101 and 103 above). These interferences therefore did not constitute a violation of Article 8 (art. 8). The same conclusion applies as regards the delaying of Mr. Noe's letter no. 12 (see paragraphs 95 and 104 above).

On the other hand, the stopping of the 57 remaining letters was not "necessary in a democratic society" (see paragraph 99 above); there has therefore been a violation of Article 8 (art. 8) in each case.

IV. THE ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

106. The applicants also submitted that the control of their mail by the prison authorities constituted a breach of their right to freedom of expression, guaranteed by Article 10 (art. 10) of the Convention.

107. The Commission concluded that since, in the context of correspondence, the right to free expression was guaranteed by Article 8 (art. 8), it was not necessary to pursue a further examination of the matter in the light of Article 10 (art. 10).

Neither Government nor applicants dissented from this opinion, with which the Court concurs.

V. THE ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

108. The applicants alleged that there existed in the United Kingdom no effective remedy in respect of their claims under Articles 6 § 1, 8 and 10 (art. 6-1, art. 8, art. 10) and that they were therefore victims of a violation of Article 13 (art. 13), which provides as follows:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Article 13 taken in conjunction with Article 6 § 1 and Article 10 (art. 13+6-1, art. 13+10)

109. The Commission expressed the opinion, which was not contested by the applicants before the Court, that:

- as regards Mr. Silver's complaint under Article 6 § 1 (art. 6-1) concerning the refusal of his 1972 petition (see paragraph 12 above), no separate issue arose under Article 13 (art. 13);

- its opinion concerning Article 10 (art. 10) (see paragraph 107 above) rendered it unnecessary to examine under Article 13 (art. 13) the Article 10 (art. 10) aspects of the applicants' complaints.

110. The Court shares the Commission's opinion. Having regard to its decision on Article 6 § 1 (art. 6-1) (see paragraphs 80-82 above), there is no need to examine Mr. Silver's complaint under Article 13 (art. 13); this is because the requirements of the latter Article (art. 13) are less strict than, and are here absorbed by, those of the former (see, *inter alia*, the *Sporrong and Lönnroth* judgment of 23 September 1982, Series A no. 52, p.32, § 88). Again, there is no call to examine under Article 13 (art. 13) the Article 10 (art. 10) aspects of the complaints, since Articles 8 and 10 (art. 8, art. 10) overlap in this case (see paragraph 107 above).

B. Article 13 taken in conjunction with Article 8 (art. 13+8)

111. The same does not apply to the Article 8 (art. 8) aspects of the applicants' complaints, especially as the Court has decided to consider in the context of Article 13 (art. 13) the question of safeguards against abuse of the powers to control prisoners' correspondence (see paragraph 90 above).

The Commission, having examined various possible channels of complaint, came to the conclusion that there was no effective domestic remedy and, hence, a violation of Article 13 (art. 13). The Government requested the Court to hold that the facts of the case disclosed no breach of that provision or, alternatively, that they would disclose no such breach after the coming into effect of the revised Orders.

112. Having held that the scope of the present case does not extend to the correspondence control system in force since December 1981 (see paragraph 79 above), the Court is unable to examine the Government's alternative plea.

113. The principles that emerge from the Court's jurisprudence on the interpretation of Article 13 (art. 13) include the following:

(a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (see the above-mentioned *Klass and others* judgment, Series A no. 28, p. 29, § 64);

(b) the authority referred to in Article 13 (art. 13) may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective (*ibid.*, p. 30, § 67);

(c) although no single remedy may itself entirely satisfy the requirements of Article 13 (art. 13), the aggregate of remedies provided for under domestic law may do so (see, *mutatis mutandis*, the above-mentioned *X v. the United Kingdom* judgment, Series A no. 46, p. 26, § 60, and the *Van Droogenbroeck* judgment of 24 June 1982, Series A no. 50, p. 32, § 56);

(d) neither Article 13 (art. 13) nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention - for example, by incorporating the Convention into domestic law (see the *Swedish Engine Drivers' Union* judgment of 6 February 1976, Series A no. 20, p. 18, § 50).

It follows from the last-mentioned principle that the application of Article 13 (art. 13) in a given case will depend upon the manner in which the Contracting State concerned has chosen to discharge its obligation under Article 1 (art. 1) directly to secure to anyone within its jurisdiction the rights and freedoms set out in section I (see the above-mentioned *Ireland v. the United Kingdom* judgment, Series A no. 25, p. 91, § 239).

114. In the present case, it was not suggested that any remedies were available to the applicants other than the four channels of complaint examined by the Commission, namely an application to the Board of Visitors, an application to the Parliamentary Commissioner for Administration, a petition to the Home Secretary and the institution of proceedings before the English courts.

115. As regards the first two channels, the Court, like the Commission, considers that they do not constitute an "effective remedy" for the present purposes.

The Board of Visitors cannot enforce its conclusions (see paragraph 52 above) nor can it entertain applications from individuals like Mrs. Colne who are not in prison.

As regards the Parliamentary Commissioner, it suffices to note that he has himself no power to render a binding decision granting redress (see paragraph 54 above).

116. As for the Home Secretary, if there were a complaint to him as to the validity of an Order or Instruction under which a measure of control over correspondence had been carried out, he could not be considered to have a sufficiently independent standpoint to satisfy the requirements of Article 13 (art. 13) (see, *mutatis mutandis*, the above-mentioned *Klass and others* judgment, Series A no. 28, p. 26, § 56): as the author of the directives in question, he would in reality be judge in his own cause. The position, however, would be otherwise if the complainant alleged that a measure of control resulted from a misapplication of one of those directives. The Court is satisfied that in such cases a petition to the Home Secretary would in general be effective to secure compliance with the directive, if the complaint was well-founded. The Court notes, however, that even in these cases, at

least prior to 1 December 1981, the conditions for the submission of such petitions imposed limitations on the availability of this remedy in some circumstances (see paragraph 53 above).

117. The English courts, for their part, are endowed with a certain supervisory jurisdiction over the exercise of the powers conferred on the Home Secretary and the prison authorities by the Prison Act and the Rules (see paragraph 55 above). However, their jurisdiction is limited to determining whether or not those powers have been exercised arbitrarily, in bad faith, for an improper motive or in an *ultra vires* manner.

In this connection, the applicants stressed that the Convention, not being incorporated into domestic law, could not be directly invoked before the English courts; however, they acknowledged that it was relevant for the interpretation of ambiguous legislation, according to the presumption of the latter's conformity with the treaty obligations of the United Kingdom.

118. The applicants made no allegation that the interferences with their correspondence were contrary to English law (see paragraph 86 above). Like the Commission, the Court has found that the majority of the measures complained of in the present proceedings were incompatible with the Convention (see paragraph 105 above). In most of the cases, the Government did not contest the Commission's findings. Neither did they maintain that the English courts could have found the measures to have been taken arbitrarily, in bad faith, for an improper motive or in an *ultra vires* manner.

In the Court's view, to the extent that the applicable norms, whether contained in the Rules or in the relevant Orders or Instructions, were incompatible with the Convention there could be no effective remedy as required by Article 13 (art. 13) and consequently there has been a violation of that Article (art. 13).

To the extent, however, that the said norms were compatible with Article 8 (art. 8), the aggregate of the remedies available satisfied the requirements of Article 13 (art. 13), at least in those cases in which it was possible for a petition to be submitted to the Home Secretary (see paragraph 116 above): a petition to the Home Secretary was available to secure compliance with the directives issued by him and, as regards compliance with the Rules, the English courts had the supervisory jurisdiction described in paragraph 117 above.

119. To sum up, in those instances where the norms in question were incompatible with the Convention and where the Court has found a violation of Article 8 (art. 8) to have occurred there was no effective remedy and Article 13 (art. 13) has therefore also been violated. In the remaining cases, there is no reason to assume that the applicants' complaints could not have been duly examined by the Home Secretary and/or the English courts and Article 13 (art. 13) has therefore not been violated; this, however, is subject to the exception of Mr. Silver's letter no. 7, in respect of which the

remedy of petition to the Home Secretary was not available (see paragraphs 11 and 53 above).

VI. THE APPLICATION OF ARTICLE 50 (art. 50)

120. Article 50 (art. 50) of the Convention reads as follows:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

121. In the memorial filed on 22 September 1982 (see paragraph 8 above), the applicants claimed "general" damages for violation of their rights and reimbursement of specified legal costs and expenses; a claim for "special" damages was also put forward in the name of Mr. Silver, Mr. McMahon and Mr. Carne.

122. The written procedure on this issue has not yet been concluded (see paragraph 8 above). In these circumstances, the question of the application of Article 50 (art. 50) is not ready for decision and must therefore be reserved. The Court delegates to the President power to fix the further procedure in this respect.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that the refusal of Mr. Silver's petition of 20 November 1972 to the Home Secretary gave rise to a violation of Article 6 § 1 (art. 6-1) of the Convention;
2. Holds that, with the exception of Mr. Silver's letter no. 7, Mr. Noe's letters nos. 10 and 12 and Mr. Cooper's letters nos. 28 to 31, the stopping or delaying of all the letters written by or addressed to each applicant which are at issue in the present case constituted a violation of Article 8 (art. 8);
3. Holds that it is not necessary also to examine the case under Article 10 (art. 10);
4. Holds that it is also not necessary to examine under Article 13 (art. 13) the article 6 § 1 and Article 10 (art. 6-1, art. 10) aspects of the applicants' complaints;

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SILVER AND OTHERS v. THE UNITED KINGDOM JUDGMENT

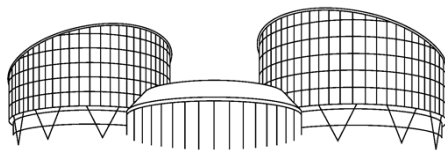
5. Holds that there has been a violation of Article 13 (art. 13) to the extent specified in paragraph 119 of the judgment;
6. Holds that the question of the application of Article 50 (art. 50) is not ready for decision;
accordingly,
 - (a) reserves the whole of the said question;
 - (b) delegates to the President of the Chamber power to fix the further procedure.

Done in English and in French, the English text being authentic, at the Human Rights Building, Strasbourg, this twenty-fifth day of March, one thousand nine hundred and eighty-three.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

ANNEX A11



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF ROMAN ZAKHAROV v. RUSSIA

(Application no. 47143/06)

JUDGMENT

STRASBOURG

4 December 2015

This judgment is final.

In the case of Roman Zakharov v. Russia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President*,
Josep Casadevall,
Guido Raimondi,
Ineta Ziemele,
Mark Villiger,
Luis López Guerra,
Khanlar Hajiyev,
Angelika Nußberger,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse,
André Potocki,
Paul Lemmens,
Helena Jäderblom,
Faris Vehabović,
Ksenija Turković,
Dmitry Dedov, *judges*,

and Lawrence Early, *Jurisconsult*,

Having deliberated in private on 24 September 2014 and 15 October 2015,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 47143/06) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Roman Andreyevich Zakharov (“the applicant”), on 20 October 2006.

2. The applicant was initially represented by Mr B. Gruzd, a lawyer practising in St Petersburg. He was subsequently represented by lawyers of the Memorial Human Rights Centre and the European Human Rights Advocacy Centre (EHRAC), non-governmental organisations based in Moscow. The Russian Government (“the Government”) were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged that the system of secret interception of mobile-telephone communications in Russia violated his right to respect for his

private life and correspondence, and that he did not have any effective remedy in that respect.

4. On 19 October 2009 notice of the application was given to the Government.

5. On 11 March 2014 a Chamber of the First Section, to which the case had been allocated (Rule 52 § 1 of the Rules of Court), composed of Isabelle Berro, President, Khanlar Hajiyeu, Julia Laffranque, Linos-Alexandre Sicilianos, Erik Møse, Ksenija Turković, Dmitry Dedov, judges, and Søren Nielsen, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 24 September 2014 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr G. MATYUSHKIN, Representative of the Russian Federation at the European Court of Human Rights, *Agent*,
Ms O. SIROTKINA,
Ms I. KORIEVA,
Ms O. IURCHENKO,
Mr O. AFANASEV,
Mr A. LAKOV, *Advisers;*

(b) *for the applicant*

Mr P. LEACH,
Ms K. LEVINE,
Mr K. KOROTEEV,
Ms A. RAZHIKOVA, *Counsel*,
Ms E. LEVCHISHINA, *Adviser.*

The Court heard addresses by Mr Matyushkin, Mr Leach, Ms Levine, Ms Razhikova and Mr Koroteev, and also replies by Mr Matyushkin and Mr Leach to questions put by judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1977 and lives in St Petersburg.

8. The applicant is the editor-in-chief of a publishing company and of an aviation magazine. He is also the chairperson of the St Petersburg branch of the Glasnost Defence Foundation, a non-governmental organisation (NGO) monitoring the state of media freedom in the Russian regions, which promotes the independence of the regional mass media, freedom of speech and respect for journalists' rights, and provides legal support, including through litigation, to journalists.

9. He subscribed to the services of several mobile-network operators.

10. On 23 December 2003 he brought judicial proceedings against three mobile-network operators, claiming that there had been an interference with his right to the privacy of his telephone communications. He claimed that pursuant to Order no. 70 (see paragraphs 115-22 below) of the State Committee for Communications and Information Technologies (the predecessor to the Ministry of Communications and Information Technologies – “the Ministry of Communications”), the mobile-network operators had installed equipment which permitted the Federal Security Service (FSB) to intercept all telephone communications without prior judicial authorisation. The applicant argued that Order no. 70, which had never been published, unduly restricted his right to privacy. He asked the court to issue an injunction ordering the removal of the equipment installed pursuant to Order no. 70, and to ensure that access to mobile-telephone communications was given to authorised persons only. The Ministry of Communications and the St Petersburg and Leningrad Region Department of the FSB were joined as a third party to the proceedings.

11. On 5 December 2005 the Vasileostrovskiy District Court of St Petersburg dismissed the applicant's claims. It found that the applicant had not proved that the mobile-network operators had transmitted any protected information to unauthorised persons or permitted the unrestricted or unauthorised interception of communications. The equipment to which he referred had been installed to enable law-enforcement agencies to conduct operational-search activities in accordance with the procedure prescribed by law. The installation of such equipment had not in itself interfered with the privacy of the applicant's communications. The applicant had failed to demonstrate any facts which would warrant a finding that his right to the privacy of his telephone communications had been violated.

12. The applicant appealed. He claimed, in particular, that the District Court had refused to accept several documents in evidence. Those documents had included two judicial orders retrospectively authorising the interception of mobile-telephone communications and an addendum to the standard service-provider agreement issued by one of the mobile-network operators. One of the judicial orders in question, issued on 8 October 2002, authorised the interception of several people's mobile-telephone communications during the periods from 1 to 5 April, 19 to 23 June, 30 June to 4 July and 16 to 20 October 2001. The other judicial order,

issued on 18 July 2003, authorised the interception of a Mr E.'s mobile-telephone communications during the period from 11 April to 11 October 2003. As to the addendum, it informed the subscriber that if his number were used to make terrorist threats, the mobile-network operator might suspend the provision of the telephone service and transfer the collected data to the law-enforcement agencies. In the applicant's opinion, the judicial orders and the addendum proved that the mobile-network operators and law-enforcement agencies were technically capable of intercepting all telephone communications without obtaining prior judicial authorisation, and routinely resorted to unauthorised interception.

13. On 26 April 2006 the St Petersburg City Court upheld the judgment on appeal. It confirmed the District Court's finding that the applicant had failed to prove that his telephone communications had been intercepted. Nor had he shown that there was a danger that his right to the privacy of his telephone communications might be unlawfully infringed. To establish the existence of such a danger, the applicant would have had to prove that the respondents had acted unlawfully. However, mobile-network operators were required by law to install equipment enabling law-enforcement agencies to perform operational-search activities and the existence of that equipment did not in itself interfere with the privacy of the applicant's communications. The refusal to admit the judicial orders of 8 October 2002 and 18 July 2003 in evidence had been lawful, as the judicial orders had been issued in respect of third persons and were irrelevant to the applicant's case. The City Court further decided to admit in evidence and examine the addendum to the service-provider agreement, but found that it did not contain any information warranting reconsideration of the District Court's judgment.

14. It can be seen from a document submitted by the applicant that in January 2007 an NGO, Civilian Control, asked the Prosecutor General's Office to carry out an inspection of the Ministry of Communications' Orders in the sphere of interception of communications in order to verify their compatibility with federal laws. In February 2007 an official from the Prosecutor General's Office telephoned Civilian Control and asked for copies of the unpublished attachments to Order no. 70, saying that it had been unable to obtain them from the Ministry of Communications. In April 2007 the Prosecutor General's Office refused to carry out the requested inspection.

II. RELEVANT DOMESTIC LAW

A. Right to respect for private life and correspondence

15. The Constitution guarantees to everyone the right to respect for his private life, personal and family secrets and the right to defend his honour

and reputation (Article 23 § 1). It further guarantees the right to respect for correspondence and telephone, postal, telegraph and other communications. That right may be restricted only on the basis of a court order (Article 23 § 2).

16. The Constitution also stipulates that it is not permissible to collect, store, use or disseminate information about a person's private life without his consent. State and municipal authorities must ensure that any person has access to documents and materials affecting his rights and freedoms, except where the law provides otherwise (Article 24).

17. The Communications Act of 7 July 2003 (no. 126-FZ) guarantees the privacy of postal, telegraphic and other forms of communication transmitted by means of telecommunications networks or mail services. Restrictions on the privacy of communications are permissible only in cases specified in federal laws (section 63(1)). The interception of communications is subject to prior judicial authorisation, except in cases specified in federal laws (section 63(3)).

18. On 2 October 2003, in its decision no. 345-O, the Constitutional Court held that the right to privacy of telephone communications covered all data transmitted, stored or discovered by means of telephone equipment, including non-content-based data, such as information about the incoming and outgoing connections of a specified subscriber. The monitoring of such data was also subject to prior judicial authorisation.

B. Responsibility for breach of privacy

19. The unauthorised collection or dissemination of information about the private or family life of a person without his consent, where it is committed out of mercenary or other personal interest and is damaging to the rights and lawful interests of citizens, is punishable by a fine, correctional labour or a custodial sentence of up to four months. The same actions committed by an official using his position are punishable by a fine, a prohibition on occupying certain positions or a custodial sentence of up to six months (Article 137 of the Criminal Code).

20. Any breach of citizens' right to the privacy of their postal, telegraphic, telephone or other forms of communication is punishable by a fine or correctional labour. The same act committed by an official using his position is punishable by a fine, a prohibition on occupying certain positions or a custodial sentence of up to four months (Article 138 of the Criminal Code).

21. Abuse of power by an official, where it is committed out of mercenary or other personal interest and entails a substantial violation of an individual's or a legal entity's rights and lawful interests, is punishable by a fine, a prohibition on occupying certain posts or engaging in certain activities for a period of up to five years, correctional labour for a period of

up to four years or imprisonment for a period ranging from four months to four years (Article 285 § 1 of the Criminal Code).

22. Actions by a public official which clearly exceed his authority and entail a substantial violation of an individual's or a legal entity's rights and lawful interests, are punishable by a fine, a prohibition on occupying certain posts or engaging in certain activities for a period of up to five years, correctional labour for a period of up to four years or imprisonment for a period ranging from four months to four years (Article 286 § 1 of the Criminal Code).

23. Ruling no. 19 of 16 October 2009 by the Plenary Supreme Court provides that for the purposes of Articles 285 and 286 of the Criminal Code "a substantial violation of an individual's or a legal entity's rights and lawful interests" means a violation of the rights and freedoms guaranteed by the generally established principles and provisions of international law and the Constitution of the Russian Federation – such as the right to respect for a person's honour and dignity, private or family life, correspondence, telephone, postal, telegraph and other communications, the inviolability of the home, etc. In assessing whether the violation was "substantial" in respect of a legal entity, it is necessary to take into account the extent of the damage sustained as a result of the unlawful act, the nature and the amount of the pecuniary damage, the number of persons affected and the gravity of the physical, pecuniary or non-pecuniary damage inflicted on them (paragraph 18 (2)).

24. Criminal proceedings are opened if there are sufficient facts showing that a criminal offence has been committed (Article 140 § 2 of the Code of Criminal Procedure).

C. General provisions on interception of communications

25. The interception of communications is governed by the Operational-Search Activities Act of 12 August 1995 (no. 144-FZ – "the OSAA"), applicable to the interception of communications both in the framework of criminal proceedings and outside such framework; and the Code of Criminal Procedure of 18 December 2001 (no. 174-FZ, in force since 1 July 2002 – "the CCrP"), applicable only to the interception of communications in the framework of criminal proceedings.

26. The aims of operational-search activities are (a) the detection, prevention, suppression and investigation of criminal offences and the identification of persons conspiring to commit, committing, or having committed a criminal offence; (b) the tracing of fugitives from justice and missing persons; (c) obtaining information about events or activities endangering the national, military, economic or ecological security of the Russian Federation (section 2 of the OSAA). On 25 December 2008 that

section was amended and a further aim, that of obtaining information about property subject to confiscation, was added.

27. State officials and agencies performing operational-search activities must show respect for the private and family life, home and correspondence of citizens. It is prohibited to perform operational-search activities to achieve aims or objectives other than those specified in the Act (section 5(1) and (2) of the OSAA).

28. State officials and agencies may not (a) conduct operational-search activities in the interest of political parties, non-profit or religious organisations; (b) conduct secret operational-search activities in respect of federal, regional or municipal authorities, political parties, or non-profit or religious organisations with the aim of influencing their activities or decisions; (c) disclose to anyone the data collected in the course of the operational-search activities if those data concern the private or family life of citizens or damage their reputation or good name, except in cases specified in federal laws; (d) incite, induce or entrap anyone to commit a criminal offence; (e) or falsify the results of operational-search activities (section 5(8) of the OSAA).

29. Operational-search activities include, *inter alia*, the interception of postal, telegraphic, telephone and other forms of communication and the collection of data from technical channels of communication. The Act stipulates that audio and video-recording, photography, filming and other technical means may be used during operational-search activities, provided that they are not harmful to the life or health of those involved or to the environment. Operational-search activities involving the interception of postal, telegraphic, telephone and other forms of communication and collection of data from technical channels of communication using equipment installed by communications service providers is carried out by technical means by the FSB and the agencies of the Ministry of the Interior, in accordance with decisions and agreements signed between the agencies involved (section 6 of the OSAA).

30. Presidential Decree no. 891 of 1 September 1995 provides that the interception of postal, telegraphic or other communications is to be carried out by the FSB in the interests and on behalf of all law-enforcement agencies (paragraph 1). In situations where the FSB does not have available the necessary technical equipment, interceptions may be carried out by the agencies of the Ministry of the Interior in the interests and on behalf of all law-enforcement agencies (paragraph 2). Similar provisions are contained in paragraphs 2 and 3 of Order no. 538, issued by the government on 27 August 2005.

D. Situations that may give rise to interception of communications

31. Operational-search activities involving interference with the constitutional right to the privacy of postal, telegraphic and other communications transmitted by means of a telecommunications network or mail services, or within the privacy of the home, may be conducted following the receipt of information (a) that a criminal offence has been committed, is being committed, or is being plotted; (b) about persons conspiring to commit, or committing, or having committed a criminal offence; or (c) about events or activities endangering the national, military, economic or ecological security of the Russian Federation (section 8(2) of the OSAA).

32. The OSAA provides that interception of telephone and other communications may be authorised only in cases where a person is suspected of, or charged with, a criminal offence of medium severity, a serious offence or an especially serious criminal offence, or may have information about such an offence (section 8(4) of the OSAA). The CCRP also provides that interception of telephone and other communications of a suspect, an accused or other person may be authorised if there are reasons to believe that they may contain information relevant for the criminal case in respect of a criminal offence of medium severity, a serious offence or an especially serious criminal offence (Article 186 § 1 of the CCRP).

33. Article 15 of the Criminal Code provides that “offences of medium severity” are premeditated offences for which the Criminal Code prescribes a maximum penalty of between three and five years’ imprisonment and unpremeditated offences for which the Criminal Code prescribes a maximum penalty of more than three years’ imprisonment. “Serious offences” are premeditated offences for which the Criminal Code prescribes a maximum penalty of between five and ten years’ imprisonment. “Especially serious offences” are premeditated offences for which the Code prescribes a maximum penalty of more than ten years’ imprisonment or a harsher penalty.

E. Authorisation procedure and time-limits

1. Operational-Search Activities Act

34. Operational-search measures involving interference with the constitutional right to the privacy of postal, telegraphic and other communications transmitted by means of a telecommunications network or mail services or within the privacy of the home – such as an inspection of premises or buildings, an interception of postal, telegraphic, telephone and other forms of communication or a collection of data from technical channels of communication – require prior judicial authorisation (section 8(2) of the OSAA).

35. In urgent cases where there is an immediate danger that a serious or especially serious offence may be committed or where there is information about events or activities endangering national, military, economic or ecological security, the operational-search measures specified in section 8(2) may be conducted without prior judicial authorisation. In such cases a judge must be informed within twenty-four hours of the commencement of the operational-search activities. If judicial authorisation has not been obtained within forty-eight hours of the commencement of the operational-search activities, those activities must be stopped immediately (section 8(3) of the OSAA).

36. The examination of requests to take measures involving interference with the constitutional right to the privacy of correspondence and telephone, postal, telegraphic and other communications transmitted by means of telecommunications networks or mail services, or with the right to privacy of the home, falls within the competence of a court in the locality where the requested measure is to be carried out or in the locality where the requesting body is located. The request must be examined immediately by a single judge (section 9(1) of the OSAA).

37. The judge takes a decision on the basis of a reasoned request by the head of one of the agencies competent to perform operational-search activities. Relevant supporting materials, except materials containing information about undercover agents or police informers or about the organisation and tactics of operational-search measures, may also be produced at the judge's request (section 9(2) and (3) of the OSAA).

38. The judge examining the request shall decide whether to authorise measures involving interference with the above-mentioned constitutional rights, or to refuse authorisation, giving reasons. The judge must specify the period of time for which the authorisation is granted, which shall not normally exceed six months. If necessary, the judge may extend the authorised period after a fresh examination of all the relevant materials (section 9(4) and (5) of the OSAA).

39. The judicial decision authorising operational-search activities and the materials that served as a basis for that decision must be held in the exclusive possession of the State agency performing the operational-search activities (section 12(3) of the OSAA).

40. On 14 July 1998 the Constitutional Court, in its decision no. 86-O, dismissed as inadmissible a request for a review of the constitutionality of certain provisions of the OSAA. It held, in particular, that a judge was to authorise investigative measures involving interference with constitutional rights only if he was persuaded that such measures were lawful, necessary and justified, that is, compatible with all the requirements of the OSAA. The burden of proof was on the requesting State agency to show the necessity of the measures. Supporting materials were to be produced to the judge at his request. Given that some of those materials might contain State secrets, only

judges with the necessary level of security clearance could examine authorisation requests. Further, relying on the need to keep the surveillance measures secret, the Constitutional Court held that the principles of a public hearing and adversarial proceedings were not applicable to the authorisation proceedings. The fact that the person concerned was not entitled to participate in the authorisation proceedings, to be informed of the decision taken or to appeal to a higher court did not therefore violate that person's constitutional rights.

41. On 2 October 2003 the Constitutional Court, in its decision no. 345-O, held that the judge had an obligation to examine the materials submitted to him in support of a request for interception thoroughly and carefully. If the request was insufficiently substantiated, the judge could request additional information.

42. Further, on 8 February 2007 the Constitutional Court, in its decision no. 1-O, dismissed as inadmissible a request for a review of the constitutionality of section 9 of the OSAA. It found that before granting authorisation to perform operational-search measures the judge had an obligation to verify the grounds for that measure. The judicial decision authorising operational-search measures was to contain reasons and to refer to specific grounds for suspecting that a criminal offence had been committed, was being committed, or was being plotted or that activities endangering national, military, economic or ecological security were being carried out, and that the person in respect of whom operational-search measures were requested was involved in those criminal or otherwise dangerous activities.

43. On 15 July 2008 the Constitutional Court, in its decision no. 460-O-O, dismissed as inadmissible a request for a review of the constitutionality of sections 5, 11 and 12 of the OSAA. The Constitutional Court found that a person whose communications had been intercepted was entitled to lodge a supervisory-review complaint against the judicial decision authorising the interception. The fact that he had no copy of that decision did not prevent him from lodging the supervisory-review complaint, because the relevant court could request it from the competent authorities.

2. Code of Criminal Procedure

44. Investigative measures involving a search in a person's home or interception of his telephone calls and other communications are subject to prior judicial authorisation. A request to search a person's home or intercept his communications must be submitted by an investigator with a prosecutor's approval and must be examined by a single judge within twenty-four hours. The prosecutor and the investigator are entitled to attend. The judge examining the request shall decide whether to authorise the

requested measure, or to refuse authorisation, giving reasons (Article 165 of the CCrP).

45. A court may grant authorisation to intercept the communications of a suspect, an accused or other persons if there are reasons to believe that information relevant to the criminal case may be discussed (Article 186 § 1 of the CCrP).

46. A request for authorisation to intercept communications must clearly mention (a) the criminal case to which the request is related; (b) the grounds for conducting the requested measures; (c) the family name, the first name and the patronymic of the person whose communications are to be intercepted; (d) the duration of the requested measure; and (e) the State agency that will perform the interception (Article 186 § 3 of the CCrP)

47. The judicial decision authorising interception of communications must be forwarded by the investigator to the State agency charged with its implementation. The interception of communications may be authorised for a period not exceeding six months, and is discontinued by the investigator when it is no longer necessary. It must in any case be discontinued when the investigation has been completed (Article 186 §§ 4 and 5 of the CCrP).

48. A court may also authorise the monitoring of communications data relating to a person's telephone or wireless connections if there are sufficient reasons to believe that such data may be relevant to a criminal case. A request for authorisation must contain the same elements referred to in paragraph 46 above. A copy of the judicial decision authorising the monitoring of a person's communications-related data is forwarded by the investigator to the relevant communications service provider, which must then submit the requested data to the investigator on a regular basis, and at least once a week. The monitoring of communications data may be authorised for a period not exceeding six months, and is discontinued by the investigator when it is no longer necessary. It must in any case be discontinued when the investigation has been completed (Article 186.1 of the CCrP, added on 1 July 2010).

F. Storage, use and destruction of collected data

1. Storage of collected data

49. Section 10 of the OSAA stipulates that law-enforcement agencies performing operational-search activities may create and use databases or open personal files. The personal file must be closed when the aims specified in section 2 of the Act have been achieved or if it has been established that it is impossible to achieve them.

50. In its decision of 14 July 1998 (see paragraph 40 above), the Constitutional Court noted, as regards the possibility provided by section 10 for law-enforcement agencies conducting operational-search activities to

create databases or open personal files, that only the data relating to the prevention or investigation of criminal offences could be entered into such databases or personal files. Given that criminal activities did not fall within the sphere of private life, collection of information about such criminal activities did not interfere with the right to respect for private life. If information about a person's criminal activities entered into a file was not subsequently confirmed, the personal file had to be closed.

51. Records of intercepted telephone and other communications must be sealed and stored under conditions excluding any risk of their being listened to or copied by unauthorised persons (section 8(4) of the OSAA).

52. Information about the facilities used in operational-search activities, the methods employed, the officials involved and the data collected constitutes a State secret. It may be declassified only pursuant to a special decision of the head of the State agency performing the operational-search activities (section 12(1) of the OSAA and section 5(4) of Law no. 5485-I of 21 July 1993 – “the State Secrets Act”).

53. Materials containing State secrets should be clearly marked with the following information: degree of secrecy, the State agency which has taken the decision to classify them, registration number, and the date or conditions for declassifying them (section 12 of the State Secrets Act).

2. Use of collected data and conditions for their disclosure

54. Information containing State secrets may be disclosed to another State authority, an organisation or an individual only subject to authorisation by the State authority which took the decision to classify that information. It may be disclosed only to State authorities or organisations holding a special license or to individuals with the required level of security clearance. The State authority or organisation to which classified information is disclosed must ensure that that information is adequately protected. The head of such State authority or organisation is personally responsible for protecting the classified information against unauthorised access or disclosure (sections 16 and 17 of the State Secrets Act).

55. A license to access State secrets may be issued to an organisation or a company only after it has been confirmed that it has specific internal departments charged with data protection, that its employees are qualified to work with classified information and that it uses approved systems of data protection (section 27 of the State Secrets Act).

56. Security clearance is granted only to those State officials who genuinely need it for the performance of their duties. It is also granted to judges for the period of their service and to counsel participating in a criminal case if the case file contains materials involving State secrets. Anyone who has been granted security clearance must give a written undertaking not to disclose the classified information entrusted to him

(paragraphs 7, 11 and 21 of Regulation no. 63 of 6 February 2010 of the government of the Russian Federation).

57. The head of the State authority or organisation in possession of information containing State secrets is responsible for giving State officials and other authorised persons access to that information. He must ensure that only the information that the recipient needs for the performance of his duties is disclosed (section 25 of the State Secrets Act).

58. If the data collected in the course of operational-search activities contain information about the commission of a criminal offence, that information, together with all the necessary supporting material such as photographs and audio or video-recordings, must be sent to the competent investigation authorities or a court. If the information was obtained as a result of operational-search measures involving interference with the right to the privacy of postal, telegraphic and other communications transmitted by means of a telecommunications network or mail services, or with the privacy of the home, it must be sent to the investigation or prosecution authorities together with the judicial decision authorising those measures. The information must be transmitted in accordance with the special procedure for handling classified information, unless the State agency performing operational-search activities has decided to declassify it (paragraphs 1, 12, 14 and 16 of Order no. 776/703/509/507/1820/42/535/398/68 of 27 September 2013 by the Ministry of the Interior).

59. If the person whose telephone or other communications were intercepted is charged with a criminal offence, the records are to be given to the investigator and attached to the criminal case file. Their further use and storage are governed by criminal procedural law (section 8(5) of the OSAA).

60. Data collected as a result of operational-search activities may be used for the preparation and conduct of the investigation and court proceedings and used as evidence in criminal proceedings in accordance with the legal provisions governing the collection, evaluation and assessment of evidence. The decision to transfer the collected data to other law-enforcement agencies or to a court is taken by the head of the State agency performing the operational-search activities (section 11 of the OSAA).

61. If the interception was authorised in the framework of criminal proceedings, the investigator may obtain the records from the agency conducting it at any time during the authorised period of interception. The records must be sealed and must be accompanied by a cover letter indicating the dates and time of the beginning and end of the recorded communications, as well as the technical means used to intercept them. Recordings must be listened to by the investigator in the presence of attesting witnesses, an expert (where necessary) and the persons whose

communications have been intercepted. The investigator must draw up an official report containing a verbatim transcription of those parts of the recorded communications that are relevant to the criminal case (Article 186 §§ 6 and 7 of the CCrP). On 4 March 2013 Article 186 § 7 was amended and the requirement of the presence of attesting witnesses was deleted.

62. Recordings and communications-related data that have been collected are to be attached to the criminal case file. They must be sealed and stored under conditions excluding any risk of their being listened to or copied by unauthorised persons (Article 186 § 8 of the CCrP and Article 186.1, added on 1 July 2010).

63. The results of operational-search activities involving a restriction on the right to respect for correspondence, telephone, postal, telegraph or other communications may be used as evidence in criminal proceedings only if they have been obtained pursuant to a court order and if the operational-search activities have been carried out in accordance with the law on criminal procedure (paragraph 14 of Ruling no. 8 of 31 October 1995 by the Plenary Supreme Court of the Russian Federation).

64. It is prohibited to use in evidence data obtained as a result of operational-search activities that do not comply with the admissibility-of-evidence requirements of the CCrP (Article 89 of the CCrP). Evidence obtained in breach of the CCrP shall be inadmissible. Inadmissible evidence shall have no legal force and cannot be relied on as grounds for criminal charges or for proving any of the circumstances for which evidence is required in criminal proceedings. If a court decides to exclude evidence, that evidence shall have no legal force and cannot be relied on in a judgment or other judicial decision, or be examined or used during the trial (Articles 75 and 235 of the CCrP).

3. Destruction of collected data

65. The data collected in the course of operational-search activities in respect of a person whose guilt has not been proved in accordance with the procedure prescribed by law must be stored for a year and then destroyed, unless those data are needed in the interests of the authority or of justice. Audio-recordings and other materials collected as a result of intercepting telephone or other communications must be stored for six months and then destroyed if the person has not been charged with a criminal offence. The judge who authorised the interception must be informed of the scheduled destruction three months in advance (section 5(7) of the OSAA).

66. If the person has been charged with a criminal offence, at the end of the criminal proceedings the trial court takes a decision on the further storage or destruction of the data used in evidence. The destruction must be recorded in a report to be signed by the head of the investigation authority and included in the case file (Article 81 § 3 of the CCrP and paragraph 49 of Order no. 142 of 30 September 2011 of the Investigations Committee).

G. Supervision of interception of communications

67. The heads of the agencies conducting operational-search activities are personally responsible for the lawfulness of all operational-search activities (section 22 of the OSAA).

68. Overall supervision of operational-search activities is exercised by the President, Parliament and the government of the Russian Federation within the limits of their competence (section 20 of the OSAA).

69. The Prosecutor General and competent lower-level prosecutors may also exercise supervision over operational-search activities. At the request of a competent prosecutor, the head of a State agency performing operational-search activities must produce operational-search materials, including personal files, information on the use of technical equipment, registration logs and internal instructions. Materials containing information about undercover agents or police informers may be disclosed to the prosecutor only with the agent's or informer's consent, except in cases of criminal proceedings against them. The head of a State agency may be held liable in accordance with the law for failure to comply with the prosecutor's request. The prosecutor must ensure the protection of the data contained in the materials produced (section 21 of the OSAA).

70. The Prosecutors' Office Act (Federal Law no. 2202-I of 17 January 1992) provides that the Prosecutor General is to be appointed or dismissed by the Federation Council (the upper house of Parliament) on proposal by the President (section 12). Lower-level prosecutors are to be appointed by the Prosecutor General after consultation with the regional executive authorities (section 13). To be appointed as a prosecutor the person must be a Russian citizen and must have a Russian law degree (section 40.1).

71. In addition to their prosecuting functions, prosecutors are responsible for supervising whether the administration of detention facilities, bailiffs' activities, operational-search activities and criminal investigations are in compliance with the Russian Constitution and Russian laws (section 1). Prosecutors also coordinate the activities of all law-enforcement authorities in combatting crime (section 8).

72. As regards supervision of operational-search activities, prosecutors may review whether measures taken in the course of operational-search activities are lawful and respectful of human rights (section 29). Prosecutors' orders made in the context of such supervision must be complied with within the time-limit set. Failure to comply may result in liability in accordance with the law (section 6).

73. Prosecutors may also examine complaints of breaches of the law and give a reasoned decision on each complaint. Such a decision does not prevent the complainant from bringing the same complaint before a court. If a prosecutor discovers a breach of the law, he must take measures to bring the responsible persons to account (section 10).

74. The Federal Security Service Act of 3 April 1995 (no. 40-FZ – “the FSB Act”) provides that information about the security services’ undercover agents, as well as about the tactics, methods and means used by them is outside the scope of supervision by prosecutors (section 24).

75. The procedures for prosecutors’ supervision of operational-search activities have been set out in Order no. 33, issued by the Prosecutor General’s Office on 15 February 2011.

76. Order no. 33 provides that a prosecutor may carry out routine inspections of agencies carrying out operational-search activities, as well as *ad hoc* inspections following a complaint by an individual or receipt of information about potential violations. Operational-search activities performed by the FSB in the sphere of counterintelligence may be inspected only following an individual complaint (paragraph 5 of Order no. 33).

77. During the inspection the prosecutor must verify compliance with the following requirements:

- observance of citizens’ constitutional rights, such as the right to respect for private and family life, home, correspondence, telephone, postal, telegraph and other communications;

- that the measures taken in the course of operational-search activities are lawful and justified, including those measures that have been authorised by a court (paragraphs 4 and 6 of Order no. 33).

78. During the inspection the prosecutor must study the originals of the relevant operational-search materials, including personal files, information on the use of technical equipment, registration logs and internal instructions, and may request explanations from competent officials. The prosecutors must protect the sensitive data entrusted to them from unauthorised access or disclosure (paragraphs 9 and 12 of Order no. 33).

79. If a prosecutor identifies a breach of the law, he must request the official responsible for it to remedy the breach. He must also take measures to stop and remedy violations of citizens’ rights and to bring those responsible to liability (paragraphs 9 and 10 of Order no. 33). A State official who refuses to comply with a prosecutor’s orders may be brought to account in accordance with the law (paragraph 11).

80. The prosecutors responsible for supervision of operational-search activities must submit six-monthly reports detailing the results of the inspections to the Prosecutor General’s Office (paragraph 15 of Order no. 33). A report form to be filled in by prosecutors is attached to Order no. 33. The form indicates that it is confidential. It contains two sections, both in table format. The first section concerns inspections carried out during the reference period and contains information about the number of inspections, number of files inspected and number of breaches detected. The second section concerns citizens’ complaints and contains information about the number of complaints examined and granted.

H. Access by individuals to data collected about them in the course of interception of communications

81. Russian law does not provide that a person whose communications are intercepted must be notified at any point. However, a person who is in possession of the facts of the operational-search measures to which he was subjected and whose guilt has not been proved in accordance with the procedure prescribed by law, that is, he has not been charged or the charges have been dropped on the ground that the alleged offence was not committed or that one or more elements of a criminal offence were missing, is entitled to receive information about the data collected in the course of the operational-search activities, to the extent compatible with the requirements of operational confidentiality (*конспирации*) and excluding data which could enable State secrets to be disclosed (section 5(4), (5) and (6) of the OSAA).

82. In its decision of 14 July 1998 (cited in paragraph 40 above), the Constitutional Court noted that any person who was in possession of the facts of the operational-search measures to which he had been subjected was entitled to receive information about the data collected in the course of those activities, unless those data contained State secrets. Under section 12 of the OSAA, data collected in the course of operational-search activities – such as information about criminal offences and the persons involved in their commission – were a State secret. However, information about breaches of citizens' rights or unlawful acts on the part of the authorities could not be classified as a State secret and should be disclosed. Section 12 could not therefore serve as a basis for refusing access to information affecting a person's rights, provided that such information did not concern the aims of, or the grounds for, the operational-search activities. In view of the above, the fact that, pursuant to the contested Act, a person was not entitled to be granted access to the entirety of the data collected about him did not constitute a violation of that person's constitutional rights.

I. Judicial review

1. General provisions on judicial review of interception of communications as established by the OSAA

83. A person claiming that his rights have been or are being violated by a State official performing operational-search activities may complain to the official's superior, a prosecutor or a court. If a citizen's rights were violated in the course of operational-search activities by a State official, the official's superior, a prosecutor or a court must take measures to remedy the violation and compensate the damage (section 5(3) and (9) of the OSAA).

84. If a person was refused access to information about the data collected about him in the course of operational-search activities, he is

entitled to know the reasons for the refusal of access and may appeal against the refusal to a court. The burden of proof is on the law-enforcement authorities to show that the refusal of access is justified. To ensure a full and thorough judicial examination, the law-enforcement agency responsible for the operational-search activities must produce, at the judge's request, operational-search materials containing information about the data to which access was refused, with the exception of materials containing information about undercover agents or police informers. If the court finds that the refusal to grant access was unjustified, it may compel the law-enforcement agency to disclose the materials to the person concerned (section 5(4), (5) and (6) of the OSAA).

85. In its decision of 14 July 1998 (cited in paragraph 40 above), the Constitutional Court noted that a person who learned that he had been subjected to operational-search activities and believed that the actions of State officials had violated his rights was entitled, under section 5 of the OSAA, to challenge before a court the grounds for conducting such activities, as well as the specific actions performed by the competent authorities in the course of such activities, including in those cases where they had been authorised by a court.

86. As regards procedural matters, the Constitutional Court held that in proceedings in which the grounds for the operational-search activities or the actions of the competent authorities conducting such activities were challenged, as well as proceedings against the refusal to give access to the data collected, the law-enforcement authorities were to submit to the judge, at his request, all relevant operational-search materials, except materials containing information about undercover agents or police informers.

87. A person wishing to complain about interception of his communications may lodge a judicial-review complaint under Article 125 of the CCrP, a judicial-review complaint under Chapter 25 of the Code of Civil Procedure and Law no. 4866-1 of 27 April 1993 on judicial review of decisions and acts violating citizens' rights and freedoms ("the Judicial Review Act"), which were repealed and replaced on 15 September 2015 by the Code of Administrative Procedure, or a civil tort claim under Article 1069 of the Civil Code.

2. A judicial-review complaint under Article 125 of the CCrP

88. The Plenary Supreme Court in its Ruling no. 1 of 10 February 2009 held that actions of officials or State agencies conducting operational-search activities at the request of an investigator could be challenged in accordance with the procedure prescribed by Article 125 of the CCrP (paragraph 4). Complaints lodged under that Article may be examined only while the criminal investigation is pending. If the case has already been transmitted to a court for trial, the judge declares the complaint inadmissible and explains

to the complainant that he may raise the complaints before the relevant trial court (paragraph 9).

89. Article 125 of the CCrP provides for the judicial review of decisions and acts or failures to act by an investigator or a prosecutor which are capable of adversely affecting the constitutional rights or freedoms of the participants to criminal proceedings. The lodging of a complaint does not suspend the challenged decision or act, unless the investigator, the prosecutor, or the court decides otherwise. The court must examine the complaint within five days. The complainant, his counsel, the investigator and the prosecutor are entitled to attend the hearing. The complainant must substantiate his complaint (Article 125 §§ 1, 2, 3 and 4 of the CCrP).

90. Participants in the hearing are entitled to study all the materials submitted to the court and to submit additional materials relevant to the complaint. Disclosure of criminal-case materials is permissible only if it is not contrary to the interests of the investigation and does not breach the rights of the participants in the criminal proceedings. The judge may request the parties to produce the materials which served as the basis for the contested decision or any other relevant materials (paragraph 12 of Ruling no. 1).

91. Following the examination of the complaint, the court either declares the challenged decision, act or failure to act unlawful or unjustified and instructs the responsible official to rectify the indicated shortcoming, or dismisses the complaint (Article 125 § 5 of the CCrP). When instructing the official to rectify the indicated shortcoming, the court may not indicate any specific measures to be taken by the official or annul or order that the official annul the decision that had been found to be unlawful or unjustified (paragraph 21 of Ruling no. 1 of 10 February 2009 of the Plenary Supreme Court of the Russian Federation).

3. A judicial-review complaint under Chapter 25 of the Code of Civil Procedure, the Judicial Review Act and the Code of Administrative Procedure

92. Ruling no. 2 of 10 February 2009 of the Plenary Supreme Court of the Russian Federation provides that complaints concerning decisions and acts of officials or agencies performing operational-search activities that may not be challenged in criminal proceedings, as well as complaints concerning a refusal of access to information about the data collected in the course of operational-search activities, may be examined in accordance with the procedure established by Chapter 25 of the Code of Civil Procedure (“the CCP”) (paragraph 7).

93. Chapter 25 of the CCP, in force until 15 September 2015, established the procedure for examining complaints against decisions and acts of officials violating citizens’ rights and freedoms, which was further detailed in the Judicial Review Act. On 15 September 2015 Chapter 25 of

the CCP and the Judicial Review Act were repealed and replaced by the Code of Administrative Procedure (Law no. 21-FZ of 8 March 2015 – “the CAP”) which came into force on that date. The CAP confirmed in substance and expounded the provisions of Chapter 25 of the CCP and the Judicial Review Act.

94. The CCP, the Judicial Review Act and the CAP all provide that a citizen may lodge a complaint before a court concerning an act or decision by any State or municipal authority or official if he considers that it has violated his rights and freedoms (Article 254 of the CCP and section 1 of the Judicial Review Act). The complaint may concern any decision, act or omission which has violated the citizen’s rights or freedoms, has impeded the exercise of rights or freedoms, or has imposed a duty or liability on him (Article 255 of the CCP, section 2 of the Judicial Review Act and Article 218 § 1 of the CAP).

95. The complaint must be lodged with a court of general jurisdiction within three months of the date on which the complainant learnt of the breach of his rights. The time-limit may be extended for valid reasons (Article 254 of the CCP, sections 4 and 5 of the Judicial Review Act and Articles 218 § 5 and 219 §§ 1 and 7 of the CAP). The complaint must mention the identification number and the date of the contested decision or the date and place of commission of the contested act (Article 220 § 2 (3) of the CAP). The claimant must submit supporting documents or explain why he is unable to submit them (Article 220 §§ 2 (8) and 3 of the CAP). If the claimant does not meet the above requirements, the judge declares the complaint inadmissible (Article 222 § 3 of the CAP).

96. The burden of proof as to the lawfulness of the contested decision, act or omission lies with the authority or official concerned. The complainant must, however, prove that his rights and freedoms were breached by the contested decision, act or omission (section 6 of the Judicial Review Act and Article 226 § 11 of the CAP).

97. Under the CCP the complaint had to be examined within ten days (Article 257 of the CCP), while under the CAP it must be examined within two months (Article 226 § 1 of the CAP). If the court finds the complaint justified, it issues a decision annulling the contested decision or act and requiring the authority or official to remedy in full the breach of the citizen’s rights (Article 258 § 1 of the CCP, section 7 of the Judicial Review Act and Article 227 §§ 2 and 3 of the CAP). The court may determine the time-limit for remedying the violation and/or the specific steps which need to be taken to remedy the violation in full (paragraph 28 of Ruling no. 2 and Article 227 § 3 of the CAP). The claimant may then claim compensation in respect of pecuniary and non-pecuniary damage in separate civil proceedings (section 7 of the Judicial Review Act).

98. The court may reject the complaint if it finds that the act or decision being challenged has been taken by a competent authority or official, is

lawful and does not breach the citizen's rights (Article 258 § 4 of the CCP and Articles 226 § 9 and 227 § 2 of the CAP).

99. A party to the proceedings may lodge an appeal with a higher court (Article 336 of the CCP as in force until 1 January 2012, Article 320 of the CCP as in force after 1 January 2012, and Article 228 of the CAP). The appeal decision come into force on the day of its delivery (Article 367 of the CCP as in force until 1 January 2012, Article 329 § 5 as in force after 1 January 2012, and Articles 186 and 227 § 5 of the CAP).

100. The CCP provided that a judicial decision allowing a complaint and requiring the authority or official to remedy the breach of the citizen's rights had to be dispatched to the head of the authority concerned, to the official concerned or to their superiors within three days of its entry into force (Article 258 § 2 of the CCP). The Judicial Review Act required that the judicial decision be dispatched within ten days of its entry into force (section 8). The CAP requires that the judicial decision be dispatched on the day of its entry into force (Article 227 § 7). The court and the complainant must be notified of the enforcement of the decision no later than one month after its receipt (Article 258 § 3 of the CCP, section 8 of the Judicial Review Act and Article 227 § 9 of the CAP).

4. A tort claim under Article 1069 the of Civil Code

101. Damage caused to the person or property of a citizen shall be compensated in full by the tortfeasor. The tortfeasor is not liable for damage if he proves that the damage has been caused through no fault of his own (Article 1064 §§ 1 and 2 of the Civil Code).

102. State and municipal bodies and officials shall be liable for damage caused to a citizen by their unlawful actions or omissions (Article 1069 of the Civil Code). Irrespective of any fault by State officials, the State or regional treasury is liable for damage sustained by a citizen on account of (i) unlawful criminal conviction or prosecution; (ii) unlawful application of a preventive measure, or (iii) unlawful administrative punishment (Article 1070 of the Civil Code).

103. A court may impose on the tortfeasor an obligation to compensate for non-pecuniary damage (physical or mental suffering). Compensation for non-pecuniary damage is unrelated to any award in respect of pecuniary damage (Articles 151 § 1 and 1099 of the Civil Code). The amount of compensation is determined by reference to the gravity of the tortfeasor's fault and other significant circumstances. The court also takes into account the extent of physical or mental suffering in relation to the victim's individual characteristics (Articles 151 § 2 and 1101 of the Civil Code).

104. Irrespective of the tortfeasor's fault, non-pecuniary damage shall be compensated for if the damage was caused (i) by a hazardous device; (ii) in the event of unlawful conviction or prosecution or unlawful application of a preventive measure or unlawful administrative punishment; or (iii) through

dissemination of information which was damaging to honour, dignity or reputation (Article 1100 of the Civil Code).

105. In civil proceedings a party who makes an allegation must prove that allegation, unless provided otherwise by federal law (Article 56 § 1 of the CCP).

5. A complaint to the Constitutional Court

106. The Constitutional Court Act (Law no. 1-FKZ of 21 July 1994) provides that the Constitutional Court's opinion as to whether the interpretation of a legislative provision adopted by judicial and other law-enforcement practice is compatible with the Constitution, when that opinion is expressed in a judgment, must be followed by the courts and law-enforcement authorities from the date of that judgment's delivery (section 79(5)).

J. Obligations of communications service providers

1. Obligation to protect personal data and privacy of communications

107. The Communications Act provides that communications service providers must ensure privacy of communications. Information about the communications transmitted by means of telecommunications networks or mail services, and the contents of those communications, may be disclosed only to the sender and the addressee or their authorised representatives, except in cases specified in federal laws (section 63(2) and (4) of the Communications Act).

108. Information about subscribers and the services provided to them is confidential. Information about subscribers includes their family names, first names, patronymics and nicknames for natural persons; company names and family names, first names and patronymics of company directors and employees for legal persons; subscribers' addresses, numbers and other information permitting identification of the subscriber or his terminal equipment; and data from payment databases, including information about the subscribers' communications, traffic and payments. Information about subscribers may not be disclosed to third parties without the subscriber's consent, except in cases specified in federal laws (section 53 of the Communications Act).

2. Obligation to cooperate with law-enforcement authorities

109. The Communications Act imposes an obligation on communications service providers to provide the law-enforcement agencies, in cases specified in federal laws, with information about subscribers and services received by them and any other information the agencies require in

order to achieve their aims and objectives (section 64(1) of the Communications Act).

110. On 31 March 2008 the Moscow City Council discussed a proposal to introduce an amendment to section 64(1) of the Communications Act requiring law-enforcement agencies to show judicial authorisation to communications service providers when requesting information about subscribers. The representatives of the FSB and the Ministry of the Interior informed those present that judicial decisions authorising interceptions were classified documents and could not therefore be shown to communications service providers. The proposal to introduce the amendment was later rejected.

111. Communications service providers must ensure that their networks and equipment comply with the technical requirements developed by the Ministry of Communications in cooperation with law-enforcement agencies. Communications service providers must also ensure that the methods and tactics employed by law-enforcement agencies remain confidential (section 64(2) of the Communications Act).

112. In cases specified in federal laws, communications service providers must suspend provision of service to a subscriber upon receipt of a reasoned written order by the head of a law-enforcement agency conducting operational-search activities or protecting national security (section 64(3) of the Communications Act).

113. The FSB Act requires communications service providers to install equipment permitting the FSB to carry out operational-search activities (section 15).

3. Technical requirements for equipment to be installed by communications service providers

114. The main characteristics of the system of technical facilities enabling operational-search activities to be carried out (*Система технических средств для обеспечения функций оперативно-разыскных мероприятий* – “the SORM”) are outlined in a number of orders and regulations issued by the Ministry of Communications.

(a) Order no. 70

115. Order no. 70 on the technical requirements for the system of technical facilities enabling the conduct of operational-search activities using telecommunications networks, issued by the Ministry of Communications on 20 April 1999, stipulates that equipment installed by communications service providers must meet certain technical requirements, which are described in the addendums to the Order. The Order, with addendums, has been published in the Ministry of Communications’ official magazine, *SvyazInform*, distributed through subscription. It can also be

accessed through a privately maintained online legal database, which reproduced it from the publication in *SvyazInform*.

116. Addendums nos. 1 and 3 describe the technical requirements for the SORM on mobile-telephone networks. They specify that interception of communications is performed by law-enforcement agencies from a remote terminal connected to the interception equipment installed by the mobile-network operators. The equipment must be capable, *inter alia*, of (a) creating databases of interception subjects, to be managed from the remote terminal; (b) intercepting communications and transmitting the data thereby obtained to the remote terminal; (c) protecting the data from unauthorised access, including by the employees of the mobile-network operator; (d) providing access to subscriber-address databases (paragraphs 1.1 and 1.6 of Addendum no. 1).

117. More precisely, the equipment must ensure (a) interception of all the incoming and outgoing calls of the interception subject; (b) access to information about his whereabouts; (c) maintenance of interception capability where an ongoing connection is transferred between the networks of different mobile-network operators; (d) maintenance of interception capability in cases involving supplementary services, such as call forwarding, call transfer or conference calls, with the possibility of registering the number or numbers to which the call is routed; (e) collection of communications data concerning all types of connections, including fax, SMS or other; (f) access to information about the services provided to the interception subject (paragraph 2.1.2 of Addendum no. 1).

118. There are two types of interception: “total interception” and “statistical monitoring”. Total interception is the real-time interception of communications data and of the contents of all communications to or by the interception subject. Statistical monitoring is real-time monitoring of communications data only, with no interception of the content of communications. Communications data include the telephone number called, the start and end times of the connection, supplementary services used, location of the interception subject and his connection status (paragraphs 2.2 and 2.4 of Addendum no. 1).

119. The equipment installed must be capable of launching the interception of communications within thirty seconds of receiving a command from the remote terminal (paragraph 2.5 of Addendum no. 1).

120. Information about interception subjects or about the transmission of any data to the remote terminal cannot be logged or recorded (paragraph 5.4 of Addendum no. 1).

121. The remote terminal receives a password from the mobile-network operator giving it full access to the SORM. The remote terminal then changes the password so that unauthorised persons cannot gain access to the SORM. From the remote terminal, the SORM can be commanded, among others, to start interception in respect of a subscriber, interrupt or

discontinue the interception, intercept a subscriber's ongoing communication, and submit specified information about a subscriber (paragraph 3.1.2 of Addendum no. 3).

122. The remote terminal receives the following automatic notifications about the interception subjects: SMS sent or received by the interception subject, including their contents; a number being dialled; a connection being established; a connection being interrupted; use of supplementary services; and a change in the subject's connection status or location (paragraph 3.1.4 of Addendum no. 3).

(b) Order no. 130

123. Order no. 130 on the installation procedures for technical facilities enabling the conduct of operational-search activities, issued by the Ministry of Communications on 25 July 2000, stipulated that communications service providers had to install equipment which met the technical requirements laid down in Order no. 70. The installation procedure and schedule had to be approved by the FSB (paragraph 1.4).

124. Communications service providers had to take measures to protect information regarding the methods and tactics employed in operational-search activities (paragraph 2.4)

125. Communications service providers had to ensure that any interception of communications or access to communications data was granted only pursuant to a court order and in accordance with the procedure established by the OSAA (paragraph 2.5).

126. Communications service providers did not have to be informed of interceptions in respect of their subscribers. Nor did they have to be provided with judicial orders authorising interceptions (paragraph 2.6).

127. Interceptions were carried out by the staff and technical facilities of the FSB and the agencies of the Ministry of the Interior (paragraph 2.7).

128. Paragraphs 1.4 and 2.6 of Order no. 130 were challenged by a Mr N. before the Supreme Court. Mr N. argued that the reference to Order no. 70 contained in paragraph 1.4 was unlawful, as Order no. 70 had not been published and was invalid. As to paragraph 2.6, it was incompatible with the Communications Act, which provided that communications service providers had an obligation to ensure the privacy of communications. On 25 September 2000 the Supreme Court found that the reference to Order no. 70 in paragraph 1.4 was lawful, as Order no. 70 was technical in nature and was therefore not subject to publication in a generally accessible official publication. It had therefore been published only in a specialised magazine. As to paragraph 2.6, the Supreme Court considered that it could be interpreted as requiring communications service providers to grant law-enforcement agencies access to information about subscribers without judicial authorisation. Such a requirement was, however, incompatible with

the Communications Act. The Supreme Court therefore found that paragraph 2.6 was unlawful and inapplicable.

129. On 25 October 2000 the Ministry of Communications amended Order no. 130 by repealing paragraph 2.6.

130. In reply to a request for information by the NGO Civilian Control, the Ministry of Communications stated, in a letter dated 20 August 2006, that the repealing of paragraph 2.6 of Order no. 130 did not mean that communications service providers had to be informed of operational-search measures in respect of a subscriber or be provided with a copy of the relevant decision granting judicial authorisation for such surveillance.

131. Order no. 130 was repealed on 16 January 2008 (see paragraph 134 below).

(c) Order no. 538

132. Order no. 538 on cooperation between communications service providers and law-enforcement agencies, issued by the government on 27 August 2005, provides that communications service providers must be diligent in updating databases containing information about subscribers and the services provided to them. That information must be stored for three years. Law-enforcement agencies must have remote access to the databases at all times (paragraph 12).

133. Databases must contain the following information about subscribers: (a) first name, patronymic and family name, home address and passport number for natural persons; (b) company name, address and list of persons having access to the terminal equipment with their names, patronymics and family names, home addresses and passport numbers for legal persons; (c) information about connections, traffic and payments (paragraph 14).

(d) Order no. 6

134. Order no. 6 on requirements for telecommunications networks concerning the conduct of operational-search activities, Part I, issued by the Ministry of Communications on 16 January 2008, replaced Order no. 130.

135. It retained the requirement that communications service providers had to ensure transmission to the relevant law-enforcement agency's remote terminal of information about (a) subscribers' numbers and identification codes, and (b) the contents of their communications. The information must be transmitted in real time following a request from the remote terminal. Communications service providers must also ensure that the subscriber's location is identified (paragraphs 2, 3 and 5).

136. The remote terminal must have access to databases containing information about subscribers, including their numbers and identification codes (paragraphs 7 and 8).

137. Communications service providers must ensure that the interception subject remains unaware of the interception of his communications. Information about ongoing or past interceptions must be protected from unauthorised access by the employees of the communications service providers (paragraph 9).

(e) Order no. 73

138. Order no. 73 on requirements for telecommunications networks concerning the conduct of operational-search activities, Part II, issued by the Ministry of Communications on 27 May 2010, elaborates on certain requirements contained in Order no. 6. In particular, it provides that the equipment installed by communications service providers must ensure that agencies performing operational-search activities have access to all data transmitted through the telecommunications networks and are capable of selecting data and transmitting the selected data to its control terminal (paragraph 2).

III. RELEVANT INTERNATIONAL AND EUROPEAN INSTRUMENTS

A. United Nations

139. Resolution no. 68/167, on The Right to Privacy in the Digital Age, adopted by the General Assembly on 18 December 2013, reads as follows:

“The General Assembly,

...

4. *Calls upon* all States:

...

(c) To review their procedures, practices and legislation regarding the surveillance of communications, their interception and the collection of personal data, including mass surveillance, interception and collection, with a view to upholding the right to privacy by ensuring the full and effective implementation of all their obligations under international human rights law;

(d) To establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception and the collection of personal data;

...”

B. Council of Europe

140. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 (ETS 108) sets out standards for data protection in the sphere of automatic processing of

personal data in the public and private sectors. The relevant parts read as follows.

Article 8 – Additional safeguards for the data subject

“Any person shall be enabled:

- a. to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file;
- b. to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him are stored in the automated data file as well as communication to him of such data in an intelligible form;
- c. to obtain, as the case may be, rectification or erasure of such data if these have been processed contrary to the provisions of domestic law giving effect to the basic principles set out in Articles 5 and 6 of this Convention;
- d. to have a remedy if a request for confirmation or, as the case may be, communication, rectification or erasure as referred to in paragraphs b and c of this Article is not complied with.”

Article 9 – Exceptions and restrictions

“1. No exception to the provisions of Articles 5, 6 and 8 of this Convention shall be allowed except within the limits defined in this Article.

2. Derogation from the provisions of Articles 5, 6 and 8 of this Convention shall be allowed when such derogation is provided for by the law of the Party and constitutes a necessary measure in a democratic society in the interests of:

- a. protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences;
 - b. protecting the data subject or the rights and freedoms of others.
- ...”

Article 10 – Sanctions and remedies

“Each Party undertakes to establish appropriate sanctions and remedies for violations of provisions of domestic law giving effect to the basic principles for data protection set out in this chapter.”

141. The above Convention was ratified by Russia on 15 May 2013 and came into force in respect of Russia on 1 September 2013. The instrument of ratification deposited by the Russian Federation on 15 May 2013 contains the following declaration.

“The Russian Federation declares that in accordance with subparagraph ‘a’ of paragraph 2 of Article 3 of the Convention, it will not apply the Convention to personal data:

...

(b) falling under State secrecy in accordance with the legislation of the Russian Federation on State secrecy.

The Russian Federation declares that in accordance with subparagraph ‘c’ of paragraph 2 of Article 3 of the Convention, it will apply the Convention to personal data which is not processed automatically, if the application of the Convention corresponds to the nature of the actions performed with the personal data without using automatic means.

The Russian Federation declares that in accordance with subparagraph ‘a’ of paragraph 2 of Article 9 of the Convention, it retains the right to limit the right of the data subject to access personal data on himself for the purposes of protecting State security and public order.”

142. The Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows of 8 November 2001 (ETS 181), signed but not ratified by Russia, provides as follows:

“Article 1 – Supervisory authorities

“1. Each Party shall provide for one or more authorities to be responsible for ensuring compliance with the measures in its domestic law giving effect to the principles stated in Chapters II and III of the Convention and in this Protocol.

2. a. To this end, the said authorities shall have, in particular, powers of investigation and intervention, as well as the power to engage in legal proceedings or bring to the attention of the competent judicial authorities violations of provisions of domestic law giving effect to the principles mentioned in paragraph 1 of Article 1 of this Protocol.

b. Each supervisory authority shall hear claims lodged by any person concerning the protection of his/her rights and fundamental freedoms with regard to the processing of personal data within its competence.

3. The supervisory authorities shall exercise their functions in complete independence.

4. Decisions of the supervisory authorities, which give rise to complaints, may be appealed against through the courts.

...”

143. Recommendation No. R (87) 15 of the Council of Europe’s Committee of Ministers to member States regulating the use of personal data in the police sector, adopted on 17 September 1987, reads as follows.

“1.1. Each member state should have an independent supervisory authority outside the police sector which should be responsible for ensuring respect for the principles contained in this recommendation.

...

2.1. The collection of personal data for police purposes should be limited to such as is necessary for the prevention of a real danger or the suppression of a specific criminal offence. Any exception to this provision should be the subject of specific national legislation.

2.2. Where data concerning an individual have been collected and stored without his knowledge, and unless the data are deleted, he should be informed, where

practicable, that information is held about him as soon as the object of the police activities is no longer likely to be prejudiced.

...

3.1. As far as possible, the storage of personal data for police purposes should be limited to accurate data and to such data as are necessary to allow police bodies to perform their lawful tasks within the framework of national law and their obligations arising from international law.

...

5.2.i. ... Communication of data to other public bodies should only be permissible if, in a particular case:

a. there exists a clear legal obligation or authorisation, or with the authorisation of the supervisory authority, or if

b. these data are indispensable to the recipient to enable him to fulfil his own lawful task and provided that the aim of the collection or processing to be carried out by the recipient is not incompatible with the original processing, and the legal obligations of the communicating body are not contrary to this.

5.2.ii. Furthermore, communication to other public bodies is exceptionally permissible if, in a particular case:

a. the communication is undoubtedly in the interest of the data subject and either the data subject has consented or circumstances are such as to allow a clear presumption of such consent, or if

b. the communication is necessary so as to prevent a serious and imminent danger.

5.3.i. ... The communication of data to private parties should only be permissible if, in a particular case, there exists a clear legal obligation or authorisation, or with the authorisation of the supervisory authority.

...

6.4. Exercise of the rights [of the data subject] of access, rectification and erasure should only be restricted insofar as a restriction is indispensable for the performance of a legal task of the police or is necessary for the protection of the data subject or the rights and freedoms of others.

...

6.5. A refusal or a restriction of those rights should be reasoned in writing. It should only be possible to refuse to communicate the reasons insofar as this is indispensable for the performance of a legal task of the police or is necessary for the protection of the rights and freedoms of others.

6.6. Where access is refused, the data subject should be able to appeal to the supervisory authority or to another independent body which shall satisfy itself that the refusal is well founded.

...

7.1. Measures should be taken so that personal data kept for police purposes are deleted if they are no longer necessary for the purposes for which they were stored.

For this purpose, consideration shall in particular be given to the following criteria: the need to retain data in the light of the conclusion of an inquiry into a particular

case; a final judicial decision, in particular an acquittal; rehabilitation; spent convictions; amnesties; the age of the data subject, particular categories of data.

7.2. Rules aimed at fixing storage periods for the different categories of personal data as well as regular checks on their quality should be established in agreement with the supervisory authority or in accordance with domestic law.

8. The responsible body should take all the necessary measures to ensure the appropriate physical and logical security of the data and prevent unauthorised access, communication or alteration.

The different characteristics and contents of files should, for this purpose, be taken into account.”

144. Recommendation No. R (95) 4 on the protection of personal data in the area of telecommunication services, with particular reference to telephone services, adopted on 7 February 1995, reads in so far as relevant as follows.

“2.4. Interference by public authorities with the content of a communication, including the use of listening or tapping devices or other means of surveillance or interception of communications, must be carried out only when this is provided for by law and constitutes a necessary measure in a democratic society in the interests of:

- a. protecting state security, public safety, the monetary interests of the state or the suppression of criminal offences;
- b. protecting the data subject or the rights and freedoms of others.

2.5. In the case of interference by public authorities with the content of a communication, domestic law should regulate:

- a. the exercise of the data subject’s rights of access and rectification;
- b. in what circumstances the responsible public authorities are entitled to refuse to provide information to the person concerned, or delay providing it;
- c. storage or destruction of such data.

If a network operator or service provider is instructed by a public authority to effect an interference, the data so collected should be communicated only to the body designated in the authorisation for that interference.”

C. European Union

145. Council Resolution of 17 January 1995 on the lawful interception of telecommunications (96/C 329/01) provides as follows.

“This section presents the requirements of law enforcement agencies relating to the lawful interception of telecommunications. These requirements are subject to national law and should be interpreted in accordance with applicable national policies.

...

1.3. Law enforcement agencies require that the telecommunications to and from a target service be provided to the exclusion of any telecommunications that do not fall within the scope of the interception authorization.

...

2. Law enforcement agencies require a real-time, fulltime monitoring capability for the interception of telecommunications. Call associated data should also be provided in real-time. If call associated data cannot be made available in real time, law enforcement agencies require the data to be available as soon as possible upon call termination.

3. Law enforcement agencies require network operators/service providers to provide one or several interfaces from which the intercepted communications can be transmitted to the law enforcement monitoring facility. These interfaces have to be commonly agreed on by the interception authorities and the network operators/service providers. Other issues associated with these interfaces will be handled according to accepted practices in individual countries.

...

5. Law enforcement agencies require the interception to be designed and implemented to preclude unauthorized or improper use and to safeguard the information related to the interception.

...

5.2. Law enforcement agencies require network operators/service providers to ensure that intercepted communications are only transmitted to the monitoring agency specified in the interception authorization.

...”

146. The above requirements were confirmed and expounded in Council Resolution No. 9194/01 of 20 June 2001 on law enforcement operational needs with respect to public telecommunication networks and services.

147. The judgment the Court of Justice of the European Union (CJEU) of 8 April 2014 in the joined cases of *Digital Rights Ireland and Seitinger and Others* (C-293/12 and C-594/12, EU:C:2014:238) declared invalid the Data Retention Directive 2006/24/EC laying down the obligation on the providers of publicly available electronic communication services or of public communications networks to retain all traffic and location data for periods from six months to two years, in order to ensure that the data were available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each member State in its national law. The CJEU noted that, even though the Directive did not permit the retention of the content of the communication, the traffic and location data covered by it might allow very precise conclusions to be drawn concerning the private lives of the persons whose data had been retained. Accordingly, the obligation to retain those data constituted in itself an interference with the right to respect for private life and communications guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union and the right to protection of personal data under its Article 8. Furthermore, the access of the competent national authorities to the data constituted a further interference with those fundamental rights. The CJEU further held that the interference was particularly serious. The fact that data were retained and subsequently used without the subscriber or registered user being informed

was likely to generate in the minds of the persons concerned the feeling that their private lives were the subject of constant surveillance. The interference satisfied an objective of general interest, namely to contribute to the fight against serious crime and terrorism and thus, ultimately, to public security. However, it failed to satisfy the requirement of proportionality. Firstly, the Directive covered, in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime. It therefore entailed an interference with the fundamental rights of practically the entire European population. It applied even to persons for whom there was no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime. Secondly, the Directive did not contain substantive and procedural conditions relating to the access of the competent national authorities to the data and to their subsequent use. By simply referring, in a general manner, to serious crime, as defined by each member State in its national law, the Directive failed to lay down any objective criterion by which to determine which offences might be considered to be sufficiently serious to justify such an extensive interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. Above all, the access by the competent national authorities to the data retained was not made dependent on a prior review carried out by a court or by an independent administrative body whose decision sought to limit access to the data and their use to what was strictly necessary for the purpose of attaining the objective pursued. Thirdly, the Directive required that all data be retained for a period of at least six months, without any distinction being made between the categories of data on the basis of their possible usefulness for the purposes of the objective pursued or according to the persons concerned. The CJEU concluded that the Directive entailed a wide-ranging and particularly serious interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, without such an interference being precisely circumscribed by provisions to ensure that it was actually limited to what was strictly necessary. The CJEU also noted that the Directive did not provide for sufficient safeguards, by means of technical and organisational measures, to ensure effective protection of the data retained against the risk of abuse and against any unlawful access and use of those data.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

148. The applicant complained that the system of covert interception of mobile-telephone communications in Russia did not comply with the requirements of Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

149. The Government submitted that the applicant could not claim to be a victim of the alleged violation of his right to respect for his private life or correspondence (see paragraphs 152-57 below). Moreover, he had not exhausted domestic remedies (see paragraphs 219-26 below).

150. The Court considers that the Government’s objections are so closely linked to the substance of the applicant’s complaint that they must be joined to the merits.

151. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant’s victim status and the existence of an “interference”

(a) The parties’ submissions

(i) The Government

152. The Government submitted that the applicant could not claim to be a victim of the alleged violation of Article 8 of the Convention and that there had been no interference with his rights. He had not complained that his communications had been intercepted. The gist of his complaint before the domestic courts and the Court was that communications service providers had installed special equipment enabling the authorities to perform operational-search activities. In the Government’s opinion, the case of *Orange Slovensko, a. s. v. Slovakia* ((dec.), no. 43983/02, 24 October

2006) confirmed that installation of interception equipment, or even its financing, by private companies was not in itself contrary to the Convention.

153. The Government further submitted that Article 34 could not be used to lodge an application in the nature of an *actio popularis*; nor could it form the basis of a claim made *in abstracto* that a law contravened the Convention (they referred to *Aalmoes and Others v. the Netherlands* (dec.), no. 16269/02, 25 November 2004). They argued that the approach to victim status established in the cases of *Klass and Others v. Germany* (6 September 1978, § 34, Series A no. 28) and *Malone v. the United Kingdom* (2 August 1984, § 64, Series A no. 82) – according to which an individual might, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures had in fact been applied to him – could not be interpreted so broadly as to encompass every person in the respondent State who feared that the security services might have compiled information about him. An applicant was required to demonstrate that there was a “reasonable likelihood” that the security services had compiled and retained information concerning his private life (they referred to *Esbester v. the United Kingdom*, no. 18601/91, Commission decision of 2 April 1993, unreported; *Redgrave v. the United Kingdom*, no. 20271/92, Commission decision of 1 September 1993, unreported; *Matthews v. the United Kingdom*, no. 28576/95, Commission decision of 16 October 1996, unreported; *Halford v. the United Kingdom*, 25 June 1997, § 17, Reports of Judgments and Decisions 1997-III; *Weber and Saravia v. Germany* (dec.), no. 54934/00, §§ 4-6 and 78, ECHR 2006-XI; and *Kennedy v. the United Kingdom*, no. 26839/05, §§ 122-23, 18 May 2010).

154. The Government maintained that exceptions to the rule of “reasonable likelihood” were permissible only for special reasons. An individual could claim an interference as a result of the mere existence of legislation permitting secret surveillance measures in exceptional circumstances only, having regard to the availability of any remedies at the national level and the risk of secret surveillance measures being applied to him (they cited *Kennedy*, cited above, § 124). According to the Government, no such special reasons could be established in the present case.

155. Firstly, there was no “reasonable likelihood”, or indeed any risk whatsoever, that the applicant had been subjected to surveillance measures because he had not been suspected of any criminal offences. The fact that he was the editor-in-chief of a publishing company could not serve as a ground for interception under Russian law. The Government asserted that the applicant’s telephone conversations had never been intercepted. The applicant had not produced any proof to the contrary. The documents

submitted by him in the domestic proceedings had concerned third persons and had not contained any proof that his telephone had been tapped.

156. Secondly, remedies were available at the national level to challenge both the alleged insufficiency of safeguards against abuse in Russian law and any specific surveillance measures applied to an individual. It was possible to request that the Constitutional Court review the constitutionality of the Operational-Search Activities Act of 12 August 1995 (no. 144-FZ – “the OSAA”). It was also possible to lodge a complaint with the Supreme Court, as had been successfully done by Mr N., who had obtained a finding of unlawfulness in respect of a provision of the Ministry of Communications’ Order no. 130 (see paragraph 128 above). As regards Order no. 70, contrary to the applicant’s allegations, it had been duly published (see paragraph 181 below) and could therefore be challenged in the courts. A person whose communications had been intercepted unlawfully without prior judicial authorisation could also obtain redress in a civil court. The Government referred to the Supreme Court’s judgment of 15 July 2009, which found that the installation of a video camera in the claimant’s office and the tapping of his office telephone had been unlawful because those surveillance measures had been carried out without prior judicial authorisation (see also paragraphs 219-24 below). Finally, Russian law provided for supervision of interception of communications by an independent body, the prosecutor’s office.

157. The Government concluded, in view of the above, that the present case was different from *Association for European Integration and Human Rights and Ekimdzhev v. Bulgaria* (no. 62540/00, 28 June 2007) where the Court had refused to apply the “reasonable likelihood” test because of the absence of any safeguards against unlawful interception in Bulgaria. Given that Russian law provided for adequate and sufficient safeguards against abuse in the sphere of interception of communications, including available remedies, in the Government’s opinion the applicant could not claim an interference as a result of the mere existence of legislation permitting secret surveillance. In the absence of a “reasonable likelihood” that his telephone communications had been intercepted, he could not claim to be a victim of the alleged violation of Article 8 of the Convention.

(ii) *The applicant*

158. The applicant submitted that he could claim to be a victim of a violation of Article 8 due to the mere existence of legislation which allowed a system of secret interception of communications, without having to demonstrate that such secret measures had in fact been applied to him. The existence of such legislation entailed a threat of surveillance for all users of the telecommunications services and therefore amounted in itself to an interference with the exercise of his rights under Article 8. He relied in support of his position on *Klass and Others* (cited above, §§ 34 and 37),

Association for European Integration and Human Rights and Ekimdzhiev (cited above, § 58) and *Kennedy* (cited above, § 123).

159. The applicant maintained that the test of “reasonable likelihood” had been applied by the Court only in those cases where the applicant had alleged actual interception, while in the cases concerning general complaints concerning legislation and practice permitting secret surveillance measures the “mere existence” test established in *Klass and Others* had been applied (see *Association for European Integration and Human Rights and Ekimdzhiev*, cited above, § 59, and *Kennedy*, cited above, §§ 122-23, with further references). In *Liberty and Others v. the United Kingdom* (no. 58243/00, §§ 56-57, 1 July 2008), the Court found that the existence of powers permitting the authorities to intercept communications constituted an interference with the Article 8 rights of the applicants, since they were persons to whom these powers might have been applied. In *Kennedy* (cited above, § 124) that test had been further elaborated upon to include the assessment of availability of any remedies at the national level and the risk of secret surveillance measures being applied to the applicant. Finally, in *Mersch and Others v. Luxemburg* (nos. 10439/83 and 5 others, Commission decision of 10 May 1985, Decisions and Reports 43) the Commission found that, in those cases where the authorities had no obligation to notify the persons concerned about the surveillance measures to which they had been subjected, the applicants could claim to be “victims” of a violation of the Convention on account of the mere existence of secret-surveillance legislation, even though they could not allege in support of their applications that they had been subjected to an actual measure of surveillance.

160. The applicant argued that he could claim to be a victim of a violation of Article 8 on account both of the mere existence of secret-surveillance legislation and of his personal situation. The OSAA, taken together with the FSB Act, the Communications Act and the Orders adopted by the Ministry of Communication, such as Order no. 70, permitted the security services to intercept, through technical means, any person’s communications without obtaining prior judicial authorisation for interception. In particular, the security services had no obligation to show the interception authorisation to anyone, including the communications service provider. The contested legislation therefore permitted blanket interception of communications.

161. No remedies were available under Russian law to challenge that legislation. Thus, as regards the possibility of challenging Order no. 70, the applicant referred to the Supreme Court’s decision of 25 September 2000 on a complaint by a Mr N. (see paragraph 128 above) finding that that Order was technical rather than legal in nature, and was therefore not subject to official publication. He also submitted a copy of the decision of 24 May 2010 by the Supreme Commercial Court finding that the Orders by the

Ministry of Communications requiring communications providers to install equipment enabling the authorities to perform operational-search activities were not subject to judicial review in commercial courts. The domestic proceedings brought by the applicant had shown that Order no. 70 could not be effectively challenged before the Russian courts. Further, as far as the OSAA was concerned, the Constitutional Court had already examined its constitutionality on a number of occasions and had found that it was compatible with the Constitution. Finally, as regards the possibility of challenging individual surveillance measures, the applicant submitted that the person concerned was not notified of the interception, unless the intercepted material had been used as evidence in criminal proceedings against him. In the absence of notification, the domestic remedies were ineffective (see also paragraph 217 below).

162. As to his personal situation, the applicant submitted that he was a journalist and the chairperson of the St Petersburg branch of the Glasnost Defence Foundation, which monitored the state of media freedom and provided legal support to journalists whose professional rights had been violated (see paragraph 8 above). His communications were therefore at an increased risk of being intercepted. The applicant referred in that connection to the fundamental importance of protecting journalists' sources, emphasised by the Grand Chamber judgment in *Sanoma Uitgevers B.V. v. the Netherlands* ([GC], no. 38224/03, § 50, 14 September 2010).

(b) The Court's assessment

163. The Court observes that the applicant in the present case claims that there has been an interference with his rights as a result of the mere existence of legislation permitting covert interception of mobile-telephone communications and a risk of being subjected to interception measures, rather than as a result of any specific interception measures applied to him.

(i) Summary of the Court's case-law

164. The Court has consistently held in its case-law that the Convention does not provide for the institution of an *actio popularis* and that its task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention (see, among other authorities, *N.C. v. Italy* [GC], no. 24952/94, § 56, ECHR 2002-X; *Krone Verlag GmbH & Co. KG v. Austria (no. 4)*, no. 72331/01, § 26, 9 November 2006; and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 101, ECHR 2014). Accordingly, in order to be able to lodge an application in accordance with Article 34, an individual must be able to show that he was "directly affected" by the measure complained of. This is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in

a rigid, mechanical and inflexible way throughout the proceedings (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 96).

165. Thus, the Court has permitted general challenges to the relevant legislative regime in the sphere of secret surveillance in recognition of the particular features of secret surveillance measures and the importance of ensuring effective control and supervision of them. In *Klass and Others* the Court held that an individual might, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures had in fact been applied to him. The relevant conditions were to be determined in each case according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures (see *Klass and Others*, cited above, § 34). The Court explained the reasons for its approach as follows.

“36. The Court points out that where a State institutes secret surveillance the existence of which remains unknown to the persons being controlled, with the effect that the surveillance remains unchallengeable, Article 8 could to a large extent be reduced to a nullity. It is possible in such a situation for an individual to be treated in a manner contrary to Article 8, or even to be deprived of the right granted by that Article, without his being aware of it and therefore without being able to obtain a remedy either at the national level or before the Convention institutions.

...

The Court finds it unacceptable that the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the person concerned is kept unaware of its violation. A right of recourse to the Commission for persons potentially affected by secret surveillance is to be derived from Article 25 [currently Article 34], since otherwise Article 8 runs the risk of being nullified.

37. As to the facts of the particular case, the Court observes that the contested legislation institutes a system of surveillance under which all persons in the Federal Republic of Germany can potentially have their mail, post and telecommunications monitored, without their ever knowing this unless there has been either some indiscretion or subsequent notification in the circumstances laid down in the Federal Constitutional Court’s judgment ... To that extent, the disputed legislation directly affects all users or potential users of the postal and telecommunication services in the Federal Republic of Germany. Furthermore, as the Delegates rightly pointed out, this menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8.

...

38. Having regard to the specific circumstances of the present case, the Court concludes that each of the applicants is entitled to ‘(claim) to be the victim of a violation’ of the Convention, even though he is not able to allege in support of his application that he has been subject to a concrete measure of surveillance. The question whether the applicants were actually the victims of any violation of the

Convention involves determining whether the contested legislation is in itself compatible with the Convention's provisions.

..."

166. Following the judgment in *Klass and Others*, the case-law of the Convention organs developed two parallel approaches to victim status in secret-surveillance cases.

167. In several cases the Commission and the Court held that the test in *Klass and Others* could not be interpreted so broadly as to encompass every person in the respondent State who feared that the security services might have compiled information about him. An applicant could not, however, be reasonably expected to prove that information concerning his private life had been compiled and retained. It was sufficient, in the area of secret measures, that the existence of practices permitting secret surveillance be established and that there was a reasonable likelihood that the security services had compiled and retained information concerning his private life (see *Esbester*, cited above; *Redgrave*, cited above; *Christie v. the United Kingdom*, no. 21482/93, Commission decision of 27 June 1994, Decisions and Reports 78-A; *Matthews*, cited above; *Halford*, cited above, §§ 47 and 55-57; and *Iliya Stefanov v. Bulgaria*, no. 65755/01, §§ 49-50, 22 May 2008). In all of the above cases, the applicants alleged actual interception of their communications. In some of them they also made general complaints concerning legislation and practice permitting secret surveillance measures (see *Esbester*; *Redgrave*; *Matthews*; and *Christie*, all cited above).

168. In other cases the Court reiterated the *Klass and Others* approach that the mere existence of laws and practices which permitted and established a system for effecting secret surveillance of communications entailed a threat of surveillance for all those to whom the legislation might be applied. This threat necessarily affected freedom of communication between users of the telecommunications services and thereby amounted in itself to an interference with the exercise of the applicants' rights under Article 8, irrespective of any measures actually taken against them (see *Malone*, cited above, § 64; *Weber and Saravia*, cited above, § 78; *Association for European Integration and Human Rights and Ekimdzhiev*, cited above, §§ 58-59 and 69; *Liberty and Others*, cited above, §§ 56-57; and *Iordachi and Others v. Moldova*, no. 25198/02, §§ 30-35, 10 February 2009). In all of the above cases the applicants made general complaints concerning legislation and practice permitting secret surveillance measures. In some of them they also alleged actual interception of their communications (see *Malone*, cited above, § 62, and *Liberty and Others*, cited above, §§ 41-42).

169. Finally, in its most recent case on the subject, *Kennedy*, the Court held that sight should not be lost of the special reasons justifying the Court's departure, in cases concerning secret measures, from its general approach to deny individuals the right to challenge a law *in abstracto*. The principal

reason was to ensure that the secrecy of such measures did not result in the measures being effectively unchallengeable and outside the supervision of the national judicial authorities and the Court. In order to assess, in a particular case, whether an individual can claim an interference as a result of the mere existence of legislation permitting secret surveillance measures, the Court must have regard to the availability of any remedies at the national level and the risk of secret surveillance measures being applied to him. Where there is no possibility of challenging the alleged application of secret surveillance measures at domestic level, widespread suspicion and concern among the general public that secret surveillance powers are being abused cannot be said to be unjustified. In such cases, even where the actual risk of surveillance is low, there is a greater need for scrutiny by this Court (see *Kennedy*, cited above, § 124).

(ii) *Harmonisation of the approach to be taken*

170. The Court considers, against this background, that it is necessary to clarify the conditions under which an applicant can claim to be the victim of a violation of Article 8 without having to prove that secret surveillance measures had in fact been applied to him, so that a uniform and foreseeable approach may be adopted.

171. In the Court's view the *Kennedy* approach is best tailored to the need to ensure that the secrecy of surveillance measures does not result in the measures being effectively unchallengeable and outside the supervision of the national judicial authorities and of the Court. Accordingly, the Court accepts that an applicant can claim to be the victim of a violation occasioned by the mere existence of secret surveillance measures, or legislation permitting secret surveillance measures, if the following conditions are satisfied. Firstly, the Court will take into account the scope of the legislation permitting secret surveillance measures by examining whether the applicant can possibly be affected by it, either because he belongs to a group of persons targeted by the contested legislation or because the legislation directly affects all users of communication services by instituting a system where any person can have his communications intercepted. Secondly, the Court will take into account the availability of remedies at the national level and will adjust the degree of scrutiny depending on the effectiveness of such remedies. As the Court observed in *Kennedy*, where the domestic system does not afford an effective remedy to the person who suspects that he was subjected to secret surveillance, widespread suspicion and concern among the general public that secret surveillance powers are being abused cannot be said to be unjustified (see *Kennedy*, cited above, § 124). In such circumstances the threat of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by

Article 8. There is therefore a greater need for scrutiny by the Court, and an exception to the rule denying individuals the right to challenge a law *in abstracto* is justified. In such cases the individual does not need to demonstrate the existence of any risk that secret surveillance measures were applied to him. By contrast, if the national system provides for effective remedies, a widespread suspicion of abuse is more difficult to justify. In such cases, the individual may claim to be a victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures only if he is able to show that, due to his personal situation, he is potentially at risk of being subjected to such measures.

172. The *Kennedy* approach therefore provides the Court with the requisite degree of flexibility to deal with a variety of situations which might arise in the context of secret surveillance, taking into account the particularities of the legal systems in the member States, namely the available remedies, as well as the different personal situations of applicants.

(iii) *Application to the present case*

173. It is not disputed that mobile-telephone communications are covered by the notions of “private life” and “correspondence” in Article 8 § 1 (see, for example, *Liberty and Others*, cited above, § 56).

174. The Court observes that the applicant in the present case claims that there has been an interference with his rights as a result of the mere existence of legislation permitting secret surveillance measures and a risk of being subjected to such measures, rather than as a result of any specific surveillance measures applied to him.

175. The Court notes that the contested legislation institutes a system of secret surveillance under which any person using the mobile-telephone services of Russian providers can have his mobile-telephone communications intercepted, without ever being notified of the surveillance. To that extent, the legislation in question directly affects all users of these mobile-telephone services.

176. Furthermore, for the reasons set out below (see paragraphs 286-300), Russian law does not provide for effective remedies for a person who suspects that he was subjected to secret surveillance.

177. In view of the above finding, the applicant does not need to demonstrate that, due to his personal situation, he is at risk of being subjected to secret surveillance.

178. Having regard to the secret nature of the surveillance measures provided for by the contested legislation, the broad scope of their application, affecting all users of mobile-telephone communications, and the lack of effective means to challenge the alleged application of secret surveillance measures at domestic level, the Court considers an examination of the relevant legislation *in abstracto* to be justified.

179. The Court therefore finds that the applicant is entitled to claim to be the victim of a violation of the Convention, even though he is unable to allege that he has been subject to a concrete measure of surveillance in support of his application. For the same reasons, the mere existence of the contested legislation amounts in itself to an interference with the exercise of his rights under Article 8. The Court therefore dismisses the Government's objection concerning the applicant's lack of victim status.

2. *The justification for the interference*

(a) **The parties' submissions**

(i) *Accessibility of domestic law*

180. The applicant submitted that the addendums to Order no. 70 describing the technical requirements for the equipment to be installed by communications service providers had never been officially published and were not accessible to the public. In the applicant's opinion, in so far as they determined the powers of the law-enforcement authorities with regard to secret surveillance, they affected citizens' rights and ought therefore to have been published. The fact that the applicant had eventually had access to the addendums in the domestic proceedings could not remedy the lack of an official publication (he referred to *Kasymakhunov and Saybatalov v. Russia*, nos. 26261/05 and 26377/06, § 92, 14 March 2013). Citizens should not be required to engage judicial proceedings to obtain access to regulations applicable to them. The Court had already found that it was essential to have clear, detailed and accessible rules on the application of secret measures of surveillance (*Shimovolos v. Russia*, no. 30194/09, § 68, 21 June 2011).

181. The Government submitted that Order no. 70 was technical in nature and was not therefore subject to official publication. It had been published in a specialised magazine, *SvyazInform* (issue no. 6 of 1999). It was also available in the *ConsultantPlus* online legal database, and was accessible without charge. The applicant had submitted a copy of the Order with its addendums to the Court, which showed that he had been able to obtain access to it. The domestic law was therefore accessible.

(ii) *Scope of application of secret surveillance measures*

182. The applicant submitted that the Court had already found that the OSAA did not meet the "foreseeability" requirement because the legal discretion of the authorities to order "an operative experiment" involving recording of private communications through a radio-transmitting device was not subject to any conditions, and the scope and the manner of its exercise were not defined (see *Bykov v. Russia* [GC], no. 4378/02, § 80, 10 March 2009). The present case was similar to that in *Bykov*. In particular, Russian law did not clearly specify the categories of persons who might be

subjected to interception measures. In particular, surveillance measures were not limited to persons suspected or accused of criminal offences. Any person who had information about a criminal offence could have his telephone tapped. Furthermore, interception was not limited to serious and especially serious offences. Russian law allowed interception measures in connection with offences of medium severity, such as, for example, pickpocketing.

183. The Government submitted that interception of communications might be conducted only following the receipt of information that a criminal offence had been committed, was being committed or was being plotted; about persons conspiring to commit, or committing, or having committed a criminal offence; or about events or activities endangering the national, military, economic or ecological security of the Russian Federation. The Constitutional Court had held in its ruling of 14 July 1998 that collecting information about a person's private life was permissible only with the aim of preventing, detecting and investigating criminal offences or in pursuance of other lawful aims listed in the OSAA.

184. Only offences of medium severity, serious offences and especially serious offences might give rise to an interception order and only persons suspected of such offences or who might have information about such offences could be subject to interception measures. The Government submitted in this connection that the Court had already found that surveillance measures in respect of a person who was not suspected of any offence could be justified under the Convention (referring to *Greuter v. the Netherlands* (dec.), no. 40045/98, 19 March 2002).

185. Further, in respect of interceptions for the purpose of protecting national security, the Government argued that the requirement of "foreseeability" of the law did not go so far as to compel States to enact legal provisions listing in detail all conduct that might prompt a decision to subject an individual to surveillance on "national security" grounds (see *Kennedy*, cited above, § 159).

(iii) *The duration of secret surveillance measures*

186. The applicant submitted that the OSAA did not explain under what circumstances interception could be extended beyond six months. Nor did it establish the maximum duration of interception measures.

187. The Government submitted that under Russian law interception might be authorised by a judge for a maximum period of six months and might be extended if necessary. It had to be discontinued if the investigation was terminated. They argued that it was reasonable to leave the duration of the interception to the discretion of the domestic authorities, having regard to the complexity and the duration of the investigation in a specific case (see *Kennedy*, cited above). They also referred to the case of *Van Pelt v. the Netherlands* (no. 20555/92, Commission decision of 6 April 1994,

unreported), where the Commission had found that the tapping of the applicant's telephone for almost two years had not violated the Convention.

(iv) Procedures to be followed for storing, accessing, examining, using, communicating and destroying the intercepted data

188. The applicant further submitted that the OSAA did not specify the procedures to be followed for examining, storing, accessing or using the intercept data or the precautions to be taken when communicating the data to other parties. It provided that the data had to be destroyed within six months, unless those data were needed in the interest of the service or of justice. There was however no definition of what the "interest of the service or of justice" meant. Russian law also gave complete freedom to the trial judge as to whether to store or to destroy data used in evidence after the end of the trial.

189. The Government submitted that the OSAA required that records of intercepted communications had to be stored under conditions excluding any risk of their being listened to or copied by unauthorised persons. The judicial decision authorising interception of communications, the materials that served as a basis for that decision and the data collected as a result of interception constituted a State secret and were to be held in the exclusive possession of the State agency performing interceptions. If it was necessary to transmit them to an investigator, a prosecutor or a court, they could be declassified by the heads of the agencies conducting operational-search activities. Interception authorisations were declassified by the courts which had issued them. The procedure for transmitting the data collected in the course of operational-search activities to the competent investigating authorities or a court was set out in the Ministry of the Interior's Order of 27 September 2013 (see paragraph 58 above).

190. The data collected in the course of operational-search activities were to be stored for one year and then destroyed, unless they were needed in the interests of the authority or of justice. Recordings were to be stored for six months and then destroyed. Russian law was therefore foreseeable and contained sufficient safeguards.

(v) Authorisation of secret surveillance measures

(a) The applicant

191. The applicant submitted that, although domestic law required prior judicial authorisation for interceptions, the authorisation procedure did not provide for sufficient safeguards against abuse. Firstly, in urgent cases communications could be intercepted without judicial authorisation for up to forty-eight hours. Secondly, in contrast to the CCrP, the OSAA did not provide for any requirements concerning the content of the interception authorisation. In particular, it did not require that the interception subject be

clearly specified in the authorisation by name, telephone number or address (see, by contrast, the United Kingdom's and Bulgaria's legislation reproduced in *Kennedy*, cited above, §§ 41 and 160, and *Association for European Integration and Human Rights and Ekimdzhiev*, cited above, § 13). Nor did domestic law require that the authorisation specify which communications, or types of communications, should be recorded in order to limit the law-enforcement authorities' discretion to determine the scope of surveillance measures. Russian law did not establish any special rules for surveillance in sensitive situations, for example where the confidentiality of journalists' sources was at stake, or where surveillance concerned privileged lawyer-client communications.

192. The applicant further submitted that domestic law did not impose any requirement on the judge to verify the existence of a "reasonable suspicion" against the person concerned or to apply the "necessity" and "proportionality" test. The requesting authorities had no obligation to attach any supporting materials to the interception requests. Moreover, the OSAA expressly prohibited submission to the judge of certain materials – those containing information about undercover agents or police informers or about the organisation and tactics of operational-search measures – thereby making it impossible for the judge to verify effectively the existence of a "reasonable suspicion". Russian law did not require that the judge should authorise interception only when it was impossible to achieve the legitimate aims by other less intrusive means.

193. In support of his allegation that judges did not verify the existence of a "reasonable suspicion" against the person concerned and did not apply the "necessity" and "proportionality" test, the applicant produced copies of analytical notes issued by three District Courts in different Russian regions (the Tambov region, the Tula region and the Dagestan Republic). The courts summarised their own case-law concerning operational-search measures involving interference with the privacy of communications or privacy of the home for the period from 2010-13. One of the courts noted that it refused authorisation to carry out an operational-search measure if it did not appear on the list of operational-search measures in the OSAA, if the request for authorisation was not signed by a competent official or was not reasoned, or if the case fell under statutory restrictions on the use of that measure (for example, relating to the person's status or to the nature of the offence). Authorisation was given if all of the above conditions were met. Another court stated that authorisation could also be refused if the request was insufficiently reasoned, that is, if it did not contain sufficient information permitting the judge to ascertain that the measure was lawful and justified. The third court stated that it granted authorisation if requested to do so by the law-enforcement authorities. It never refused a request for authorisation. All three courts considered that the request was sufficiently reasoned if it referred to the existence of information listed in section 8(2) of the OSAA

(see paragraph 31 above). One of the courts noted that supporting materials were never attached to requests for authorisation; another court noted that some, but not all, of the requests were accompanied by supporting materials, while the third court stated that all requests were accompanied by supporting materials. In all three courts the judges never requested that the law-enforcement authorities submit additional supporting materials, such as materials confirming the grounds for the interception or proving that the telephone numbers to be tapped belonged to the person concerned. Two courts granted interception authorisations in respect of unidentified persons, one of them specifying that such authorisations only concerned collection of data from technical channels of communication. Such authorisations did not mention a specific person or a telephone number to be tapped, but authorised interception of all telephone communications in the area where a criminal offence had been committed. One court never gave such authorisations. Two courts noted that authorisations always indicated the duration for which the interception was authorised, while one court stated that the duration of interception was not indicated in the authorisations issued by it. Finally, none of the three courts had examined any complaints from persons whose communications had been intercepted.

194. The applicant also produced official statistics by the Supreme Court for the period from 2009-13. It could be seen from those statistics that in 2009 Russian courts granted 130,083 out of 132,821 requests under the CCrP and 245,645 out of 246,228 requests under the OSAA (99%). In 2010 the courts allowed 136,953 out of 140,372 interception requests under the CCrP and 276,682 out of 284,137 requests under the OSAA. In 2011 the courts allowed 140,047 out of 144,762 interception requests under the CCrP and 326,105 out of 329,415 requests under the OSAA. In 2012 they granted 156,751 out of 163,469 interception requests under the CCrP (95%) and 372,744 out of 376,368 requests under the OSAA (99%). In 2013 the courts allowed 178,149 out of 189,741 interception requests lodged under the CCrP (93%) and 416,045 out of 420,242 interception requests lodged under the OSAA (99%). The applicant drew the Court's attention to the fact that the number of interception authorisations had almost doubled between 2009 and 2013. He also argued that the very high percentage of authorisations granted showed that the judges did not verify the existence of a "reasonable suspicion" against the interception subject and did not exercise careful and rigorous scrutiny. As a result, interceptions were ordered in respect of vast numbers of people in situations where the information could have been obtained by other less intrusive means.

195. The applicant concluded from the above that the authorisation procedure was defective and was therefore not capable of confining the use of secret surveillance measures to what was necessary in a democratic society.

196. As regards safeguards against unauthorised interceptions, the applicant submitted that the law-enforcement authorities were not required under domestic law to show judicial authorisation to the communications service provider before obtaining access to a person's communications. All judicial authorisations were classified documents, kept in the exclusive possession of law-enforcement authorities. An obligation to forward an interception authorisation to the communications service provider was mentioned only once in Russian law in connection with the monitoring of communications-related data under the CCrP (see paragraph 48 above). The equipment the communications service providers had installed pursuant to the Orders issued by the Ministry of Communications, in particular the unpublished addendums to Order no. 70, allowed the law-enforcement authorities direct and unrestricted access to all mobile-telephone communications of all users. The communications service providers also had an obligation under Order no. 538 to create databases to store information about all subscribers and the services provided to them for three years. The secret services had direct remote access to those databases. The manner in which the system of secret surveillance thus operated gave the security services and the police the technical means to circumvent the authorisation procedure and to intercept any communications without obtaining prior judicial authorisation. The necessity to obtain such authorisation therefore arose only in those cases where the intercepted data had to be used as evidence in criminal proceedings.

197. The applicant produced documents showing, in his view, that law-enforcement officials unlawfully intercepted telephone communications without prior judicial authorisation and disclosed the records to unauthorised persons. For example, he produced printouts from the Internet containing transcripts of the private telephone conversations of politicians. He also submitted news articles describing criminal proceedings against several high-ranking officers from the police technical department. The officers were suspected of unlawfully intercepting the private communications of politicians and businessmen in return for bribes from their political or business rivals. The news articles referred to witness statements to the effect that intercepting communications in return for bribes was a widespread practice and that anyone could buy a transcript of another person's telephone conversations from the police.

(β) The Government

198. The Government submitted that any interception of telephone or other communications had to be authorised by a court. The court took a decision on the basis of a reasoned request by a law-enforcement authority. The burden of proof was on the requesting authority to justify the necessity of the interception measures. To satisfy that burden of proof, the requesting authorities enclosed with their request all relevant supporting materials,

except materials containing information about undercover agents or police informers or about the organisation and tactics of operational-search measures. That exception was justified by the necessity to ensure the security and protection of undercover agents and police informers and their family members and was therefore compatible with the Convention.

199. The Government further referred to the Plenary Supreme Court's Ruling of 27 June 2013, which explained to the lower courts that any restrictions on human rights and freedoms had to be prescribed by law and be necessary in a democratic society, that is, proportionate to a legitimate aim. Courts were instructed to rely on established facts, verify the existence of relevant and sufficient reasons to justify a restriction on an individual's rights and balance the interests of the individual whose rights were being restricted against the interests of other individuals, the State and society as a whole. The OSAA explicitly required the courts to give reasons for the decision to authorise interception. In line with the Constitutional Court's decision of 8 February 2007 (see paragraph 42 above), the interception authorisation was to refer to the specific grounds for suspecting the person in respect of whom operational-search measures were requested of a criminal offence or of activities endangering national, military, economic or ecological security. In its decision of 2 October 2003 (see paragraph 41 above), the Constitutional Court also held that judges had an obligation to examine the materials submitted to them carefully and thoroughly.

200. According to the Government, in practice, each interception authorisation specified: the State agency responsible for performing the interception; the grounds for conducting the surveillance measures and the reasons why they were necessary; a reference to applicable legal provisions, the person whose communications were to be intercepted; the grounds for suspecting that person's involvement in the commission of a specific criminal offence; that person's telephone number or IMEI code; the period of time for which the authorisation was granted; and other necessary information. In exceptional circumstances it was permissible to authorise the interception of communications of unidentified persons. As a rule, in such cases a judge authorised the collection of data from technical channels of communication in order to identify the persons present at a specific location at the time that a criminal offence was committed there. That practice was compatible with the principles established in the Court's case-law, because in such cases the interception authorisation specified a single set of premises (locations) as the premises (locations) in respect of which the authorisation was ordered (they referred to *Kennedy*, cited above).

201. Russian law permitted communications to be intercepted without prior judicial authorisation in urgent cases. A judge had to be informed of any such case within twenty-four hours and judicial authorisation for continuing the interception had to be obtained within forty-eight hours. According to the Government, the judge had to examine the lawfulness of

such interception even in those cases when it had already been discontinued. They referred to an appeal judgment of 13 December 2013 in a criminal case, in which the Supreme Court declared inadmissible as evidence recordings of telephone conversations obtained under the urgent procedure without prior judicial authorisation. The Supreme Court had held that, although a judge had been informed of the interception, no judicial decision on its lawfulness and necessity had ever been issued.

(vi) Supervision of the implementation of secret surveillance measures

(a) The applicant

202. Regarding supervision of interceptions, the applicant argued at the outset that in Russia the effectiveness of any supervision was undermined by the absence of an obligation on the intercepting authorities to keep records of interceptions carried out by them. Moreover, Order no. 70 explicitly provided that information about interceptions could not be logged or recorded.

203. The applicant further submitted that in Russia neither the judge who had issued the interception authorisation nor any other independent official qualified for judicial office had the power to supervise its implementation, and in particular to review whether the surveillance remained within the scope determined by the interception authorisation and complied with various requirements contained in domestic law.

204. Domestic law did not set out any procedures for the supervision of interceptions by the President, Parliament and the government. They certainly had no powers to supervise the implementation of interception measures in specific cases.

205. As regards supervision by the Prosecutor General and competent low-level prosecutors, they could not be considered independent because of their position within the criminal justice system and their prosecuting functions. In particular, prosecutors gave their approval to all interception requests lodged by investigators in the framework of criminal proceedings, and participated in the related court hearings. They could then use the data obtained as a result of the interception in the framework of their prosecuting functions, in particular by presenting them as evidence during a trial. There was therefore a conflict of interest with the prosecutor performing the dual function of a party to a criminal case and an authority supervising interceptions.

206. The applicant further submitted that the prosecutors' supervisory functions were limited because certain materials, in particular those revealing the identity of undercover agents or the tactics, methods and means used by the security services, were outside the scope of their supervision. The prosecutors' supervisory powers were also limited in the area of counter-intelligence, where inspections could be carried out only

following an individual complaint. Given the secrecy of interception measures and the lack of any notification of the person concerned, such individual complaints were unlikely to be lodged, with the result that counter-intelligence-related surveillance measures *de facto* escaped any supervision by prosecutors. It was also significant that prosecutors had no power to cancel an interception authorisation, to discontinue unlawful interceptions or to order the destruction of unlawfully obtained data.

207. Further, prosecutors' biannual reports were not published or publicly discussed. The reports were classified documents and contained statistical information only. They did not contain any substantive analysis of the state of legality in the sphere of operational-search activities or any information about what breaches of law had been detected and what measures had been taken to remedy them. Moreover, the reports amalgamated together all types of operational-search activities, without separating interceptions from other measures.

(β) The Government

208. The Government submitted that supervision of operational-search activities, including interceptions of telephone communications, was exercised by the President, Parliament and the government. In particular, the President determined the national security strategy and appointed and dismissed the heads of all law-enforcement agencies. There was also a special department within the President's Administration which supervised the activities of the law-enforcement agencies, including operational-search activities. That department consisted of officials from the Ministry of the Interior and the FSB who had the appropriate level of security clearance. Parliament participated in the supervision process by adopting and amending laws governing operational-search activities. It could also form committees and commissions and hold parliamentary hearings on all issues, including those relating to operational-search activities, and could hear the heads of law-enforcement agencies if necessary. The government adopted decrees and orders governing operational-search activities and allocated the budgetary funds to the law-enforcement agencies.

209. Supervision was also exercised by the Prosecutor General and competent low-level prosecutors who were independent from the federal, regional and local authorities. The Prosecutor General and his deputies were appointed and dismissed by the Federation Council, the upper house of Parliament. Prosecutors were not entitled to lodge interception requests. Such requests could be lodged either by the State agency performing operational-search activities in the framework of the OSAA, or by the investigator in the framework of the CCrP. The prosecutor could not give any instructions to the investigator. In the course of a prosecutor's inspection, the head of the intercepting agency had an obligation to submit all relevant materials to the prosecutor at his request and could be held

liable for a failure to do so. The prosecutors responsible for supervision of operational-search activities submitted six-monthly reports to the Prosecutor General. The reports did not, however, analyse interceptions separately from other operational-search measures.

(vii) Notification of secret surveillance measures

(a) The applicant

210. The applicant further submitted that Russian law did not provide that a person whose communications had been intercepted was to be notified before, during or after the interception. He conceded that it was acceptable not to notify the person before or during the interception, since the secrecy of the measure was essential to its efficacy. He argued, however, that such notification was possible after the interception had ended, “as soon as it [could] be made without jeopardising the purpose of the restriction” (he referred to *Klass and Others*, cited above). In Russia the person concerned was not notified at any point. He could therefore learn about the interception only if there was a leak or if criminal proceedings were opened against him, and the intercepted data were used in evidence.

211. With regard to the possibility of obtaining access to the data collected in the course of interception, the applicant submitted that such access was possible only in very limited circumstances. If criminal proceedings had never been opened or if the charges had been dropped on other grounds than those listed in the OSAA, the person concerned was not entitled to have access to the data. Furthermore, before obtaining access, the claimant had to prove that his communications had been intercepted. Given the secrecy of the surveillance measures and the lack of notification, such burden of proof was impossible to satisfy unless the information about the interception had been leaked. Even after satisfying all those preconditions, the person could only receive “information about the data collected” rather than obtain access to the data themselves. Finally, only information that did not contain State secrets could be disclosed. Given that under the OSAA all data collected in the course of operational-search activities constituted a State secret and the decision to declassify them fell to the head of the intercepting authority, access to interception-related documents depended entirely on the intercepting authorities’ discretion.

212. A refusal to grant access to the collected data could be appealed against to a court and the OSAA required the intercepting authorities to produce, at the judge’s request, “operational-search materials containing information about the data to which access [had been] refused”. It was significant that the intercepting authorities were required to submit “information about the data” rather than the data themselves. Materials containing information about undercover agents or police informers could

not be submitted to the court and were thereby excluded from the scope of judicial review.

(β) The Government

213. The Government submitted that under Russian law an individual subject to secret surveillance measures did not have to be informed of those measures at any point. The Constitutional Court held (see paragraph 40 above) that, in view of the necessity to keep the surveillance measures secret, the principles of a public hearing and adversarial proceedings were not applicable to the interception authorisation proceedings. The person concerned was therefore not entitled to participate in the authorisation proceedings or to be informed of the decision taken.

214. After the termination of the investigation, the defendant was entitled to study all the materials in the criminal case-file, including the data obtained in the course of operational-search activities. Otherwise, in cases where the investigator decided not to open criminal proceedings against the interception subject or to discontinue the criminal proceedings on the grounds that the alleged offence had not been committed or one or more elements of a criminal offence were missing, the interception subject was entitled to request and receive information about the data collected. A refusal to provide such information could be challenged before a court, which had power to order the disclosure of the information if it considered the refusal to be ill-founded. The Government submitted a copy of the decision of 4 August 2009 by the Alekseyevskiy District Court of the Belgorod region, ordering that the police provide, within one month, an interception subject with information about the data collected about him in the course of the interception “to the extent permitted by the requirements of confidentiality and with the exception of data which could enable State secrets to be disclosed”.

215. The Government argued that Russian law was different from the Bulgarian law criticised by the Court in its judgment in *Association for European Integration and Human Rights and Ekimdzhiev* (cited above, § 91) because it provided for a possibility of declassifying the interception materials and granting the person concerned access to them. In support of that allegation, they referred to the criminal-conviction judgment of 11 July 2012 by the Zabaykalsk Regional Court. That judgment – a copy of which was not provided to the Court – relied, according to the Government, on a judicial decision authorising the interception of the defendant’s telephone communications which had been declassified and submitted to the trial judge at his request. The Government also referred to two further judgments – by the Presidium of the Krasnoyarsk Regional Court and the Presidium of the Supreme Court of the Mariy-El Republic – quashing, by way of supervisory review, judicial decisions authorising the interception of communications. They did not submit copies of those judgments.

(viii) *Available remedies*

(α) The applicant

216. The applicant submitted that the questions of notification of surveillance measures and of the effectiveness of remedies before the courts were inextricably linked, since there was in principle little scope for recourse to the courts by the individual concerned unless the latter was advised of the measures taken without his knowledge and was thus able to challenge their legality retrospectively (he referred to *Weber and Saravia*, cited above).

217. The applicant argued that the remedies available under Russian law were ineffective. As regards the possibility for the surveillance subject to apply for judicial review of the measures applied, the burden of proof was on the claimant to demonstrate that his telephone had been tapped. However, since those being monitored were not informed of the surveillance measures unless charged with a criminal offence, the burden of proof was impossible to satisfy. The copies of domestic judgments submitted by the Government concerned searches and seizures, that is, operational-search measures which were known to the person concerned (see paragraphs 220, 221 and 223 below). The applicant knew of no publicly available judicial decisions where an interception subject's complaint concerning unlawful interception had been allowed. It was also significant that in none of the judgments produced by the Government had the domestic courts assessed the proportionality of the contested operational-search measures. The domestic proceedings brought by the applicant had also clearly demonstrated that remedies available under Russian law were ineffective. Moreover, in *Avanesyan v. Russia* (no. 41152/06, 18 September 2014) the Court had already found that there were no effective remedies under Russian law to challenge operational-search measures.

218. Lastly, the applicant submitted that an interception subject or the communications service providers could not challenge the ministerial orders governing secret interceptions of communications, because those orders were considered to be technical rather than legal in nature and were therefore not subject to judicial review, as demonstrated by the decisions mentioned in paragraph 161 above.

(β) The Government

219. The Government argued that in Russia a person claiming that his rights had been or were being violated by a State official performing operational-search activities was entitled to complain to the official's superior, the prosecutor or a court, in accordance with section 5 of the OSAA (see paragraph 83 above).

220. As explained by the Plenary Supreme Court, if the person concerned learned of the interception, he could apply to a court of general jurisdiction in accordance with the procedure established by Chapter 25 of the CCP (see paragraph 92 above). According to the Government, a claimant did not have to prove that his rights had been breached as a result of the interception measures. The burden of proof was on the intercepting authorities to show that the interception measures had been lawful and justified. Russian law provided that if a breach of the claimant's rights was found by a court in civil proceedings, the court had to take measures to remedy the violation and compensate the damage (see paragraph 97 above). The Government submitted copies of two judicial decisions under Chapter 25 of the CCP, declaring searches and seizures of objects or documents unlawful and ordering the police to take specific measures to remedy the violations.

221. Furthermore, according to the Government, the interception subject was also entitled to lodge a supervisory-review complaint against the judicial decision authorising the interception, as explained by the Constitutional Court in its decision of 15 July 2008 (see paragraph 43 above). He was likewise entitled to lodge an appeal or a cassation appeal.

222. If the interception was carried out in the framework of criminal proceedings, the person concerned could also lodge a complaint under Article 125 of the CCrP. The Government referred to the Supreme Court's decision of 26 October 2010 quashing, by way of supervisory review, the lower courts' decisions to declare inadmissible K.'s complaint under Article 125 of the CCrP regarding the investigator's refusal to give her a copy of the judicial decision authorising the interception of her communications. The Supreme Court held that her complaint was to be examined under Article 125 of the CCrP, despite the fact that she had already been convicted, and that she was entitled to receive a copy of the interception authorisation. The Government submitted copies of ten judicial decisions allowing complaints under Article 125 of the CCrP concerning unlawful searches and seizures of objects or documents. They also produced a copy of a judgment acquitting a defendant on appeal after finding that his conviction at first instance had been based on inadmissible evidence obtained as a result of an unlawful test purchase of drugs.

223. The Government further submitted that the person concerned could apply for compensation under Article 1069 of the Civil Code (see paragraph 102 above). That Article provided for compensation of pecuniary and non-pecuniary damage caused to an individual or a legal entity by unlawful actions by State and municipal bodies and officials, provided that the body's or the official's fault had been established. Compensation for non-pecuniary damage was determined in accordance with the rules set out in Articles 1099 to 1101 of the Civil Code (see paragraphs 103-04 above). The Government observed, in particular, that non-pecuniary damage caused

through dissemination of information which was damaging to honour, dignity or reputation could be compensated irrespective of the tortfeasor's fault. The Government submitted a copy of a decision of 9 December 2013 by the Vichuga Town Court of the Ivanovo region, awarding compensation in respect of non-pecuniary damage for unlawful interception of a suspect's telephone conversations after the recordings obtained as a result of that interception had been declared inadmissible as evidence by the trial court. The Government also submitted a judicial decision awarding compensation for an unlawful search and seizure of documents and a judicial decision awarding compensation to an acquitted defendant for unlawful prosecution.

224. Russian law also provided for criminal remedies for abuse of power (Articles 285 and 286 of the Criminal Code), unauthorised collection or dissemination of information about a person's private and family life (Article 137 of the Criminal Code) and breach of citizens' right to privacy of communications (Article 138 of the Criminal Code – see paragraphs 19-22 above). The Government referred in that connection to the Supreme Court's judgment of 24 October 2002, convicting a certain E.S. of an offence under Article 138 of the Criminal Code for inciting an official to supply him with the names of the owners of several telephone numbers and to provide him with call detail records in respect of those telephone numbers. They also referred to the Supreme Court's judgment of 15 March 2007, convicting a customs official of an offence under Article 138 of the Criminal Code for intercepting the telephone communications of a certain P. They submitted copies of two more conviction judgments under Article 138 of the Criminal Code: the first concerned the selling of espionage equipment, namely pens and watches with built-in cameras, while the second concerned the covert hacking of a communication provider's database in order to obtain the users' call detail records.

225. Lastly, the Government argued that remedies were also available in Russian law to challenge the alleged insufficiency of safeguards against abuse in the sphere of interception of communications (see paragraph 156 above).

226. The Government submitted that the applicant had not used any of the remedies available to him under Russian law and described above. In particular, he had chosen to bring judicial proceedings against mobile-network operators, the Ministry of Communications being joined only as a third party to the proceedings.

(b) The Court's assessment

(i) General principles

227. The Court reiterates that any interference can only be justified under Article 8 § 2 if it is in accordance with the law, pursues one or more of the legitimate aims to which paragraph 2 of Article 8 refers and is

necessary in a democratic society in order to achieve any such aim (see *Kennedy*, cited above, § 130).

228. The Court notes from its well-established case-law that the wording “in accordance with the law” requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the Preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus meet quality requirements: it must be accessible to the person concerned and foreseeable as to its effects (see, among many other authorities, *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 95, ECHR 2008; and *Kennedy*, cited above, § 151).

229. The Court has held on several occasions that the reference to “foreseeability” in the context of interception of communications cannot be the same as in many other fields. Foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident. It is therefore essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated. The domestic law must be sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (see *Malone*, cited above, § 67; *Leander v. Sweden*, 26 March 1987, § 51, Series A no. 116; *Huvig v. France*, 24 April 1990, § 29, Series A no. 176-B; *Valenzuela Contreras v. Spain*, 30 July 1998, § 46, Reports 1998-V; *Rotaru*, cited above, § 55; *Weber and Saravia*, cited above, § 93; and *Association for European Integration and Human Rights and Ekimdzhev*, cited above, § 75).

230. Moreover, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see, among other authorities, *Malone*, cited above, § 68; *Leander*, cited above, § 51; *Huvig*, cited above, § 29; and *Weber and Saravia*, cited above, § 94).

231. In its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in law in order to avoid abuses of power: the nature of offences which may give

rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed (see *Huvig*, cited above, § 34; *Amann v. Switzerland* [GC], no. 27798/95, §§ 56-58, ECHR 2000-II; *Valenzuela Contreras*, cited above, § 46; *Prado Bugallo v. Spain*, no. 58496/00, § 30, 18 February 2003; *Weber and Saravia*, cited above, § 95; and *Association for European Integration and Human Rights and Ekimdzhiiev*, cited above, § 76).

232. As to the question whether an interference was “necessary in a democratic society” in pursuit of a legitimate aim, the Court has acknowledged that, when balancing the interest of the respondent State in protecting its national security through secret surveillance measures against the seriousness of the interference with an applicant’s right to respect for his private life, the national authorities enjoy a certain margin of appreciation in choosing the means for achieving the legitimate aim of protecting national security. However, this margin is subject to European supervision embracing both legislation and decisions applying it. In view of the risk that a system of secret surveillance set up to protect national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there are adequate and effective guarantees against abuse. The assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by national law. The Court has to determine whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the “interference” to what is “necessary in a democratic society” (see *Klass and Others*, cited above, §§ 49-50 and 59; *Weber and Saravia*, cited above, § 106; *Kvasnica v. Slovakia*, no. 72094/01, § 80, 9 June 2009; and *Kennedy*, cited above, §§ 153-54).

233. Review and supervision of secret surveillance measures may come into play at three stages: when the surveillance is first ordered, while it is being carried out, or after it has been terminated. As regards the first two stages, the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be effected without the individual’s knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of his own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding his rights. In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of

Article 8 § 2, are not to be exceeded. In a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge, judicial control offering the best guarantees of independence, impartiality and a proper procedure (see *Klass and Others*, cited above, §§ 55-56).

234. As regards the third stage, after the surveillance has been terminated, the question of subsequent notification of surveillance measures is inextricably linked to the effectiveness of remedies before the courts and hence to the existence of effective safeguards against the abuse of monitoring powers. There is in principle little scope for recourse to the courts by the individual concerned unless the latter is advised of the measures taken without his knowledge and thus able to challenge their legality retrospectively (see *Klass and Others*, cited above, § 57, and *Weber and Saravia*, cited above, § 135) or, in the alternative, unless any person who suspects that his communications are being or have been intercepted can apply to courts, so that the courts' jurisdiction does not depend on notification to the interception subject that there has been an interception of his communications (see *Kennedy*, cited above, § 167).

(ii) Application of the general principles to the present case

235. The Court notes that it has found there to be an interference under Article 8 § 1 in respect of the applicant's general complaint regarding the Russian legislation governing covert interception of mobile-telephone communications. Accordingly, in its examination of the justification for the interference under Article 8 § 2, the Court is required to examine whether the contested legislation itself is in conformity with the Convention.

236. In cases where the legislation permitting secret surveillance is contested before the Court, the lawfulness of the interference is closely related to the question whether the "necessity" test has been complied with and it is therefore appropriate for the Court to address jointly the "in accordance with the law" and "necessity" requirements (see *Kennedy*, cited above, § 155; see also *Kvasnica*, cited above, § 84). The "quality of law" in this sense implies that the domestic law must not only be accessible and foreseeable in its application, it must also ensure that secret surveillance measures are applied only when "necessary in a democratic society", in particular by providing for adequate and effective safeguards and guarantees against abuse.

237. It has not been disputed by the parties that interceptions of mobile-telephone communications have a basis in domestic law. They are governed, in particular, by the CCRP and the OSAA, as well as by the Communications Act and the Orders issued by the Ministry of Communications. Furthermore, the Court considers it clear that the surveillance measures permitted by Russian law pursue the legitimate aims of the protection of

national security and public safety, the prevention of crime and the protection of the economic well-being of the country (see paragraph 26 above). It therefore remains to be ascertained whether the domestic law is accessible and contains adequate and effective safeguards and guarantees to meet the requirements of “foreseeability” and “necessity in a democratic society”.

238. The Court will therefore assess in turn the accessibility of the domestic law, the scope and duration of the secret surveillance measures, the procedures to be followed for storing, accessing, examining, using, communicating and destroying the intercepted data, the authorisation procedures, the arrangements for supervising the implementation of secret surveillance measures, any notification mechanisms and the remedies provided for by national law.

(α) Accessibility of the domestic law

239. It is common ground between the parties that almost all legal provisions governing secret surveillance – including the CCrP, the OSAA, the Communications Act and the majority of the Orders issued by the Ministry of Communications – have been officially published and are accessible to the public. The parties disputed, however, whether the addendums to Order no. 70 by the Ministry of Communications met the requirements of accessibility.

240. The Court observes that the addendums to Order no. 70 have never been published in a generally accessible official publication, as they were considered to be technical in nature (see paragraph 128 above).

241. The Court accepts that the addendums to Order no. 70 mainly describe the technical requirements for the interception equipment to be installed by communications service providers. At the same time, by requiring that the equipment in issue must ensure that the law-enforcement authorities have direct access to all mobile-telephone communications of all users and must not log or record information about interceptions initiated by the law-enforcement authorities (see paragraphs 115-22 above), the addendums to Order no. 70 are capable of affecting the users’ right to respect for their private life and correspondence. The Court therefore considers that they must be accessible to the public.

242. The publication of the Order in the Ministry of Communications’ official magazine *SvyazInform*, distributed through subscription, made it available only to communications specialists rather than to the public at large. At the same time, the Court notes that the text of the Order, with the addendums, can be accessed through a privately maintained online legal database, which reproduced it from the publication in *SvyazInform* (see paragraph 115 above). The Court finds the lack of a generally accessible official publication of Order no. 70 regrettable. However, taking into account the fact that it has been published in an official ministerial

magazine, combined with the fact that it can be accessed by the general public through an online legal database, the Court does not find it necessary to pursue further the issue of the accessibility of the domestic law. It will concentrate instead on the requirements of “foreseeability” and “necessity”.

(β) Scope of application of secret surveillance measures

243. The Court reiterates that national law must define the scope of application of secret surveillance measures by giving citizens an adequate indication as to the circumstances in which public authorities are empowered to resort to such measures – in particular by clearly setting out the nature of the offences which may give rise to an interception order and a definition of the categories of people liable to have their telephones tapped (see paragraph 231 above).

244. As regards the nature of the offences, the Court emphasises that the condition of foreseeability does not require States to set out exhaustively, by name, the specific offences which may give rise to interception. However, sufficient detail should be provided on the nature of the offences in question (see *Kennedy*, cited above, § 159). Both the OSAA and the CCrP provide that telephone and other communications may be intercepted in connection with an offence of medium severity, a serious offence or an especially serious criminal offence – that is, an offence for which the Criminal Code prescribes a maximum penalty of more than three years’ imprisonment – which has been already committed, is being committed or being plotted (see paragraphs 31-33 above). The Court considers that the nature of the offences which may give rise to an interception order is sufficiently clear. At the same time it notes with concern that Russian law allows secret interception of communications in respect of a very wide range of criminal offences, including for example, as pointed out by the applicant, pickpocketing (see paragraph 182 above; see also, for similar reasoning, *Iordachi and Others*, cited above, §§ 43-44).

245. The Court further notes that interceptions may be ordered not only in respect of a suspect or an accused, but also in respect of a person who may have information about an offence or may have other information relevant to the criminal case (see paragraph 32 above). The Court has earlier found that interception measures in respect of a person who was not suspected of any offence but could possess information about such an offence might be justified under Article 8 of the Convention (see *Greuter*, cited above). At the same time, the Court notes the absence of any clarifications in Russian legislation or established case-law as to how the terms “a person who may have information about a criminal offence” and “a person who may have information relevant to the criminal case” are to be applied in practice (see, for similar reasoning, *Iordachi and Others*, cited above, § 44).

246. The Court also observes that, in addition to interceptions for the purposes of preventing or detecting criminal offences, the OSAA also provides that telephone or other communications may be intercepted following the receipt of information about events or activities endangering Russia's national, military, economic or ecological security (see paragraph 31 above). Which events or activities may be considered as endangering such types of security interests is not defined anywhere in Russian law.

247. The Court has previously found that the requirement of "foreseeability" of the law does not go so far as to compel States to enact legal provisions listing in detail all conduct that may prompt a decision to subject an individual to secret surveillance on "national security" grounds. By their very nature, threats to national security may vary in character and may be unanticipated or difficult to define in advance (see *Kennedy*, cited above, § 159). At the same time, the Court has also emphasised that in matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a discretion granted to the executive in the sphere of national security to be expressed in terms of unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see *Liu v. Russia*, no. 42086/05, § 56, 6 December 2007, with further references).

248. It is significant that the OSAA does not give any indication of the circumstances under which an individual's communications may be intercepted on account of events or activities endangering Russia's national, military, economic or ecological security. It leaves the authorities an almost unlimited degree of discretion in determining which events or acts constitute such a threat and whether that threat is serious enough to justify secret surveillance, thereby creating possibilities for abuse (see, for similar reasoning, *Iordachi and Others*, cited above, § 46).

249. That being said, the Court does not lose sight of the fact that prior judicial authorisation for interceptions is required in Russia. Such judicial authorisation may serve to limit the law-enforcement authorities' discretion in interpreting the broad terms of "a person who may have information about a criminal offence", "a person who may have information relevant to the criminal case", and "events or activities endangering Russia's national, military, economic or ecological security" by following an established judicial interpretation of the terms or an established practice to verify whether sufficient reasons for intercepting a specific individual's communications exist in each case. The Court accepts that the requirement

of prior judicial authorisation constitutes an important safeguard against arbitrariness. The effectiveness of that safeguard will be examined below.

(γ) The duration of secret surveillance measures

250. The Court has held that it is not unreasonable to leave the overall duration of interception to the discretion of the relevant domestic authorities which have competence to issue and renew interception warrants, provided that adequate safeguards exist, such as a clear indication in the domestic law of the period after which an interception warrant will expire, the conditions under which a warrant can be renewed and the circumstances in which it must be cancelled (see *Kennedy*, cited above, § 161; see also *Klass and Others*, cited above, § 52, and *Weber and Saravia*, cited above, § 98).

251. As regards the first safeguard, both the CCrP and the OSAA provide that interceptions may be authorised by a judge for a period not exceeding six months (see paragraphs 38 and 47 above). There is therefore a clear indication in the domestic law of the period after which an interception authorisation will expire. Secondly, the conditions under which an authorisation can be renewed are also clearly set out in law. In particular, under both the CCrP and the OSAA a judge may extend interception for a maximum of six months at a time, after a fresh examination of all the relevant materials (*ibid.*). However, as regards the third safeguard concerning the circumstances in which the interception must be discontinued, the Court notes that the requirement to discontinue interception when no longer necessary is mentioned in the CCrP only. Regrettably, the OSAA does not contain such a requirement (*ibid.*). In practice, this means that interceptions in the framework of criminal proceedings are attended by more safeguards than interceptions conducted outside such a framework, in particular in connection with “events or activities endangering national, military, economic or ecological security”.

252. The Court concludes from the above that, while Russian law contains clear rules on the duration and renewal of interceptions providing adequate safeguards against abuse, the OSAA provisions on discontinuing surveillance measures do not provide sufficient guarantees against arbitrary interference.

(δ) Procedures to be followed for storing, accessing, examining, using, communicating and destroying the intercepted data

253. Russian law stipulates that data collected as a result of secret surveillance measures constitute a State secret and are to be sealed and stored under conditions excluding any risk of unauthorised access. They may be disclosed to those State officials who genuinely need the data for the performance of their duties and have the appropriate level of security clearance. Steps must be taken to ensure that only the amount of information needed by the recipient to perform his duties is disclosed, and

no more. The official responsible for ensuring that the data are securely stored and inaccessible to those without the necessary security clearance is clearly defined (see paragraphs 51-57 above). Domestic law also sets out the conditions and procedures for communicating intercepted data containing information about a criminal offence to the prosecuting authorities. It describes, in particular, the requirements for their secure storage and the conditions for their use as evidence in criminal proceedings (see paragraphs 58-64 above). The Court is satisfied that Russian law contains clear rules governing the storage, use and communication of intercepted data, making it possible to minimise the risk of unauthorised access or disclosure (see, for similar reasoning, *Kennedy*, cited above, §§ 162-63).

254. As far as the destruction of intercept material is concerned, domestic law provides that it must be destroyed after six months of storage if the person concerned has not been charged with a criminal offence. If the person has been charged with a criminal offence, the trial judge must make a decision, at the end of the criminal proceedings, on the further storage and destruction of the intercept material used in evidence (see paragraphs 65-66 above).

255. As regards the cases where the person concerned has not been charged with a criminal offence, the Court is not convinced by the applicant's argument that Russian law permits storage of the intercept material beyond the statutory time-limit (see paragraph 188 above). It appears that the provision referred to by the applicant does not apply to the specific case of storage of data collected as a result of interception of communications. The Court considers the six-month storage time-limit set out in Russian law for such data reasonable. At the same time, it deplores the lack of a requirement to destroy immediately any data that are not relevant to the purpose for which they have been obtained (compare *Klass and Others*, cited above, § 52, and *Kennedy*, cited above, § 162). The automatic storage for six months of clearly irrelevant data cannot be considered justified under Article 8.

256. Furthermore, as regards the cases where the person has been charged with a criminal offence, the Court notes with concern that Russian law allows unlimited discretion to the trial judge to store or to destroy the data used in evidence after the end of the trial (see paragraph 66 above). Russian law does not give citizens any indication as to the circumstances in which the intercept material may be stored after the end of the trial. The Court therefore considers that the domestic law is not sufficiently clear on this point.

(e) Authorisation of interceptions

Authorisation procedures

257. The Court will take into account a number of factors in assessing whether the authorisation procedures are capable of ensuring that secret surveillance is not ordered haphazardly, irregularly or without due and proper consideration. These factors include, in particular, the authority competent to authorise the surveillance, its scope of review and the content of the interception authorisation.

258. As regards the authority competent to authorise the surveillance, authorising of telephone tapping by a non-judicial authority may be compatible with the Convention (see, for example, *Klass and Others*, cited above, § 51; *Weber and Saravia*, cited above, § 115; and *Kennedy*, cited above, § 31), provided that that authority is sufficiently independent from the executive (see *Dumitru Popescu v. Romania* (no. 2), no. 71525/01, § 71, 26 April 2007).

259. Russian law contains an important safeguard against arbitrary or indiscriminate secret surveillance. It dictates that any interception of telephone or other communications must be authorised by a court (see paragraphs 34 and 44 above). The law-enforcement agency seeking authorisation for interception must submit a reasoned request to that effect to a judge, who may require the agency to produce supporting materials (see paragraphs 37 and 46 above). The judge must give reasons for the decision to authorise interceptions (see paragraphs 38 and 44 above).

260. Turning now to the authorisation authority's scope of review, the Court reiterates that it must be capable of verifying the existence of a reasonable suspicion against the person concerned, in particular, whether there are factual indications for suspecting that person of planning, committing or having committed criminal acts or other acts that may give rise to secret surveillance measures, such as, for example, acts endangering national security. It must also ascertain whether the requested interception meets the requirement of "necessity in a democratic society", as provided by Article 8 § 2 of the Convention, including whether it is proportionate to the legitimate aims pursued, by verifying, for example, whether it is possible to achieve the aims by less restrictive means (see *Klass and Others*, cited above, § 51; *Association for European Integration and Human Rights and Ekimdzhiiev*, cited above, §§ 79-80; *Iordachi and Others*, cited above, § 51; and *Kennedy*, cited above, §§ 31-32).

261. The Court notes that in Russia judicial scrutiny is limited in scope. Thus, materials containing information about undercover agents or police informers or about the organisation and tactics of operational-search measures may not be submitted to the judge and are therefore excluded from the court's scope of review (see paragraph 37 above). The Court considers that the failure to disclose the relevant information to the courts deprives

them of the power to assess whether there is a sufficient factual basis to suspect the person in respect of whom operational-search measures are requested of a criminal offence or of activities endangering national, military, economic or ecological security (see, *mutatis mutandis*, *Liu*, cited above, §§ 59-63). The Court has earlier found that there are techniques that can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice (see, *mutatis mutandis*, *Chahal v. the United Kingdom*, 15 November 1996, § 131, *Reports* 1996-V).

262. Furthermore, the Court observes that in Russia the judges are not instructed, either by the CCrP or by the OSAA, to verify the existence of a “reasonable suspicion” against the person concerned or to apply the “necessity” and “proportionality” test. At the same time, the Court notes that the Constitutional Court has explained in its decisions that the burden of proof is on the requesting agency to show that interception is necessary and that the judge examining an interception request should verify the grounds for that measure and grant authorisation only if he is persuaded that interception is lawful, necessary and justified. The Constitutional Court has also held that the judicial decision authorising interception should contain reasons and refer to specific grounds for suspecting that a criminal offence has been committed, is being committed, or is being plotted or that activities endangering national, military, economic or ecological security are being carried out, as well as that the person in respect of whom interception is requested is involved in these criminal or otherwise dangerous activities (see paragraphs 40-42 above). The Constitutional Court has therefore recommended, in substance, that when examining interception authorisation requests Russian courts should verify the existence of a reasonable suspicion against the person concerned and should authorise interception only if it meets the requirements of necessity and proportionality.

263. However, the Court observes that domestic law does not explicitly require the courts of general jurisdiction to follow the Constitutional Court’s opinion as to how a legislative provision should be interpreted if such opinion has been expressed in a decision rather than a judgment (see paragraph 106 above). Indeed, the materials submitted by the applicant show that the domestic courts do not always follow the above-mentioned recommendations of the Constitutional Court, all of which were contained in decisions rather than in judgments. Thus, it transpires from the analytical notes issued by District Courts that interception requests are often not accompanied by any supporting materials, that the judges of these District Courts never request the interception agency to submit such materials and that a mere reference to the existence of information about a criminal offence or activities endangering national, military, economic or ecological security is considered to be sufficient for the authorisation to be granted. An

interception request is rejected only if it is not signed by a competent person, contains no reference to the offence in connection with which interception is to be ordered, or concerns a criminal offence in respect of which interception is not permitted under domestic law (see paragraph 193 above). Thus, the analytical notes issued by District Courts, taken together with the statistical information for the period from 2009-13 provided by the applicant (see paragraph 194 above), indicate that in their everyday practice Russian courts do not verify whether there is a “reasonable suspicion” against the person concerned and do not apply the “necessity” and “proportionality” test.

264. Lastly, as regards the content of the interception authorisation, it must clearly identify a specific person to be placed under surveillance or a single set of premises as the premises in respect of which the authorisation is ordered. Such identification may be made by names, addresses, telephone numbers or other relevant information (see *Klass and Others*, cited above, § 51; *Liberty and Others*, cited above, §§ 64-65; *Dumitru Popescu*, cited above, § 78; *Association for European Integration and Human Rights and Ekimdzhiiev*, cited above, § 80; and *Kennedy*, cited above, § 160).

265. The Court observes that the CCrP requires that a request for interception authorisation must clearly mention a specific person whose communications are to be intercepted, as well as the duration of the interception measure (see paragraph 46 above). By contrast, the OSAA does not contain any requirements either with regard to the content of the request for interception or to the content of the interception authorisation. As a result, courts sometimes grant interception authorisations which do not mention a specific person or telephone number to be tapped, but authorise interception of all telephone communications in the area where a criminal offence has been committed. Some authorisations do not mention the duration for which interception is authorised (see paragraph 193 above). The Court considers that such authorisations, which are not clearly prohibited by the OSAA, grant a very wide discretion to the law-enforcement authorities as to which communications to intercept, and for how long.

266. The Court further notes that in urgent cases it is possible to intercept communications without prior judicial authorisation for up to forty-eight hours. A judge must be informed of any such case within twenty-four hours from the commencement of the interception. If no judicial authorisation has been issued within forty-eight hours, the interception must be stopped immediately (see paragraph 35 above). The Court has already examined the “urgency” procedure provided for in Bulgarian law and found that it was compatible with the Convention (see *Association for European Integration and Human Rights and Ekimdzhiiev*, cited above, §§ 16 and 82). However, in contrast to the Bulgarian provision, the Russian “urgent procedure” does not provide for sufficient safeguards to

ensure that it is used sparingly and only in duly justified cases. Thus, although in the criminal sphere the OSAA limits recourse to the urgency procedure to cases where there exists an immediate danger that a serious or especially serious offence may be committed, it does not contain any such limitations in respect of secret surveillance in connection with events or activities endangering national, military, economic or ecological security. Domestic law does not limit the use of the urgency procedure to cases involving an immediate serious danger to national, military, economic or ecological security. It leaves the authorities an unlimited degree of discretion in determining in which situations it is justified to use the non-judicial urgent procedure, thereby creating possibilities for abusive recourse to it (*ibid.*). Furthermore, although Russian law requires that a judge be immediately informed of each instance of urgent interception, his power is limited to authorising the extension of the interception measure beyond forty-eight hours. He has no power to assess whether the use of the urgent procedure was justified or to decide whether the material obtained during the previous forty-eight hours is to be kept or destroyed (see, by contrast, *Association for European Integration and Human Rights and Ekimdzhiyev*, cited above, § 16). Russian law does not therefore provide for an effective judicial review of the urgency procedure.

267. In view of the above considerations the Court considers that the authorisation procedures provided for by Russian law are not capable of ensuring that secret surveillance measures are not ordered haphazardly, irregularly or without due and proper consideration.

The authorities' access to communications

268. The Court takes note of the applicant's argument that the security services and the police have the technical means to intercept mobile-telephone communications without obtaining judicial authorisation, as they have direct access to all communications and as their ability to intercept the communications of a particular individual or individuals is not conditional on providing an interception authorisation to the communications service provider.

269. The Court considers that the requirement to show an interception authorisation to the communications service provider before obtaining access to a person's communications is one of the important safeguards against abuse by the law-enforcement authorities, ensuring that proper authorisation is obtained in all cases of interception. In Russia the law-enforcement authorities are not required under domestic law to show the judicial authorisation to the communications service provider before obtaining access to a person's communications (see, by contrast, the EU Council Resolution, paragraph 145 above), except in connection with the monitoring of communications-related data under the CCrP (see paragraph 48 above). Indeed, pursuant to Orders issued by the Ministry of

Communications, in particular the addendums to Order no. 70, communications service providers must install equipment giving the law-enforcement authorities direct access to all mobile-telephone communications of all users (see paragraphs 115-22 above). The communications service providers also have an obligation under Order no. 538 to create databases storing information about all subscribers, and the services provided to them, for three years; the secret services have direct remote access to those databases (see paragraphs 132-33 above). The law-enforcement authorities thus have direct access to all mobile-telephone communications and related communications data.

270. The Court considers that the manner in which the system of secret surveillance operates in Russia gives the security services and the police technical means to circumvent the authorisation procedure and to intercept any communications without obtaining prior judicial authorisation. Although the possibility of improper action by a dishonest, negligent or overzealous official can never be completely ruled out whatever the system (see *Klass and Others*, cited above, § 59), the Court considers that a system, such as the Russian one, which enables the secret services and the police to intercept directly the communications of each and every citizen without requiring them to show an interception authorisation to the communications service provider, or to anyone else, is particularly prone to abuse. The need for safeguards against arbitrariness and abuse appears therefore to be particularly great.

271. The Court will therefore examine with particular attention whether the supervision arrangements provided by Russian law are capable of ensuring that all interceptions are performed lawfully on the basis of proper judicial authorisation.

(ζ) Supervision of the implementation of secret surveillance measures

272. The Court notes at the outset that Order no. 70 requires that the equipment installed by the communications service providers not record or log information about interceptions (see paragraph 120 above). The Court has found that an obligation on the intercepting agencies to keep records of interceptions is particularly important to ensure that the supervisory body has effective access to details of surveillance activities undertaken (see *Kennedy*, cited above, § 165). The prohibition on logging or recording interceptions set out in Russian law makes it impossible for the supervising authority to discover interceptions carried out without proper judicial authorisation. Combined with the law-enforcement authorities' technical ability, pursuant to the same Order, to intercept directly all communications, this provision renders any supervision arrangements incapable of detecting unlawful interceptions and therefore ineffective.

273. As regards supervision of interceptions carried out on the basis of proper judicial authorisations, the Court will examine whether the

supervision arrangements existing in Russia are capable of ensuring that the statutory requirements relating to the implementation of the surveillance measures, the storage, access to, use, processing, communication and destruction of intercept material are routinely respected.

274. A court which has granted authorisation for interception has no competence to supervise its implementation. It is not informed of the results of the interceptions and has no power to review whether the requirements of the decision granting authorisation were complied with. Nor do Russian courts in general have competence to carry out the overall supervision of interceptions. Judicial supervision is limited to the initial authorisation stage. Subsequent supervision is entrusted to the President, Parliament, the government, the Prosecutor General and competent lower-level prosecutors.

275. The Court has earlier found that, although it is in principle desirable to entrust supervisory control to a judge, supervision by non-judicial bodies may be considered compatible with the Convention, provided that the supervisory body is independent of the authorities carrying out the surveillance, and is vested with sufficient powers and competence to exercise an effective and continuous control (see *Klass and Others*, cited above, § 56).

276. As far as the President, Parliament and the Government are concerned, Russian law does not set out the manner in which they may supervise interceptions. There are no publicly available regulations or instructions describing the scope of their review, the conditions under which it may be carried out, the procedures for reviewing the surveillance measures or for remedying the breaches detected (see, for similar reasoning, *Association for European Integration and Human Rights and Ekimdzhiev*, cited above, § 88).

277. As regards supervision of interceptions by prosecutors, the Court observes that domestic law sets out the scope of, and the procedures for, prosecutors' supervision of operational-search activities (see paragraphs 69-80 above). It stipulates that prosecutors may carry out routine and *ad hoc* inspections of agencies performing operational-search activities and are entitled to study the relevant documents, including confidential ones. They may take measures to stop or remedy the detected breaches of law and to bring those responsible to account. They must submit biannual reports detailing the results of the inspections to the Prosecutor General's Office. The Court accepts that a legal framework exists which provides, at least in theory, for some supervision by prosecutors of secret surveillance measures. It must next be examined whether the prosecutors are independent of the authorities carrying out the surveillance, and are vested with sufficient powers and competence to exercise effective and continuous control.

278. As to the independence requirement, in previous cases the Court has taken into account the manner of appointment and the legal status of the

members of the supervisory body. In particular, it found sufficiently independent bodies composed of members of parliament of both the majority and the opposition, or of persons qualified to hold judicial office, appointed either by Parliament or by the Prime Minister (see, for example, *Klass and Others*, cited above, §§ 21 and 56; *Weber and Saravia*, cited above, §§ 24-25 and 117; *Leander*, cited above, § 65; *L. v. Norway*, no. 13564/88, Commission decision of 8 June 1990, Decisions and Reports 65; and *Kennedy*, cited above, §§ 57 and 166). In contrast, a Minister for Internal Affairs – who was not only a political appointee and a member of the executive, but also directly involved in the commissioning of special means of surveillance – was found to be insufficiently independent (see *Association for European Integration and Human Rights and Ekimdzhiev*, cited above, §§ 85 and 87). Similarly, a Prosecutor General and competent lower-level prosecutors were also found to be insufficiently independent (see *Iordachi and Others*, cited above, § 47).

279. In contrast to the supervisory bodies cited above, in Russia prosecutors are appointed and dismissed by the Prosecutor General after consultation with the regional executive authorities (see paragraph 70 above). This fact may raise doubts as to their independence from the executive.

280. Furthermore, it is essential that any role prosecutors have in the general protection of human rights does not give rise to any conflict of interest (see *Menchinskaya v. Russia*, no. 42454/02, §§ 19 and 38, 15 January 2009). The Court observes that prosecutor's offices do not specialise in supervision of interceptions (see paragraph 71 above). Such supervision is only one part of their broad and diversified functions, which include prosecution and supervision of criminal investigations. In the framework of their prosecuting functions, prosecutors give their approval to all interception requests lodged by investigators in the framework of criminal proceedings (see paragraph 44 above). This blending of functions within one prosecutor's office, with the same office giving approval to requests for interceptions and then supervising their implementation, may also raise doubts as to prosecutors' independence (see, by way of contrast, *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 215, 10 January 2012, concerning supervision by prosecutors of detention facilities, where it was found that prosecutors complied with the requirement of independence *vis-à-vis* the penitentiary system's bodies).

281. Turning now to the prosecutors' powers and competences, the Court notes that it is essential that the supervisory body has access to all relevant documents, including closed materials and that all those involved in interception activities have a duty to disclose to it any material it required (see *Kennedy*, cited above, § 166). Russian law stipulates that prosecutors are entitled to study relevant documents, including confidential ones. It is, however, important to note that information about the security services'

undercover agents, and about the tactics, methods and means used by them, is outside the scope of prosecutors' supervision (see paragraph 74 above). The scope of their supervision is therefore limited. Moreover, interceptions performed by the FSB in the sphere of counter-intelligence may be inspected only following an individual complaint (see paragraph 76 above). As individuals are not notified of interceptions (see paragraph 81 above and paragraph 289 below), it is unlikely that such a complaint will ever be lodged. As a result, surveillance measures related to counter-intelligence *de facto* escape supervision by prosecutors.

282. The supervisory body's powers with respect to any breaches detected are also an important element for the assessment of the effectiveness of its supervision (see, for example, *Klass and Others*, cited above, § 53, where the intercepting agency was required to terminate the interception immediately if the G10 Commission found it illegal or unnecessary; and *Kennedy*, cited above, § 168, where any intercept material was to be destroyed as soon as the Interception of Communications Commissioner discovered that the interception was unlawful). The Court is satisfied that prosecutors have certain powers with respect to the breaches detected by them. Thus, they may take measures to stop or remedy the detected breaches of law and to bring those responsible to account (see paragraph 79 above). However, there is no specific provision requiring destruction of the unlawfully obtained intercept material (see *Kennedy*, cited above, § 168).

283. The Court must also examine whether the supervisory body's activities are open to public scrutiny (see, for example, *L. v. Norway*, cited above, where the supervision was performed by the Control Committee, which reported annually to the government and whose reports were published and discussed by Parliament; *Kennedy*, cited above, § 166, where the supervision of interceptions was performed by the Interception of Communications Commissioner, who reported annually to the Prime Minister, his report being a public document laid before Parliament; and, by contrast, *Association for European Integration and Human Rights and Ekimdzhiiev*, cited above, § 88, where the Court found fault with the system where neither the Minister for Internal Affairs nor any other official was required to report regularly to an independent body or to the general public on the overall operation of the system or on the measures applied in individual cases). In Russia, prosecutors must submit biannual reports detailing the results of the inspections to the Prosecutor General's Office. However, these reports concern all types of operational-search measures, amalgamated together, without interceptions being treated separately from other measures. Moreover, the reports contain only statistical information about the number of inspections of operational-search measures carried out and the number of breaches detected, without specifying the nature of the breaches or the measures taken to remedy them. It is also significant that the

reports are confidential documents. They are not published or otherwise accessible to the public (see paragraph 80 above). It follows that in Russia supervision by prosecutors is conducted in a manner which is not open to public scrutiny and knowledge.

284. Lastly, the Court notes that it is for the Government to illustrate the practical effectiveness of the supervision arrangements with appropriate examples (see, *mutatis mutandis*, *Ananyev and Others*, cited above, §§ 109-10). However, they did not submit any inspection reports or decisions by prosecutors ordering the taking of measures to stop or remedy a detected breach of law. It follows that the Government did not demonstrate that prosecutors' supervision of secret surveillance measures is effective in practice. The Court also takes note in this connection of the documents submitted by the applicant illustrating prosecutors' inability to obtain access to classified materials relating to interceptions (see paragraph 14 above). That example also raises doubts as to the effectiveness of supervision by prosecutors in practice.

285. In view of the defects identified above, and taking into account the particular importance of supervision in a system where law-enforcement authorities have direct access to all communications, the Court considers that the prosecutors' supervision of interceptions as it is currently organised is not capable of providing adequate and effective guarantees against abuse.

(η) Notification of interception of communications and available remedies

286. The Court will now turn to the issue of notification of interception of communications which is inextricably linked to the effectiveness of remedies before the courts (see the case-law cited in paragraph 234 above).

287. It may not be feasible in practice to require subsequent notification in all cases. The activity or danger against which a particular series of surveillance measures is directed may continue for years, even decades, after the suspension of those measures. Subsequent notification to each individual affected by a suspended measure might well jeopardise the long-term purpose that originally prompted the surveillance. Furthermore, such notification might serve to reveal the working methods and fields of operation of the intelligence services and even possibly to identify their agents. Therefore, the fact that persons concerned by secret surveillance measures are not subsequently notified once surveillance has ceased cannot by itself warrant the conclusion that the interference was not "necessary in a democratic society", as it is the very absence of knowledge of surveillance which ensures the efficacy of the interference. As soon as notification can be carried out without jeopardising the purpose of the restriction after the termination of the surveillance measure, information should, however, be provided to the persons concerned (see *Klass and Others*, cited above, § 58, and *Weber and Saravia*, cited above, § 135). The Court also takes note of the Recommendation of the Committee of Ministers regulating the use of

personal data in the police sector, which provides that where data concerning an individual have been collected and stored without his knowledge, and unless the data are deleted, he should be informed, where practicable, that information is held about him as soon as the object of the police activities is no longer likely to be prejudiced (§ 2.2, see paragraph 143 above).

288. In *Klass and Others* and *Weber and Saravia*, the Court examined German legislation which provided for notification of surveillance as soon as that could be done after its termination without jeopardising its purpose. The Court took into account that it was an independent authority, the G10 Commission, which had the power to decide whether an individual being monitored was to be notified of a surveillance measure. The Court found that the provision in question ensured an effective notification mechanism which contributed to keeping the interference with the secrecy of telecommunications within the limits of what was necessary to achieve the legitimate aims pursued (see *Klass and Others*, cited above, § 58, and *Weber and Saravia*, cited above, § 136). In *Association for European Integration and Human Rights and Ekimdzhiiev* and *Dumitru Popescu*, the Court found that the absence of a requirement to notify the subject of interception at any point was incompatible with the Convention, in that it deprived the interception subject of an opportunity to seek redress for unlawful interferences with his Article 8 rights and rendered the remedies available under the national law theoretical and illusory rather than practical and effective. The national law thus eschewed an important safeguard against the improper use of special means of surveillance (see *Association for European Integration and Human Rights and Ekimdzhiiev*, cited above, §§ 90-91, and *Dumitru Popescu*, cited above, § 77). By contrast, in *Kennedy* the absence of a requirement to notify the subject of interception at any point in time was compatible with the Convention, because in the United Kingdom any person who suspected that his communications were being or had been intercepted could apply to the Investigatory Powers Tribunal, whose jurisdiction did not depend on notification to the interception subject that there had been an interception of his communications (see *Kennedy*, cited above, § 167).

289. Turning now to the circumstances of the present case, the Court observes that in Russia persons whose communications have been intercepted are not notified of this fact at any point or under any circumstances. It follows that, unless criminal proceedings have been opened against the interception subject and the intercepted data have been used in evidence, or unless there has been a leak, the person concerned is unlikely ever to find out that his communications have been intercepted.

290. The Court takes note of the fact that a person who has somehow learned that his communications have been intercepted may request information about the corresponding data (see paragraph 81 above). It is

worth noting in this connection that in order to be entitled to lodge such a request the person must be in possession of the facts of the operational-search measures to which he was subjected. It follows that access to the information is conditional on the person's ability to prove that his communications were intercepted. Furthermore, the interception subject is not entitled to obtain access to documents relating to interception of his communications; he is at best entitled to receive "information" about the collected data. Such information is provided only in very limited circumstances, namely if the person's guilt has not been proved in accordance with the procedure prescribed by law, that is, he has not been charged or the charges have been dropped on the ground that the alleged offence was not committed or that one or more elements of a criminal offence were missing. It is also significant that only information that does not contain State secrets may be disclosed to the interception subject and that under Russian law information about the facilities used in operational-search activities, the methods employed, the officials involved and the data collected constitutes a State secret (see paragraph 52 above). In view of the above features of Russian law, the possibility of obtaining information about interceptions appears to be ineffective.

291. The Court will bear the above factors – the absence of notification and the lack of an effective possibility of requesting and obtaining information about interceptions from the authorities – in mind when assessing the effectiveness of remedies available under Russian law.

292. Russian law provides that a person claiming that his rights have been or are being violated by a State official performing operational-search activities may complain to the official's superior, a prosecutor or a court (see paragraph 83 above). The Court reiterates that a hierarchical appeal to a direct supervisor of the authority whose actions are being challenged does not meet the requisite standards of independence needed to constitute sufficient protection against the abuse of authority (see, for similar reasoning, *Khan v. the United Kingdom*, no. 35394/97, §§ 45-47, ECHR 2000-V; *Dumitru Popescu*, cited above, § 72; and *Avanesyan*, cited above, § 32). Prosecutors also lack independence and have a limited scope of review, as demonstrated above (see paragraphs 277-85 above). It remains to be ascertained whether a complaint to a court may be regarded as an effective remedy.

293. There are four judicial procedures which, according to the Government, may be used by a person wishing to complain of the interception of his communications: an appeal, a cassation appeal or a supervisory-review complaint against the judicial decision authorising interception of communications; a judicial-review complaint under Article 125 of the CCRP; a judicial-review complaint under the Judicial Review Act and Chapter 25 of the CCP; and a civil tort claim under Article 1069 of the Civil Code. The Court will examine them in turn.

294. The first of the procedures invoked by the Government is an appeal, cassation appeal or supervisory-review complaint against the judicial decision authorising interception of communications. However, the Constitutional Court stated clearly that the interception subject had no right to appeal against the judicial decision authorising interception of his communications (see paragraph 40 above; see also *Avanesyan*, cited above, § 30). Domestic law is silent on the possibility of lodging a cassation appeal. Given that the Government did not submit any examples of domestic practice on examination of cassation appeals, the Court has serious doubts as to the existence of a right to lodge a cassation appeal against a judicial decision authorising interception of communications. At the same time, the interception subject is clearly entitled to lodge a supervisory-review complaint (see paragraph 43 above). However, in order to lodge a supervisory-review complaint against the judicial decision authorising interception of communications, the person concerned had to be aware that such a decision existed. Although the Constitutional Court has held that it is not necessary to attach a copy of the contested judicial decision to the supervisory-review complaint (*ibid.*), it is difficult to imagine how a person can lodge such a complaint without having at least the minimum information about the decision he is challenging, such as its date and the court which has issued it. In the absence of notification of surveillance measures under Russian law, an individual would hardly ever be able to obtain that information unless it were to be disclosed in the context of criminal proceedings against him or there was some indiscretion which resulted in disclosure.

295. Further, a complaint under Article 125 of the CCrP may be lodged only by a participant to criminal proceedings while a pre-trial investigation is pending (see paragraphs 88-89 above). This remedy is therefore available only to persons who have learned of the interception of their communications in the framework of criminal proceedings against them. It cannot be used by a person against whom no criminal proceedings have been brought following the interception of his communications and who does not know whether his communications were intercepted. It is also worth noting that the Government did not submit any judicial decisions examining a complaint under Article 125 of the CCrP concerning the interception of communications. They therefore failed to illustrate the practical effectiveness of the remedy invoked by them with examples from the case-law of the domestic courts (see, for similar reasoning, *Rotaru*, cited above, § 70, and *Ananyev and Others*, cited above, §§ 109-10).

296. As regards the judicial-review complaint under the Judicial Review Act, Chapter 25 of the CCP and the new Code of Administrative Procedure and a civil tort claim under Article 1069 of the Civil Code, the burden of proof is on the claimant to show that the interception has taken place and that his rights were thereby breached (see paragraphs 85, 95-96 and 105

above). In the absence of notification or some form of access to official documents relating to the interceptions, such a burden of proof is virtually impossible to satisfy. Indeed, the applicant's judicial complaint was rejected by the domestic courts on the ground that he had failed to prove that his telephone communications had been intercepted (see paragraphs 11 and 13 above). The Court notes that the Government submitted several judicial decisions taken under Chapter 25 of the CCP or Article 1069 of the Civil Code (see paragraphs 220-23 above). However, all of those decisions, with one exception, concern searches or seizures of documents or objects, that is, operational-search measures carried out with the knowledge of the person concerned. Only one judicial decision concerns interception of communications. In that case the intercept subject was able to discharge the burden of proof because she had learned of the interception of her communications in the course of criminal proceedings against her.

297. Further, the Court takes note of the Government's argument that Russian law provides for criminal remedies for abuse of power, unauthorised collection or dissemination of information about a person's private and family life and breach of citizens' right to privacy of communications. For the reasons set out in the preceding paragraphs these remedies are also available only to persons who are capable of submitting to the prosecuting authorities at least some factual information about the interception of their communications (see paragraph 24 above).

298. The Court concludes from the above that the remedies referred to by the Government are available only to persons who are in possession of information about the interception of their communications. Their effectiveness is therefore undermined by the absence of a requirement to notify the subject of interception at any point, or an adequate possibility of requesting and obtaining information about interceptions from the authorities. Accordingly, the Court finds that Russian law does not provide for an effective judicial remedy against secret surveillance measures in cases where no criminal proceedings were brought against the interception subject. It is not the Court's task in the present case to decide whether these remedies will be effective in cases where an individual learns about the interception of his communications in the course of criminal proceedings against him (see, however, *Avanesyan*, cited above, where some of these remedies were found to be ineffective in order to complain of an "inspection" of the applicant's flat).

299. Lastly, with respect to the remedies to challenge the alleged insufficiency of safeguards against abuse in Russian law before the Russian courts, the Court is not convinced by the Government's argument that such remedies are effective (see paragraphs 156 and 225 above). As regards the possibility of challenging the OSAA before the Constitutional Court, the Court observes that the Constitutional Court has examined the constitutionality of the OSAA on many occasions and found that it was

compatible with the Constitution (see paragraphs 40-43, 50, 82 and 85-87 above). In such circumstances the Court finds it unlikely that a complaint by the applicant to the Constitutional Court, raising the same issues that have already been examined by it, would have any prospect of success. Nor is the Court convinced that a challenge of Order no. 70 before the Supreme Court or the lower courts would constitute an effective remedy. Indeed, the applicant did challenge Order no. 70 in the domestic proceedings. However, both the District and City Courts found that the applicant had no standing to challenge the Order because the equipment installed pursuant to it did not in itself interfere with the privacy of his communications (see paragraphs 10-11 and 13 above). It is also significant that the Supreme Court found that Order no. 70 was technical rather than legal in nature (see paragraph 128 above).

300. In view of the above considerations, the Court finds that Russian law does not provide for effective remedies to a person who suspects that he has been subjected to secret surveillance. By depriving the subject of interception of the effective possibility of challenging interceptions retrospectively, Russian law thus eschews an important safeguard against the improper use of secret surveillance measures.

301. For the above reasons, the Court also rejects the Government's objection as to non-exhaustion of domestic remedies.

(θ) Conclusion

302. The Court concludes that Russian legal provisions governing interceptions of communications do not provide for adequate and effective guarantees against arbitrariness and the risk of abuse which is inherent in any system of secret surveillance, and which is particularly high in a system where the secret services and the police have direct access, by technical means, to all mobile-telephone communications. In particular, the circumstances in which public authorities are empowered to resort to secret surveillance measures are not defined with sufficient clarity. Provisions on discontinuation of secret surveillance measures do not provide sufficient guarantees against arbitrary interference. Domestic law permits automatic storage of clearly irrelevant data and is not sufficiently clear as to the circumstances in which the intercept material will be stored and destroyed after the end of a trial. The authorisation procedures are not capable of ensuring that secret surveillance measures are ordered only when "necessary in a democratic society". The supervision of interceptions, as it is currently organised, does not comply with the requirements of independence, powers and competence which are sufficient to exercise an effective and continuous control, public scrutiny and effectiveness in practice. The effectiveness of the remedies is undermined by the absence of notification at any point of interceptions, or adequate access to documents relating to interceptions.

303. It is significant that the shortcomings in the legal framework as identified above appear to have an impact on the actual operation of the system of secret surveillance which exists in Russia. The Court is not convinced by the Government's assertion that all interceptions in Russia are performed lawfully on the basis of a proper judicial authorisation. The examples submitted by the applicant in the domestic proceedings (see paragraph 12 above) and in the proceedings before the Court (see paragraph 197 above) indicate the existence of arbitrary and abusive surveillance practices, which appear to be due to the inadequate safeguards provided by law (see, for similar reasoning, *Association for European Integration and Human Rights and Ekimdzhiiev*, cited above, § 92; and, by contrast, *Klass and Others*, cited above, § 59, and *Kennedy*, cited above, §§ 168-69).

304. In view of the shortcomings identified above, the Court finds that Russian law does not meet the "quality of law" requirement and is incapable of keeping the "interference" to what is "necessary in a democratic society".

305. There has accordingly been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

306. The applicant complained that he had no effective remedy for his complaint under Article 8. He relied on Article 13 of the Convention, which reads as follows:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

307. Having regard to the findings under Article 8 of the Convention in paragraphs 286 to 300 above, the Court considers that, although the complaint under Article 13 of the Convention is closely linked to the complaint under Article 8 and therefore has to be declared admissible, it is not necessary to examine it separately (see *Liberty and Others*, cited above, § 73).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

308. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

309. The applicant claimed 9,000 euros (EUR) in respect of non-pecuniary damage.

310. The Government submitted that the claim was excessive, taking into account that the applicant had challenged Russian law *in abstracto* without being in any way personally affected by it. The finding of a violation would therefore constitute sufficient just satisfaction.

311. The Court reiterates that, in the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which it finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned any sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. Furthermore, in ratifying the Convention, the Contracting States undertake to ensure that their domestic law is compatible with it (see *Association for European Integration and Human Rights and Ekimdzhev*, cited above, § 111, with further references).

312. The Court considers that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage caused to the applicant.

B. Costs and expenses

313. Before the Chamber, the applicant claimed 26,579 Russian roubles (RUB, approximately EUR 670) on the date of submission) for postal and translation expenses. He relied on postal and fax-service invoices and a translation-services contract.

314. Before the Grand Chamber, the applicant claimed 22,800 pounds sterling (GBP, approximately EUR 29,000 on the date of submission) and EUR 13,800 for legal fees. He relied on lawyers' time-sheets. Relying on bills and invoices, he also claimed GBP 6,833.24 (approximately EUR 8,700 on the date of submission) for translation, travelling and other administrative expenses.

315. The Government accepted the claim for costs and expenses made before the Chamber because it was supported by documentary evidence. As

regards the claims for costs and expenses made before the Grand Chamber, the Government submitted that the claims had been submitted more than a month after the hearing. As regards the legal fees, the Government submitted that part of those fees covered the work performed by the representatives before the applicant had signed an authority form and that there was no authority form in the name of Ms Levine. Furthermore, the number of representatives and the number of hours spent by them on the preparation of the case had been excessive. There was moreover no evidence that the applicant had paid the legal fees in question or was under a legal or contractual obligation to pay them. As regards the translation and other administrative expenses, the Government submitted that the applicant had not provided any documents showing that he had paid the amounts claimed. Nor had he proved that the translation expenses had indeed been necessary, given that some of the applicant's lawyers spoke Russian. The rates claimed by the translators had been excessive. Lastly, the travelling expenses had also been excessive.

316. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 40,000 covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

317. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Joins*, unanimously, to the merits the Government's objections regarding the applicant's lack of victim status and non-exhaustion of domestic remedies and *declares* the application admissible;
2. *Holds*, unanimously, that there has been a violation of Article 8 of the Convention and *dismisses* the Government's above-mentioned objections;
3. *Holds*, unanimously, that there is no need to examine the complaint under Article 13 of the Convention;

4. *Holds*, by sixteen votes to one, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
5. *Holds*, unanimously,
 - (a) that the respondent State is to pay the applicant, within three months, EUR 40,000 (forty thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 4 December 2015.

Lawrence Early
Jurisconsult

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Dedov;
- (b) partly dissenting opinion of Judge Ziemele.

D.S.
T.L.E.

CONCURRING OPINION OF JUDGE DEDOV

1. Competence of the Court to examine the domestic law *in abstracto*

As pointed out by the Government, doubts may exist as to the Court's competence to examine the quality and effectiveness of the domestic law *in abstracto* without the applicant's victim status being established and without determining that there had been an interference with his right to respect for his private life in practice, and not merely theoretically.

This approach has already been used by the Court in interception cases in order to prevent potential abuses of power. In two leading cases, *Kennedy v. the United Kingdom* (no. 26839/05, §§ 122-23, 18 May 2010) and *Klass and Others v. Germany* (6 September 1978, § 34, Series A no. 28), against two prominent democratic States, namely the United Kingdom and Germany, the Court confirmed the effectiveness of the relevant domestic systems against arbitrariness. However, and regrettably, we cannot ignore the fact that both of these States have recently been involved in major well-publicised surveillance scandals. Firstly, the mobile-telephone conversations of the Federal Chancellor of Germany were unlawfully intercepted by the national secret service, and, secondly, the UK authorities provided a secret service of the United States of America with access to and information about the former State's entire communication database, with the result that the US authorities were able to intercept all UK citizens without being subject to any appropriate domestic safeguards at all.

This indicates that something was wrong with the Court's approach from the very outset. It would perhaps be more effective to deal with applications on an individual basis, so that the Court has an opportunity to establish interference and to find a violation of the Convention, as indeed it regularly finds in relation to unjustified searches of applicants' premises. Generally speaking, the problem in those cases does not concern the authorisation powers of the domestic courts, but the manner in which the judges authorise the requests for investigative searches.

The Court's approach can easily shift from the actual application of the law to the potential for interference. Here are examples from *Kennedy*:

“119. The Court has consistently held in its case-law that its task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention (see, *inter alia*, *Klass and Others*, cited above, § 33; *N.C. v. Italy* [GC], no. 24952/94, § 56, ECHR 2002-X; and *Krone Verlag GmbH & Co. KG v. Austria* (no. 4), no. 72331/01, § 26, 9 November 2006)”;

and from *Klass and Others*:

“36. ... The Court finds it unacceptable that the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the

person concerned is kept unaware of its violation. A right of recourse to the Commission for persons potentially affected by secret surveillance is to be derived from Article 25, since otherwise Article 8 runs the risk of being nullified.”

However, the German and English scandals referred to above confirm that, sooner or later, the individual concerned will become aware of the interception. One may find relevant examples in the Russian context (see *Shimovolos v. Russia*, no. 30194/09, 21 June 2011). The applicant in the present case is not aware of any interception of his communications, and this fact cannot be ignored by the Court.

The Court has on many occasions avoided examining cases *in abstracto* (see *Silver and Others v. the United Kingdom*, 25 March 1983, § 79, Series A no. 61; *Nikolova v. Bulgaria* [GC], no. 31195/96, § 60, ECHR 1999-II; *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, §§ 68-70, 20 October 2011; *Sabanchiyeva and Others v. Russia*, no. 38450/05, § 137, ECHR 2013; and *Monnat v. Switzerland*, no. 73604/01, §§ 31-32, ECHR 2006-X). Thus, one can presume that the interception cases are unique. We then need to know the reasons why the Court should change its general approach when examining such cases. Yet we have no idea about what those reasons might be. If the legislation creates the risk of arbitrariness, then we need to see the outcome of that arbitrariness. I am not sure that a few examples (unrelated to the applicant’s case) prove that the entire system of safeguards should be revised and strengthened. I would accept such an approach if the Court had a huge backlog of individual repetitive petitions showing that Order no. 70 (on the connection of interception equipment to operators’ networks) is not technical in nature but that it creates a structural problem in Russia. If that is the case, however, we need a pilot procedure and a pilot judgment.

Every case in which the Court has found a violation of the Convention (more than 15,000 judgments) is based on the abuse of power, even where the domestic legislation is of good quality. Every abuse of power is a question of ethics, and cannot be eliminated by legislative measures alone.

The Court has consistently held that its task is not to review domestic law and practice *in abstracto* or to express a view as to the compatibility of the provisions of legislation with the Convention, but to determine whether the manner in which they were applied or in which they affected the applicant gave rise to a violation of the Convention (see, among other authorities, in the Article 14 context, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, no. 40825/98, § 90, 31 July 2008).

Article 34 of the Convention does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain of a law *in abstracto* simply because they feel that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been

applied to his detriment (see *Klass and Others*, cited above, § 33). These principles should not be applied arbitrarily.

2. Legislature and judiciary: the Court should respect differences

This case is very important in terms of the separation of functions between the Court and the Parliamentary Assembly of the Council of Europe, as it is necessary to separate the powers of the legislature and judiciary. The Parliamentary Assembly adopts recommendations, resolutions and opinions which serve as guidelines for the Committee of Ministers, national governments, parliaments and political parties. Ultimately, through conventions, legislation and practice, the Council of Europe promotes human rights, democracy and the rule of law. It monitors member States' progress in these areas and makes recommendations through independent expert monitoring bodies. The European Court of Human Rights rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. Taking account of the above separation of functions, the examination of a case *in abstracto* is similar to an expert report, but not to a judgment.

Morten Kjaerum, Director of the European Union Agency for Fundamental Human Rights, addressed a joint debate on fundamental rights at the European Parliamentary Committee on Civil Liberties, Justice and Home Affairs on 4 September 2014. The Director pointed out, *inter alia*, as follows.

“The Snowden revelations of mass surveillance highlighted the fact that the protection of personal data is under threat. The protection of the right to privacy is far from sufficient when we look across Europe today. Following last year's debates, we very much welcome the European Parliament's request to the Fundamental Rights Agency to further investigate the fundamental rights and safeguards in place in the context of large-scale surveillance programmes. And of course you will be informed probably towards the end of this year about the findings of this particular request.

But it's not only the big surveillance programmes. There are also misgivings about oversight mechanisms in the area of general data protection. When we give data to health authorities, to tax authorities, to other institutions, public or private. We see from the work of the Fundamental Rights Agency that the national oversight structures in the EU are currently too weak to fulfil their mission. Data protection authorities, which are established in all Member States have an important role to play in the enforcement of the overall data protection system, but the powers and resources of national data protection authorities urgently needs to be strengthened and also their independence needs to be guaranteed.

Finally, I would also highlight that those who are entrusted to store the data, whether it is private or public, that the institutions need to be accountable, at a much stronger level [than] we see today if the safeguards that they create are not sufficiently in place.”

These remarks were addressed to the newly elected members of the European Parliament (rather than to judges), raising issues of concern across Europe and calling for a more sophisticated system of data protection. The aim of the speech was to initiate public debate in order to find effective measures and to promote proper ethical standards in society; the courtroom is not the place for such a debate.

I would suggest that the Court should focus on a particular interference and the effectiveness of the measures in place to prevent that specific violation (as the Court usually does in all other categories of cases). This is the Court's primary task: to establish that an interference has taken place and then to examine whether the interference was lawful and necessary in a democratic society. It is ethically unacceptable for judges to presume that every citizen in a particular country could be under unlawful secret surveillance without knowledge of the facts. A judgment cannot be built on the basis of allegations.

The Court has used many tools to fight violations. One of them was to find a violation of Article 10 on account of an intelligence service's refusal to provide information to the applicant organisation about individuals placed under electronic surveillance for a specified period (*Youth Initiative for Human Rights v. Serbia*, no. 48135/06, 25 June 2013). In the operative part of that judgment, the Court invited the Government to ensure that the disputed information was made available to the applicant organisation (without waiting for measures to be proposed by the Committee of Ministers). I recognise this as an effective measure and a judicial success.

3. The “reasonable likelihood” approach should be developed

Establishment of the applicant's victim status is an integral part of the judicial process. Article 34 of the Convention provides that “[t]he Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto”. The notion of “victim” does not imply the existence of prejudice (see *Brumărescu v. Romania* [GC], no. 28342/95, § 50, ECHR 1999-VII).

The Court has previously ruled that, while the existence of a surveillance regime might interfere with privacy, a claim that this created a violation of rights was justiciable only where there was a “reasonable likelihood” that a person had actually been subjected to unlawful surveillance (see *Esbester v. the United Kingdom*, no. 18601/91, Commission decision of 2 April 1993, unreported; *Redgrave v. the United Kingdom*, no. 20271/92, Commission decision of 1 September 1993, unreported; and *Matthews v. the United Kingdom*, no. 28576/95, Commission decision of 16 October 1996,

unreported). These references are to inadmissibility decisions, since all of the allegations of interception were considered manifestly ill-founded.

However, the Court changed its approach completely in *Kennedy*: “... it could not be excluded that secret surveillance measures were applied to him or that [the applicant] was ... potentially at risk of being subjected to such measures” (see *Kennedy*, cited above, §§ 125-29). Today we see that this change in the case-law was not effective.

The term “reasonable likelihood” implies that there are negative consequences for an applicant who is potentially subject to secret surveillance, on account of certain information that is made available to the authorities through interception, and excluding the possibility that this information could be uncovered by other means. The Court made this approach dangerously simple in order to examine the merits of these cases, presuming that persons who are subject to secret supervision by the authorities are not always subsequently informed of such measures against them, and thus it is impossible for the applicants to show that any of their rights have been interfered with. In these circumstances the Court concluded that applicants must be considered to be entitled to lodge an application even if they cannot show that they are victims. The applicants in *Klass and Others* and *Liberty and Others v. the United Kingdom* (no. 58243/00, 1 July 2008) were lawyers and theoretically they could have been subject to secret surveillance in consequence of contacts they may have had with clients suspected of illegal activities (see *Klass and Others*, § 27).

In *Kennedy* the applicant alleged that local calls to his telephone were not being put through to him and that he was receiving a number of time-wasting hoax calls. The applicant suspected that this was because his mail, telephone and email communications were being intercepted, and the Court took this into serious consideration, rejecting the Government’s objections that the applicant had failed to show that there had been interference for the purposes of Article 8, and that he had not established a reasonable likelihood. The Court also rejected the non-exhaustion submissions, in spite of the fact that the applicant had not checked the quality of telecommunications services with his operator, but had made subject access requests to MI5 and GCHQ (the United Kingdom’s intelligence agencies responsible for national security) under the Data Protection Act 1998.

Returning to the circumstances of the present case, it can reasonably be concluded that the interconnection between the telecommunication equipment and the interception equipment does not necessarily mean that interception of the applicant’s telephone conversations has actually taken place. Nor can the Court base its findings on the presumption of the “possibility of improper action by a dishonest, negligent or over-zealous official” (see *Klass and Others*, §§ 49-50 and 59; *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 106, ECHR 2006-XI; and *Kennedy*, §§ 153-54). Equally, the Court cannot presume in general (in order to

examine the case *in abstracto*) the existence of State violence against the opposition movements and other democratic institutions in the respondent State, even if corresponding resolutions have been adopted by the Parliamentary Assembly. The Court must maintain its impartiality and neutrality.

4. Role of the judiciary in civil society

Nonetheless, I have voted for admissibility and for the finding of a violation of Article 8 of the Convention on account of the fact that the fundamental importance of safeguards to protect private communications against arbitrary surveillance, especially in the non-criminal context, was never addressed in the domestic proceedings. The Russian courts refused to address the applicant's allegations on the merits, mistakenly referring to the technical nature of the impugned ministerial orders. As a national judge, I cannot ignore the fact that a widespread suspicion exists in Russian society that surveillance is exercised over political and economic figures, including human rights activists, opposition activists and leaders, journalists, State officials, managers of State property – in other words, over all those who are involved in public affairs. Such a suspicion is based on past experience of the totalitarian regime during the Soviet era, and even on the long history of the Russian Empire.

This judgment could serve as a basis for improving the legislation in the sphere of operational and search activities and for establishing an effective system of public control over surveillance. Moreover, this judgment demonstrates that if widespread suspicion exists in society, and if there is no other possibility for society to lift this suspicion without a social contract and appropriate changes in national law and practice, then where the problem is not identified by the other branches of power the judiciary must be active in order to facilitate those changes. This is even more obvious if there are no other means available to protect democracy and the rule of law. This is an important role which the judiciary must play in civil society.

The Court could be criticised for failing to provide more specific reasoning for its *in abstracto* examination within the social context, with the observation that the Court has merely followed its own Chamber case-law. However, the judgment in the present case is a difficult one, since before reaching their conclusion the judges had to take care to establish whether or not all other means were useless. In contrast, in the case of *Clapper v. Amnesty International USA* (568 US 398 (2013)), the US Supreme Court failed to take a step forward, despite the existence of a mass surveillance programme and “the widespread suspicion” of its existence (or, in the words of Justice Breyer in his dissenting opinion, “[the harm] is as likely to take place as are most future events that common-sense inference and ordinary knowledge of human nature tell us will happen”). Instead, it rejected as

insufficient the argument by the plaintiffs (including human rights, legal and media organisations) that they were likely to be subject to surveillance due to the nature of their work.

I shall stop here, leaving the discussions on judicial aggression, activism or restraint for academics. I should like merely to close my opinion by quoting Edward Snowden: “With each court victory, with every change in the law, we demonstrate facts are more convincing than fear. As a society, we rediscover that the value of a right is not in what it hides, but in what it protects.”

PARTLY DISSENTING OPINION OF JUDGE ZIEMELE

1. I fully agree with the finding of a violation in this case. The Court has rendered a very important judgment on a matter of principle, since secret surveillance as carried out in the manner described in the facts of the case is, in its very essence, incompatible with the rule of law and the principles of democracy.

2. It is especially in such a context that I cannot agree with the Court's decision not to award any compensation for the non-pecuniary damage sustained. I consider that the applicant's claim for damages was very reasonable (see paragraph 309 of the present judgment) and that the finding of a violation, while very important as a matter of principle in this case, is not appropriate satisfaction for the applicant's specific situation. I therefore voted against operative provision no. 4.

ANNEX A12

HC McCANN v. MINISTER FOR EDUCATION (*Costello P*) 1

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Frances McCann v. Minister for Education and Another: High Court
(*Costello P*) 10 October 1996

Judicial Review - Rules regarding scheme for payment of incremental salaries to secondary school teachers - Entitlement of Minister for Education to make rules for administration of funds allocated by Oireachtas to Department of Education - Salaries paid to recognised teachers registered under regulations made pursuant to Intermediate Education (Ireland) Act 1914 - Registration dependent on teacher possessing prescribed qualifications - Test of reasonableness applicable to administrative measures made by a minister for the purpose of administering public funds - Intermediate Education (Ireland) Act 1914 (4 & 5 Geo. 5, c. 41), s. 1

Constitution - Principle of proportionality - Application of principle where interference with legally protected right - Principle of proportionality not applicable to administrative orders, measures, decisions or regulations which do not attack legally protected rights

European Communities - Right of freedom of establishment - Recognition of foreign qualifications - Refusal to register applicant as teacher on grounds that qualifications obtained by her in England not equivalent to those prescribed - Right of establishment conferred on the nationals of member states in the territory of another member state - Applicant an Irish citizen and thus unable to rely upon right in Ireland - No discrimination on grounds of nationality as applicant's nationality not relevant to decision as to whether qualifications were equivalent - EEC Treaty, Articles 6, 52

Facts S. 1 of the Intermediate Education (Ireland) Act 1914 empowers the Minister for Education to appoint a registration council to make regulations for a register of intermediate school teachers and for prescribing the conditions to be fulfilled by teachers who wish to be placed on the register. Regulation 2 of the Regulations for the Register of Teachers 1967 provided that an applicant for registration must have obtained one of the qualifications specified in Schedule E of the regulations or such other university diploma or qualification as the council may recognise with the approval of the minister. Since 1925 the Dáil voted annual funds to the Department of Education and an item in the estimates of expenditure of the Department of Education specified the sum to be spent on the payment of incremental salaries to secondary teachers. The Central Fund (Permanent Provisions) Act 1965 and the annual Appropriation Acts authorise expenditure by the minister out of public funds to provide this service. In 1958 the Minister for Education made Rules for the Payment of Incremental Salary

to Secondary Teachers ('the 1958 rules'). These rules related to the direct payment of incremental salaries by the Department of Education to teachers who are employed by the management authorities of secondary schools. The 1958 rules were amended from time to time, sometimes by the minister's acceptance of a report from a conciliation council established to consider the operation of the scheme for incremental salaries, and sometimes by means of a circular letter from the Department of Education. The 1958 rules provide that the management authority of secondary schools may nominate a number of recognised teachers for the payment of incremental salaries. The salary is paid directly to the teacher by the Department of Education. A recognised teacher is defined as meaning a registered teacher who complies with certain conditions. A registered teacher is defined as a teacher who is registered under regulations made by the registration council established under the 1914 Act. The incremental salary payable to a recognised teacher is based on the total number of completed years of approved teaching service, which is defined as service as a registered teacher or service as a teacher, other than a recognised teacher, which is registrable teaching service accepted for the purpose of s. 111 of regulation 2 of the Regulations for the Register of Teachers.

Between 1970 and 1973 the applicant undertook a general course in teacher training at a college in England. The main part of the course related to art and design. She obtained a certificate in education from the University of Leicester and successfully completed a period of probationary teaching between September 1973 and July 1974. The applicant came to Ireland and on 1 September 1974 she was appointed to a post teaching art and design in the Holy Family School in Newbridge, County Kildare. In 1986 the applicant applied for registration as a registered secondary teacher but this was turned down as her qualifications were not regarded as equivalent to those prescribed. The applicant was employed on a non-incremental basis until she obtained a diploma in art and design from the National College of Art and Design in Ireland in 1991. This left her qualified to be registered as a fully qualified teacher on an incremental basis and she was appointed on this basis from September 1992. On 2 November 1992 the applicant applied to the Minister for Education for incremental credits in respect of her previous 18 years' service so that her salary would start at a higher point on the incremental scale. She drew attention to the fact that during that period she had been a full-time teacher with sole responsibility for teaching art in the school where she was employed. On 30 August 1993 the applicant was informed orally that this application had been refused and this was confirmed by letter dated 28 August 1993. The basis of the refusal was that the applicant did not become a registered teacher until 1991 and her teaching service before that date was not registrable. Accordingly, her years of service in the Holy Family School prior to 1991 did not constitute approved teaching service and thus could not be taken into account in establishing a point on the scale of incremental salary. On 27

February 1994 the applicant's solicitor applied for incremental credit in respect of the applicant's year of service in England. This application was also refused.

The applicant instituted judicial review proceedings seeking to quash both decisions to refuse her credit. First, she argued that the 1958 rules were illegal as they were not properly made under the 1914 Act. Secondly, she argued that the minister's decisions were invalid as they failed the test of proportionality. Thirdly, she submitted that the minister's decision was haphazard and irrational and thus invalid. Fourthly, she claimed that the right of freedom of establishment provided for in Article 52 of the EEC Treaty requires member states to recognise equivalent foreign qualifications and, as the applicant's qualifications would probably have been acceptable in England, the minister's failure to recognise them was invalid. It was also claimed that the ministerial rules favoured persons qualified in Ireland and thus were inconsistent with Article 6 of the EEC Treaty which prohibits discrimination on the ground of nationality.

Held by Costello P in dismissing the applicant's claim:

(1) The sums appropriated to the Department of Education for the payment of incremental salaries to secondary teachers could be lawfully spent by the minister. As part of the minister's administrative functions she could properly adopt a scheme that contained rules under which the payment of incremental salaries could be made. This method of administering funds voted by the Oireachtas has the advantage of flexibility and informality, but the disadvantage that the exact terms of a ministerial scheme might not be readily available or difficult to ascertain.

(2) The 1958 rules were not made under the 1914 Act or any other express statutory power. They were purely administrative rules made for the purpose of administering a scheme for which monies had been voted by the Oireachtas and as such they were not invalid.

(3) Embodying a scheme for the payment of incremental salaries to secondary teachers in detailed rules which were published for all to read was a proper discharge of the minister's responsibilities. It was not improper for those rules to make provision for the teachers who would qualify for such salaries and for the conditions under which different rates of incremental salary would be paid. It followed that the minister was entitled to apply those rules when considering an application in an individual case for payment of incremental salary and in deciding whether the applicant was entitled to incremental benefits for previous years' service as a teacher. In doing so the minister did not fetter her discretion as she was not exercising a power conferred by statute which had to be exercised in the manner prescribed by the legislature. She was simply administering funds allocated to her by the legislature in accordance with rules which she and her predecessors had validly made.

(4) In cases where the validity of a law restricting a constitutional right falls

to be considered the courts may examine the restriction imposed to see whether it is in excess of that necessary to achieve the object of the impugned legislation. If the means are excessive, and thus disproportionate to the aim which the legislation is designed to achieve, then it cannot be said that the law is justified by the exigencies of the common good. The legislation is constitutionally impermissible because it impinges on the exercise of a legally protected right without justification.

(5) The decision impugned by the applicant did not restrict a legally protected right. Therefore, as there was no basis for suggesting that illegality attached to it on the grounds that the restriction which it imposed was excessive, the test of proportionality had no application. The test of proportionality could not be extended to administrative orders, measures, decisions or regulations which do not attack legally protected rights.

(6) A statutorily delegated power must be exercised reasonably. Accordingly, a by-law or statutory regulation made under a statutory power will be invalid if it is unreasonable. An unreasonable by-law or regulation is one of such manifest arbitrariness, injustice or partiality that a court would conclude that the legislature never intended to give authority to make such rules.

(7) The test of reasonableness could be applied to administrative measures made by a minister for the purpose of administering public funds. The scheme adopted by the minister for the payment of incremental salaries to secondary teachers was a perfectly reasonable one as were the amendments to the scheme. It could not be said that the scheme or any of the amendments to it were arbitrary or unjust. Likewise, the minister's decision that she should adjudicate on the applicant's claim for incremental credits in accordance with the provisions of the scheme was rational, just and in no way arbitrary.

(8) The right of freedom of establishment conferred by Article 52 of the EEC Treaty is a right conferred on the nationals of member states in the territory of another member state. As the applicant was an Irish citizen working in Ireland no breach of the rights conferred by Article 52 could arise.

(9) The scheme operated by the minister made provision for the recognition of foreign qualifications by providing that effect would be given to the decisions of the registration council relating to the equivalence of qualifications. Here the council decided that the applicant's qualifications were not equivalent to those laid down in its regulations. In those circumstances no breach of Article 52 could arise.

(10) A decision on an application was taken by considering the equivalence of the qualification. An applicant who had obtained a degree from a university outside the State or had obtained a teaching qualification from an educational institution outside the State was not precluded from registration provided the degree and/or qualifications were equivalent to those specified in the rules. The nationality of the applicant was in no way relevant and so there was no

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discrimination on the grounds of nationality as prohibited by Article 6 of the EEC Treaty.

Cases referred to in judgment

Bloomer v. Law Society [1995] 3 IR 14

Bosphorus Hava Yollari Turizm v. Minister for Transport [1994] 2 ILRM 551

Cassidy v. Minister for Industry and Commerce [1978] IR 297

Cox v. Ireland [1992] 2 IR 503

Daly v. Revenue Commissioners [1995] 3 IR 1; [1996] 1 ILRM 122

Doyle v. An Taoiseach [1986] ILRM 693

Hand v. Dublin Corporation [1989] IR 26

Heaney v. Ireland [1994] 3 IR 593; [1994] 2 ILRM 420

Matrimonial Home Bill 1993, In re [1994] 1 IR 305; [1994] 1 ILRM 241

Mixnam's Properties Ltd v. Chertsey Urban District Council [1964] 1 QB 214; [1963] 3 WLR 38; [1963] 2 All ER 787

Gerard Hogan for the applicant

Ian Finlay SC and Seamus Woulfe for the respondents

COSTELLO P delivered his judgment on 10 October 1996 saying:

Introduction

The applicant in this application for judicial review is a secondary school teacher. She undertook a three year general course in teacher training, the main course of which was Art and Design, at St Paul's College of Education, Newbold Revel, Rugby, Warwickshire, England between 1970 and 1973 and obtained a 'certificate in education' from the University of Leicester. She completed satisfactorily a year's probationary teaching under the education department of the City of Birmingham from September 1973 to July 1974. She then came to Ireland and was appointed on 1 September 1974 to a teaching post in Holy Family School, Newbridge, County Kildare teaching art and design. Her application for registration as a registered secondary teacher was not accepted (her qualifications not being regarded as equivalent to those prescribed) and she was employed on a non-incremental basis until she obtained a diploma for art/design from the National College of Art and Design in Ireland in 1991. She was then qualified to be registered as a fully qualified teacher on an incremental scale basis and she was so appointed from September 1992. She applied to the minister on 2 November 1992 for incremental credits for her previous 18 years' service (so that her salary would commence on a higher point on the incremental scale) pointing out that she had been a full-time teacher with sole responsibility for the art department in her school for this period. She was informed orally on 30 August 1993 that her application would be refused and this was confirmed by a letter of 28 August 1993 to a public representative who had written on her behalf. This decision is the first decision which is challenged in these proceedings. On 27 February 1994 her solicitor applied on her behalf for incremental credit in

respect of her one year's service in England. This was also refused and this is the second decision which she now challenges.

Under the scheme for the payment of incremental salaries which is embodied in regulations made by the minister which I will examine later incremental credits may only be given for 'approved service' at a time when the teacher is 'registered' as a teacher or was registrable as a teacher and the reason for the minister's refusal to give credit for the years between 1974 and 1991 during which the applicant served as a teacher in the Holy Family School is that during that period she was not a registered teacher. For similar reasons her claim for a year's credit whilst serving in England was refused. Before examining the regulations under which incremental salaries are paid and the grounds on which the minister's decision is challenged it will help an understanding of the issues if I first consider the regulations relating to registration and the applicant's application for registration.

Registration of secondary teachers

S. 1 of the Intermediate Education (Ireland) Act 1914 empowered the Lord Lieutenant (whose functions were later transferred to the minister) to appoint a registration council which was required to make regulations for a register of intermediate school teachers and for prescribing the conditions to be fulfilled by teachers who wish to be placed on the register. The Minister for Education appointed a registration council (by SI No. 117 of 1926) which consists of representatives of 'appointing bodies' which includes the universities, teachers' organisations and associations of school managers as well as officers from the minister's department. It has made regulations in 1967 and again in 1987 for the 'register of intermediate school teachers' which, *inter alia*, prescribe the qualifications which an applicant must have in order to be admitted to the register. Regulation 2 of the 1967 Regulations were those relevant at the time the applicant was appointed to the Holy Family School and when she applied for registration. It provided, under the heading 'Training in teaching', that an applicant must have obtained one of the qualifications specified in schedule E to the regulation 'or such other university diploma or qualification as the council may recognise with the approval of the minister'.

The applicant was aware that her qualifications were not specified in the regulations and she sought firstly from the department and later from the council 'recognition' so that she could be registered and thus be paid an incremental salary. On 16 January 1975 the department wrote outlining the qualifications which were acceptable for the purposes of registration. On 19 July 1982 it wrote again to the headmistress of her school suggesting that she should seek to establish with the National College of Art and Design what exemptions would be allowed in its diploma course on the basis of the applicant's previous study, pointing out that the diploma of the NCAD was acceptable for registration. In a

further letter to a public representative (who had written on her behalf) of 10 February 1985 the minister explained that for the purposes of registration as a secondary teacher of art in secondary schools the registration council accepted, in general, a specialist qualification obtained as a result of a full-time art course of at least three years' duration at a *recognised college of art* together with an acceptable teaching qualification obtained following a one year full-time course of teacher training but that the applicant's qualifications were not acceptable for the purpose of registration since it was obtained following a course of only three years duration at a *general teacher training college*. The letter went on to point out that only teachers holding qualifications acceptable to the registration council may be recognised and paid incremental salary as secondary teachers by the department.

In 1986 the applicant formally applied to the registration council for recognition of her qualifications for the purposes of registration as a teacher of art. Her application was formally turned down by the council for reasons explained in a letter of 18 July 1986. In the course of this letter the then secretary to the council stated:

Your application was considered by the committee of the registration council at its meeting on 27 June 1986. The committee were concerned that your certificate did not compare favourably with the four year national diploma in art and design awarded by the NCEA which is acceptable for registration as a teacher of art. The committee recommended therefore that you should contact the NCEA with a view to establishing what exemptions you would be granted from the diploma course and that these details should be submitted to the registration council in time for its meeting on 28 November 1986. The council would then decide as to what you should be recommended to do in order that your qualifications be accepted.

The applicant did not immediately adopt this suggestion. But five years later, in July 1991, she informed the department that she had obtained the NCEA diploma. The registration council then reconsidered her application in the light of this qualification and granted it. After her registration she was nominated by her school authorities for the payment of incremental salary and this nomination was accepted by the department. She was placed on the third point on the scale with effect from 1 August 1991.

The applicant was dissatisfied with the level on the scale on which her salary was payable, believing that her qualifications and her years of experience entitled her to incremental credits from 1974. As already pointed out she applied to the minister on 3 November 1992 for incremental credits and this was refused. To explain this refusal I must now consider the scheme which the minister was administering.

Payment of incremental salaries to secondary teachers
Provision was made in the 1914 Act for payment of what was called a 'Teachers Salary Grant' to be applied in a manner prescribed by regulations made by the Lord Lieutenant (now the Minister for Education). Regulations under the 1914 Act and earlier Intermediate Education Acts were made by the minister from time to time. In July 1987 those made were entitled 'Rules for the payment of grants to secondary schools'. These made provision for a *capitation grant payable to secondary schools* based on the numbers of pupils attending the school. They are entirely distinct from another scheme with its own regulations made by the minister for the payment of *incremental salaries* under which teachers who are employed by the management authorities of secondary schools are *paid an incremental salary directly* by the department. The distinction between the different schemes administered by the department has been, not surprisingly, the cause of some confusion. It is, however, vitally important to bear it in mind and also to appreciate the special features which the different schemes possess.

The most important distinctive feature of the *scheme for the payment of incremental salaries*, and one which features prominently in the legal argument in the case, is that the regulations made by the minister for the purpose of administering it have no statutory basis and are not made pursuant to any express statutory powers. Unlike the 1987 'Rules for the Payment of Grants to Secondary Schools' and the 'Regulations for the Register of Intermediate School Teachers of 1987, (both of which are made under powers conferred by statute) the 'Rules for the Payment of Incremental Salary to Secondary Teachers' dated 1958 made by the minister are not made pursuant to the 1914 Act or any other statute. This does not mean that they are illegal or invalid on the ground that either (a) the minister lacked power to make them or that (b) that they should have been, but were not, made under the 1914 Act. Since 1925 Dáil Éireann has voted annual supplies to the Department of Education which contain an item in the estimates of the expenditure of the department which specifies the sum to be spent on the payment of incremental salaries to secondary teachers. The Central Fund (Permanent Provisions) Act 1965 and the annual Appropriation Acts authorise expenditure by the minister out of public funds of sums to provide this service. The sum so appropriated may as a result be lawfully spent by the minister, and as part of his administrative functions the minister may properly adopt a scheme which contains rules under which the payment for such salaries may be made. These rules may be referred to as 'non-statutory' rules or perhaps more accurately as 'administrative measures'. Those made in 1958 have been amended from time to time, sometimes by the acceptance by the minister of an agreed report from a conciliation council established to consider, *inter alia*, the operation of the scheme for incremental salaries, and sometimes by circular letter sent from the department. This method of administering funds voted by the Oireachtas has the advantage of flexibility and informality, but also has the disadvantage

that the exact terms of a ministerial scheme may not be readily available and may, indeed, be difficult to ascertain.

I turn then to the 1958 non-statutory rules. They provided that the management authority of secondary schools may nominate a number of 'recognised teachers' (subject to a quota based on a teacher/pupil ratio) for payment of incremental salaries. The appropriate salary is paid direct by the department to the teacher. A 'recognised teacher' is defined as meaning a 'registered teacher' who complies with certain conditions. A 'registered teacher' is defined as a teacher who is registered under regulations made by the registration council established under the 1914 Act. Thus it will be seen why the applicant was not on the quota of teachers nominated for payment of incremental salary by the Holy Family School until 1991 — she was not a 'recognised teacher' because she had not been registered by the council until that year.

The incremental salary payable to a recognised teacher is based on the total number of completed years of 'approved teaching service'. 'Approved teaching service' is defined as 'service as a registered teacher' or 'service as a teacher, other than a recognised teacher which is registrable teaching service accepted for the purpose of s. 111 of regulation 2 of the regulations for the register of teachers' and which in addition fulfils certain further specified conditions. As the applicant was not a 'registered teacher' until 1991, and as her teaching service before that date was not 'registrable' (as the council's decision not to register her establishes) it follows that her years in service in the Holy Family School were not 'approved teaching service' and could not be taken into account for the purpose of establishing the point on the scale of incremental salary at which she should be placed when she was nominated by her school for her payment of incremental salary. Under the administrative measure for the payment of incremental salary the minister was required to refuse her application for incremental credits for the years 1974 to 1991. It is this decision which is firstly challenged in these proceedings.

The applicant's submissions considered

There are four main grounds on which the challenge is mounted. The first submission is based on the nature of the 1958 rules. It was urged that they are illegal as not having been properly made under the 1914 Act. But, as I have already pointed out, they were not made under the 1914 Act or under any other express statutory power but were purely administrative rules made for the purpose of administering a scheme for which monies had been voted by the Oireachtas. As such, they were in no way invalid. The applicant then argues that even if this is so the decision taken by the minister is invalid, because she wrongly treated these regulations as if they had statutory force. It is said that when considering the applicant's application, instead of adjudicating on it on the merits and evaluating the applicant's qualifications and her service at the

Holy Family School, she applied these administrative rules as if she was bound by them and she wrongly concluded that because the applicant was not a registered or registrable teacher her claim must fail. In effect, it is said she fettered her discretion by applying these non-statutory rules and so acted invalidly.

I cannot agree with this submission. It seems to me a proper discharge of a minister's responsibilities to embody a scheme for the payment of incremental salaries to secondary teachers in detailed rules which are published for all to read. It is in no way improper for those rules to make provisions (a) for the teachers who will qualify for such salaries and (b) for the conditions under which the different rates of incremental salary will be paid. If this is so then it cannot be wrong for the minister to apply such rules when considering an application in an individual case for payment of incremental salary and in deciding whether the applicant is entitled to incremental credits for previous years' service as a teacher. I think it is incorrect to regard the minister 'as fettering her discretion' by so doing. She is not exercising a power conferred by statute which must be exercised in the manner parliament prescribes. She is administering funds allocated to her by parliament in accordance with rules which she or her predecessors had validly made.

The second submission is based on a principle developed by the courts when considering the restrictions imposed by law on the exercise of constitutionally protected and other rights, (see *Hand v. Dublin Corporation* [1989] IR 26; *Cox v. Ireland* [1992] 2 IR 503; *In Re Article 26 of the Constitution and the Matrimonial Home Bill 1993* [1994] 1 IR 305; [1994] 1 ILRM 241; *Heaney v. Ireland* [1994] 3 IR 593; [1994] 2 ILRM 420; *Daly v. Revenue Commissioners* [1995] 3 IR 1; [1996] 1 ILRM 122).

The courts have in some of the cases to which I was referred developed and applied what has been referred to as the 'test of proportionality' and the applicant argues that this test should be applied in this case and if this is done the ministerial decisions which are now challenged would be shown to be invalid.

It is important to understand exactly the test on which the applicant relies. In cases in which the validity of a law restricting a constitutional right falls to be considered the courts may examine the restriction imposed to see whether it is in excess of that necessary to achieve the object of the impugned legislation. If the means employed are excessive (and so disproportionate to the aim which the legislation is designed to achieve) then it cannot be said that the law is justified by the exigencies of the common good; the legislation is constitutionally impermissible because it impinges on the exercise of a legally protected right without justification. *Hand* was not a case in which the test was applied. *Cox* was a case in which the infringement of a constitutional right occurred because the restrictions imposed were 'impermissibly wide and indiscriminate'. The *Matrimonial Home Bill* case raised the question of the infringement of the rights

of the family and the Supreme Court held that the Bill was constitutionally infirm because it was not a 'reasonably proportionate' intervention by the State in the area of protected rights. *Heaney* was concerned with a restriction on the constitutionally protected right to silence, and *Daly* a case in which a law which interfered with property rights failed to pass a test of proportionality. In all the cases in which this test was applied the court was concerned with this infringement of a right.

The applicant, to support an argument that the test could be applied *generally* in all cases when the validity of ministerial decisions arises relied on *Bosphorus Hava Yollari Turizm v. Minister for Transport* [1994] 2 ILRM 551. This was a case concerning the application of an EEC Regulation relating to sanctions arising out of the war in the former Federal Republic of Yugoslavia. The regulation in question (Council Regulation 990/93/EEC) concerned trade between the European Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) and provided by article 8 that all aircraft in which a majority or controlling interest was held by an undertaking operating in the Federal Republic of Yugoslavia (Serbia and Montenegro) should be impounded by the competent authority of the member states. The Yugoslav Airlines was the owner of two aircraft which it had leased to the applicant company (a company registered in Turkey). One of the aircraft came to Dublin for repairs and was impounded by the Minister for Transport as the 'competent authority' under the regulation. The lessee applied to the court for a declaration that the aircraft did not come within the terms of regulation 8. Having construed the regulation and the terms of the lease Murphy J agreed that this was not a case in which the test of proportionality was applied to an administrative decision - the issue was whether the minister was correct in believing that the aircraft came within the terms of the EEC Regulation.

I will assume for the purposes of this judgment that an administrative measure (as distinct from statutory provision) which restricts a constitutionally protected right to an extent not required to achieve the object of the measure is invalid. But the present case is not concerned with such a case. In this case the impugned decision (dealing as it does with a claim for incremental credits in setting a level of salary) is not one which restricts a legally protected right. As there is therefore no basis for suggesting that illegality attaches to it on the grounds that the restriction it imposes is excessive the proportionality test has no application. The proportionality test cannot be extended to administrative orders, measures, decisions or regulations which do not attack legally protected rights. I must conclude therefore that this second ground of attack must fail.

The third submission was that the minister's decision was a 'haphazard and irrational' one and as such it was invalid, and I was referred to *Doyle v. An Taoiseach* [1986] ILRM 693. This submission was, in part, based on the fact that the rules which the minister was applying had no statutory basis. But as

already pointed out this does not as a matter of law invalidate an administrative measure or an administrative decision taken in accordance with a valid administrative measure.

When considering the validity of delegated legislation the courts have developed a principle relating to *ultra vires* acts which provides that a statutorily delegated power must be exercised 'reasonably' and so a by-law, or statutory regulation made under a statutory power will be invalid if it is 'unreasonable', an 'unreasonable' by-law or regulation being one of 'such manifest arbitrariness, injustice or partiality that a court would say: 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*' (see judgment of Henchy J in *Cassidy v. Minister for Industry and Commerce* [1978] IR 297 at p. 311 quoting with approval Diplock LJ in *Mixnan's Properties Ltd v. Chertsey Urban District Council* [1964] 1 QB 214 at p. 237).

It seems to me that the test of 'reasonableness' as defined by Henchy J can be applied to administrative measures made by a minister for the purpose of administering public funds. Applying it to the facts of this case I think (a) the scheme adopted by the minister for the payment of incremental salaries to secondary teachers was a perfectly reasonable one (as were the amendments to it) and it cannot be said that it or any of the amendments were arbitrary or unjust. I also consider (b) the decision by the minister that she should adjudicate on the applicant's application for incremental credits in accordance with the scheme's provisions was rational, just, and in no way arbitrary. Neither the ministerial measure nor the decision to apply its provisions can therefore be challenged on the ground now being considered.

Fourthly, it is submitted that invalidity arises under the law of the European Union. It is said that the right of freedom of establishment (Article 52 of the Treaty of Rome) requires that member states must recognise equivalent foreign qualifications and that as the evidence in this case is that the applicant's qualifications would probably have been acceptable in England the minister's failure to recognise them was invalid. Reliance was also placed on Article 6 which prohibits discrimination on the ground of nationality and the decision of Laffoy J in *Bloomer v. Law Society* [1995] 3 IR 14 is said to support the applicant's case.

The right of freedom of establishment conferred by Article 52 is a right conferred on the nationals of member states in the territory of another member state and as the applicant is an Irish citizen working in this country no breach of the rights conferred by this article can arise. Furthermore the scheme operated by the minister makes provision for the recognition of foreign qualifications by providing that effect will be given to the decisions of the registration council relating to the equivalence of such qualifications. In this case the council made a decision that the applicant's qualifications were not equivalent to those laid down in its regulations. In these circumstances no breach of Article 52 could

possibly arise.

Nor do I think that any breach of Article 6 of the Treaty of Rome was involved in this case. Article 6 prohibits discrimination on the ground of nationality and the applicant submits that the ministerial rules in practice favour persons qualified in Ireland and because they tend to favour Irish citizens they constitute unfair discrimination on the ground of nationality. As already pointed out the measure being applied made provision for the recognition of qualifications other than those specified in them and whether or not the qualifications were obtained in Ireland or abroad. Thus a decision on an application will be taken by considering the equivalence of the qualification; the nationality of the applicant was in no way relevant. An adverse decision does not amount to discrimination on the ground of nationality — it amounts to a rejection of the claim that an applicant's qualifications are equivalent to those specified in the rules.

Bloomer does not help the applicant. It was a case in which a number of students in the law faculty of Queen's University, Belfast challenged the validity of rules made under statutory powers by the Law Society relating to its law school. These rules provided for the holding of a preliminary and a final examination which was divided into three parts. Regulation 15 (as contained in SI No. 260 of 1992) provided that a person could be exempted from the final examination, first part, 'if such person had achieved a specified standard' in a degree of law granted by certain named universities. The University of Dublin, the National University of Ireland, the University of Limerick or Dublin City University are named universities and are situated in the State. The objective of the plaintiffs was to procure that law graduates of the Queen's University, Belfast would be exempted from the final examination, first part, in the same way as were the graduates of the universities specified in this regulation and they submitted that as they were nationals of another member state of the European Union they were entitled to access on a non-discriminatory basis to the course of vocational training provided by the society and that the failure of the society to make provision for their exemption amounted to discrimination against them on the ground of nationality contrary, *inter alia*, to Article 6 of the Treaty of Rome. The court found in their favour, holding that discrimination prohibited by Article 6 had been established.

The factual situation in this case is entirely different to that in *Bloomer*. There is no closed list of academic or specifically Irish institutions from which an applicant for registration must have obtained an academic degree or diploma. The 1967 Regulations provided that an applicant for registration must have (a) either obtained a degree from a university in Ireland or Great Britain or such other university as may, with the approval of the minister, be recognised for this purpose or (b) one of the diplomas specified in schedule D (which listed a number of educational institutions some of which were outside Ireland) or such other diploma or certificate of having completed a course of study as should be

approved for this purpose by the council with the approval of the minister. Similar provision was made in the 1987 Regulations for the recognition of degrees from universities other than those specified as well as the recognition of teacher training qualifications. It is clear therefore that an applicant who had obtained a degree from a university outside the State or had obtained a teaching qualification from an educational institution outside the State was not precluded from registration provided the degree and/or qualifications were equivalent to those specified in the rules. These regulations are therefore not discriminatory within the measures of Article 6 and when an applicant who has obtained a qualification in England is refused registration and the decision is based on an assessment of his or her qualifications, there is no discrimination on the ground of nationality.

I must therefore hold that the minister's decision was not in breach of EU law.

The second application

By application of 27 January 1994 the applicant made a claim to the minister for 'incremental credit in respect of teaching service abroad' (Agreed Report No. 9179 of the Conciliation Council for Teachers). The school in respect of which the service abroad was given was stated to be the Archbishop Isley RC School in Birmingham, the period in respect of which incremental credit was claimed was September 1973 to July 1974. Her qualifications were stated to be 'Certificate in art/design, England' plus 'Diploma in art/design NCEA' obtained in 1991.

When writing to her solicitor on 28 February 1995 the department pointed out that this application was 'unlikely' to be granted because of the reasons for which the application relating to the years 1974 to 1991 had been refused, namely that she was neither a registered nor a registrable teacher in the year 1973/74. This intimation of the minister's decision was later formally confirmed (although the exact date on which it was taken has not been established).

Once it is established that a decision on the first application was a valid one it follows that the other decision on the second application was also valid because the applicant's service as a teacher in the relevant year was not 'approved service' (because she was neither a registered teacher nor was she registrable at the relevant time).

I must therefore dismiss both of the applicant's claims.

Final comment

The facts of this case justify, I believe, a final comment. Judges are required by the Constitution to adjudicate on justiciable issues and normally it is not part of that function to suggest how other organs of government should perform their constitutional duties. But, exceptionally, cases may disclose defects in the law

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or its administration, which, if left unreformed, may lead to injustice and judges may then properly draw attention to a situation of which the legislature and the executive may be unaware. The same, I think, applies to administrative measures which affect the rights and the livelihood of those to whom they are addressed.

The law should be certain and it should be readily accessible. The same applies to non-statutory administrative measures. In the case of primary and secondary education hundreds of millions of pounds are administered annually by means of a large number of administrative measures whose existence is known only to a handful of officials and specialists, which are not readily available to the public and whose effect is uncertain and often ambiguous. If administrative ministerial rules and regulations were dated, if they were identified by reference to the sub-head in the book of estimates to which they relate, if amendments bore the same reference and were dated by reference to the ministerial order which made them, if a register was kept of the original measure and amendments to it, if the original measure and amendments were regularly consolidated and meanwhile made available in loose leaf form to members of the public, this would be one way of obviating the danger of injustice which is inherent in the present highly informal procedures. Such changes might also reduce the likelihood of the institution of proceedings like the present one.

Solicitors for the applicant: *Niall J. Clancy & Co.*
Solicitor for the respondents: *Chief State Solicitor*

Paul Coughlan
Barrister

ANNEX A13



Hilary Term
[2011] UKSC 12

On appeal from: 2010 EWCA Civ 111

JUDGMENT

**Walumba Lumba (previously referred to as WL)
(Congo) 1 and 2 (Appellant) v Secretary of State for
the Home Department (Respondent)**

**Kadian Mighty (previously referred to as KM)
(Jamaica) (Appellant) v Secretary of State for the
Home Department (Respondent)**

before

**Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lady Hale
Lord Brown
Lord Collins
Lord Kerr
Lord Dyson**

JUDGMENT GIVEN ON

23 March 2011

Heard on 15, 16, 17 and 18 November 2010

Appellant (WL)
Raza Husain QC
Laura Dubinsky
Tom Hickman
Alex Goodman
(Instructed by Public Law
Project)

Respondent
Michael Beloff QC
Robin Tam QC
Charles Bourne
Jeremy Johnson
(Instructed by Treasury
Solicitors)

Appellant (KM)
Raza Husain QC
Martin Westgate QC
Alex Goodman

(Instructed by Lawrence
Lupin Solicitors)

Respondent
Michael Beloff QC
Robin Tam QC
Charles Bourne
Jeremy Johnson
(Instructed by Treasury
Solicitors)

Intervener (JUSTICE)

Rabinder Singh QC
Elizabeth Prochaska
(Instructed by Freshfields
Bruckhaus Deringer LLP)

*Intervener (Bail for
Immigration Detainees)*
Michael Fordham QC
Graham Denholm
(Instructed by Allen &
Overy LLP)

LORD DYSON

Introduction

1. These two cases raise a number of important issues in relation to the detention pending deportation of foreign national prisoners (“FNPs”) following the completion of their sentences of imprisonment. Section 3(5)(a) of the Immigration Act 1971 (“the 1971 Act”) provides that a person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State “deems his deportation to be conducive to the public good”. Schedule 3 to the 1971 Act provides in certain specified circumstances for the detention of such a person pending his deportation.

2. Walumba Lumba is a citizen of the Democratic Republic of Congo (“DRC”) who entered the UK on 10 April 1994. He was convicted of a number of offences culminating in an offence of wounding with intent for which he was sentenced to 4 years’ imprisonment on 12 January 2004. On 3 April 2006, the Secretary of State informed Mr Lumba of his intention to deport him under section 3(5)(a) of the 1971 Act. He was due to be released from prison on 23 June 2006, but by letter dated 22 June 2006 was notified that he was to be detained pending deportation. He left the United Kingdom voluntarily on 13 February 2011.

3. Kadian Mighty is a citizen of Jamaica. He arrived in the United Kingdom on 4 December 1992 and was given 6 months’ leave to enter as a visitor. Thereafter, he made various unsuccessful applications for leave to remain. On 10 February 2003, however, he was granted indefinite leave to remain. He had been convicted of a number of offences, including possession of a Class A drug with intent to supply, for which on 27 June 2003, he was sentenced to 42 months’ imprisonment. Following his release on licence, he committed a driving offence and was recalled to prison. He was finally released on 31 March 2006. On 10 May 2006, the Secretary of State informed Mr Mighty of his intention to deport him under section 3(5)(a) of the 1971 Act. On 19 May 2006, he was detained pending deportation because he was likely to abscond and his release was not conducive to the public good. He was released on bail on 28 July 2008.

4. Schedule 3 of the 1971 Act provides, so far as material:

“2. (1) Where a recommendation for deportation made by a court is in force in respect of any person, and that person is not detained in

pursuance of the sentence or order of any court, he shall, unless the court by which the recommendation is made otherwise directs, or a direction is given under sub-paragraph (1A) below, be detained pending the making of a deportation order in pursuance of the recommendation, unless the Secretary of State directs him to be released pending further consideration of his case or he is released on bail.

(1A) Where--

(a) a recommendation for deportation made by a court on conviction of a person is in force in respect of him; and

(b) he appeals against his conviction or against that recommendation,

the powers that the court determining the appeal may exercise include power to direct him to be released without setting aside the recommendation.

(2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.

(3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise)".

5. Between April 2006 and 9 September 2008, the Secretary of State's published policy on detention of FNPs under her immigration powers was that there was a "presumption" in favour of release, although detention could be justified in some circumstances. In fact, during this period the Secretary of State applied a quite different unpublished policy which was described as a "near blanket ban" by the Secretary of State, Ms Jacqui Smith, to the Prime Minister,

Gordon Brown, on 19 September 2007 in a document entitled “Bail Proposal for Foreign National Prisoners” in which she said:

“Since April 2006, the BIA [(“the Border and Immigration Agency”)] has been applying a near blanket ban on release, regardless of whether removal can be achieved and the level of risk to the public linked to the nature of the FNP’s original offence. By currently having no discretion to grant bail, the BIA has to regularly transfer FNPs around the Estate.”

6. On 9 September 2008, the Secretary of State published a policy which included a “presumption” of detention and withdrew all references to a presumption of release. On 22 January 2009, following the decision of Davis J in the current proceedings, this policy was amended again to omit the reference to a presumption of detention and substitute a policy in favour of release from detention. It will be necessary to describe the policies and practices adopted from time to time in more detail later in this judgment.

The proceedings

7. Mr Lumba issued proceedings on 18 October 2007. He challenged the lawfulness of his detention on the grounds that he was no longer being detained pending deportation and that his continued detention was in breach of the principles stated by Woolf J in *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704 (“the *Hardial Singh* principles”). He also claimed a declaration that his detention was unlawful, a mandatory order that he be released and damages. On 4 July 2008, Collins J gave an interlocutory judgment on part of the claim: [2008] EWHC 2090 (Admin). He did not make a decision in relation to Mr Lumba’s past detention and reserved for a further hearing *inter alia* the questions of whether the operation of an unpublished policy had been unlawful and the past detention had been unlawful as a consequence. On 28 July 2008, Mr Lumba’s claim was joined to four other cases in which the same points arose. One of these was the claim of Mr Mighty which had been issued on 29 May 2008.

8. The five cases were heard by Davis J on 11-14 November 2008. In an impressive judgment given on 19 December 2008 [2008] EWHC 3166 (Admin), he granted the claimants declarations that (i) paragraph 2 of Schedule 3 to the 1971 Act prohibits the Secretary of State from operating any policy in relation to the detention of FNPs which contains a presumption in favour of detention and (ii) it was unlawful for the Secretary of State to operate the policy introduced in April 2006 in that it was not sufficiently published or accessible until its publication on 9

September 2008. He dismissed the other claims, in particular the claims for damages for unlawful detention.

9. The appellants appealed and the Secretary of State cross-appealed against the first declaration. In a judgment of the court delivered by Stanley Burnton LJ, the Court of Appeal (Lord Neuberger MR, Carnwath and Stanley Burnton LJJ) ([2010] 1 WLR 2168) allowed the cross-appeal and set aside the first declaration. They also varied the second declaration. Otherwise the appeals were dismissed.

The issues

10. The principal issues are as follows. (i) Were the detention policies that were applied to the appellants after April 2006 unlawful because (a) they were blanket policies (para 21 below) and/or (b) they were inconsistent with the published policies (para 26 below) and/or (c) they were not published policies (paras 27-38 below) and/or (d) they contained a “presumption” in favour of detention (paras 40-55 below)? (ii) If unlawful policies were applied to the appellants, was their detention unlawful in consequence (paras 56-89)? (iii) If their detention was unlawful, are the appellants entitled to more than nominal damages (paras 90-101 below)? (iv) Is Mr Lumba entitled to damages for unlawful detention on the grounds that, in his case, there has been a breach of the *Hardial Singh* principles? (paras 102-148 below) (v) Are the appellants entitled to an award of exemplary damages (paras 150-168 below)?

The policies in more detail

The published policies

11. The “presumption” of release had been entrenched in the Secretary of State’s published policies since at least 1991. It appeared in the White Paper *Fairer, Faster and Firmer: a Modern Approach to Immigration and Asylum* (1998) (Cm 4018), which was published in 1998 and again in 2002 in the White Paper *Secure Borders, Safe Haven: Integration Diversity in Modern Britain* (2002) (Cm 5387) which stated at para 4.76:

“Our 1998 White paper set out the criteria by which Immigration Act powers of detention were exercised and confirmed that the starting point in all cases was a presumption in favour of granting temporary admission or release. The criteria were modified in March 2000 to include detention at Oakington Reception Centre if it appeared that a

claimant's asylum application could be decided quickly. The modified criteria and the general presumption remain in place."

12. Chapter 38 of the Operational Enforcement Manual ("OEM"), which was a published document in force until April 2008, stated in its introductory section that the 1998 White Paper confirmed that "there was a presumption in favour of temporary admission or release and that, whenever possible, we would use alternatives to detention". Para 38.3 stated:

- "1. There is a presumption in favour of temporary admission or temporary release.
2. There must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.
3. All reasonable alternatives to detention must be considered before detention is authorised."

13. Identical wording was contained in Chapter 55 of the Enforcement Instructions and Guidance ("EIG") which replaced Chapter 38 of the OEM and came into force on 19 June 2008.

14. On 9 September 2008, Chapter 55 of the EIG was amended. With regard to FNPs, para 55.1.2 stated:

"Due to the clear imperative to protect the public from harm and the particular risk of absconding in these cases, the presumption in favour of temporary admission or temporary release does not apply where the deportation criteria are met. Instead the person will normally be detained, provided detention is, and continues to be lawful."

15. The EIG then gave guidance to caseworkers as to the factors which might make further detention unlawful. In particular, it stated that the presumption of detention "will be displaced where legally the person cannot or can no longer be detained because detention would exceed the period reasonably necessary for the purpose of removal." Following the decision of Davis J in the current proceedings, on 22 January 2009 this policy was changed again so as to replace a presumption in favour of detention with a presumption in favour of release from detention.

The unpublished policies

16. The true picture during the period from April 2006 until September 2008 was very different. Following the public disclosure on 25 April 2006 that 1,013 FNPs had been released from prison before consideration had been given to the question of whether they should have been deported, the Secretary of State adopted a new policy which he did not publish. I have already referred at para 5 above to the description of it contained in the 19 September 2007 Bail Proposal as a “near blanket ban”.

17. The policy of blanket detention admitted of exceptions only on compassionate grounds. No formal guidance was given to caseworkers to give effect to this policy until on 8 November 2007 they were issued with a document (known as “Cullen 1”) which set out criteria and guidance for the identification and release of FNPs who were considered to pose the lowest risks to the public and the lowest risks of absconding. Cullen 1 was not published to the outside world. It led at most to the release of a handful of FNPs. In March 2008, an amended guidance document (known as “Cullen 2”) was issued to the caseworkers. It too was not published to the outside world. Attached to Cullen 1 and Cullen 2 was an extensive list of offences entitled “List of recorded crimes where release from immigration detention or at the end of custody will not be appropriate”. In practice, almost all FNPs who had been sentenced to imprisonment were likely to have committed one or more of such offences. Both Mr Lumba and Mr Mighty had done so. The evidence of David Wood, Strategic Director of the Criminality and Detention Group, was that between December 2006 and July 2008, 15 FNPs were released from detention.

18. On 22 May 2008, the existence of an unpublished policy or practice was belatedly disclosed by the Secretary of State to Mitting J after he had given judgment in the case of *R (Ashori) v Secretary of State for the Home Department* [2008] EWHC 1460 (Admin). More detail as to the circumstances in which the policy came to be disclosed is given by Davis J at paras 21 to 26 of his judgment.

The unpublished policies were applied to Mr Lumba and Mr Mighty

19. It is now common ground that the unpublished policies were applied to the two appellants throughout their detention. It is, therefore, unnecessary to consider para 203 of the judgment of Davis J (where the judge stated that there was nothing to show that Mr Lumba was detained by application of the unpublished policy) or para 100 of the judgment of the Court of Appeal which upheld Davis J on this point.

Were these policies unlawful?

20. Here too, there is little dispute between the parties. Mr Beloff QC rightly accepts as correct three propositions in relation to a policy. First, it must not be a blanket policy admitting of no possibility of exceptions. Secondly, if unpublished, it must not be inconsistent with any published policy. Thirdly, it should be published if it will inform discretionary decisions in respect of which the potential object of those decisions has a right to make representations.

21. As regards the first of these propositions, it is a well established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers. Davis J held that the unpublished policy was not a “blanket” policy. The Court of Appeal disagreed. Basing themselves on the review by David Wood “of the failure to publish a revised FNP detention policy following the April 2006 crisis” approved on 3 August 2009, the Court of Appeal concluded that the policy, as applied at least from the time of Cullen 1 in November 2007, “effectively operated on a blanket basis” rather than (as held by the judge) “one of presumption”. I agree with this assessment by the Court of Appeal but would go further. It seems clear to me that a blanket policy was also applied from April 2006 until the introduction of Cullen 1 in November 2007. During this earlier period, the only exceptions made to the policy of universal detention were on compassionate grounds and these were few and far between. Importantly, there were no releases on the basis of *Hardial Singh* principles. Indeed, Cullen 1 represented a modest relaxation of the previous position.

22. It is convenient to introduce the *Hardial Singh* principles at this stage, since they infuse much of the debate on the issues that arise on this appeal. It is common ground that my statement in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, [2003] INLR 196 para 46 correctly encapsulates the principles as follows:

- (i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
- (ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
- (iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;

- (iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.

23. Lord Phillips says that the first two of these principles cannot properly be derived from *Hardial Singh*. Since their correctness has not been put in issue by the parties to these appeals, I propose to deal with the points shortly. As regards the first principle, I consider that Woolf J was saying unambiguously that the detention must be for the purpose of facilitating the deportation. The passage quoted by Lord Phillips includes the following: “as the power is given in order to enable the machinery of deportation to be carried out I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose”(emphasis added). The first principle is plainly derived from what Woolf J said.

24. As for the second principle, in my view this too is properly derived from *Hardial Singh*. Woolf J said that (i) the power of detention is limited to a period reasonably necessary for the purpose (as I would say) of facilitating deportation; (ii) what is reasonable depends on the circumstances of the particular case; and (iii) the power to detain ceases where it is apparent that deportation will not be possible “within a reasonable period”. It is clear at least from (iii) that Woolf J was not saying that a person can be detained indefinitely provided that the Secretary of State is doing all she reasonably can to effect the deportation.

25. It seems to me that, in relation to both the first and second principles, Lord Phillips is suggesting a different interpretation of paragraph 2(3) of Schedule 3 to the 1971 Act from that enunciated by Woolf J. I do not agree with this interpretation. But what is perhaps of more importance in the context of these appeals is that in my view it is not appropriate to depart from a decision which has been followed repeatedly for almost 30 years unless it is obviously wrong (which I do not believe to be the case), still less to do so without the benefit of adversarial argument.

26. As regards the second proposition accepted by Mr Beloff, a decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so. The principle that policy must be consistently applied is not in doubt: see Wade and Forsyth *Administrative Law*, 10th ed (2009) p 316. As it is put in *De Smith’s Judicial Review*, 6th ed (2007) at para 12-039:

“there is an independent duty of consistent application of policies, which is based on the principle of equal implementation of laws, non-discrimination and the lack of arbitrariness.”

The decision of the Court of Appeal in *R (Nadarajah) v Secretary of State for the Home Department* [2003] EWCA Civ 1768, [2004] INLR 139 is a good illustration of the principle. At para 68, Lord Phillips MR, giving the judgment of the court, said that the Secretary of State could not rely on an aspect of his unpublished policy to render lawful that which was at odds with his published policy.

27. As for the third proposition, the Court of Appeal dealt with the issue of whether there is a general rule of law that policies must be published at paras 70 to 79 of their judgment. Disagreeing with Davis J, they concluded that there is no such general rule and said that the fact that the appellants were detained pursuant to unpublished policies was not in itself a reason for holding that the decisions to detain them were unlawful. Mr Beloff did not feel able to support this conclusion. It is unfortunate that the Court of Appeal embarked on this topic at all, since it was not before them and was not, therefore, the subject of argument or citation of authority. As the point is of general importance, I need to say why in my view the judge was right and the Court of Appeal were wrong on this issue both as a matter of common law and ECHR law.

28. The Court of Appeal referred to a statement of Sedley LJ in *R v Secretary of State for Education and Employment Ex P Begbie* [2000] 1 WLR 1115, 1132C that there were “cogent objections to the operation of undisclosed policies affecting individuals’ entitlements or expectations” and said at para 72 that they had no difficulty in accepting this as (no more than) a statement “of good administrative practice”. They also said that the judge was wrong to rely on *Sunday Times v United Kingdom* (1979) 2 EHRR 245 and criticised the reasoning in *Nadarajah* at paras 64-67 which relied on the *Sunday Times* case in support of the proposition that a relevant policy is part of the law that must be accessible, so as to enable those affected by it reasonably to foresee the consequences of their actions. At para 73, they said that the relevant passage in the judgment of the ECtHR at para 49 of the judgment in the *Sunday Times* case is “not, as we read it, about *policy* as such, but is rather directed to the need for accessibility and precision, as requirements of *law* in the strict sense”. They went on to say that, in the present context, the requirement for an accessible and precise statement of the relevant law is satisfied by paragraph 2 of Schedule 3 to the 1971 Act, taken with the *Hardial Singh* guidelines. In short, policy is not the same as law (para 57).

29. In support for their conclusion, they referred to what Laws LJ said in *R (SK Zimbabwe) v Secretary of State for the Home Department* [2008] EWCA Civ 1204; [2009] 1 WLR 1527, para 33. In that case, the Secretary of State had failed to carry out regular reviews following detention, as required by the Detention Centre Rules. As regards the requirement that any deprivation of liberty be “in accordance with a procedure prescribed by law” in article 5(1) of the ECHR, Laws

LJ said that this was to ensure that any interference is not random and arbitrary, but governed by clear pre-existing rules. He continued:

“Here the ‘rules’ are the *Hardial Singh* principles. Their fulfilment in any given case saves a detention from the vice of arbitrariness. A system of regular monitoring is, no doubt, a highly desirable means of seeing that the principles are indeed fulfilled. But it is not itself one of those principles....”

30. But all that the *Hardial Singh* principles do is that which article 5(1)(f) does: they require that the power to detain be exercised reasonably and for the prescribed purpose of facilitating deportation. The requirements of the 1971 Act and the *Hardial Singh* principles are not the only applicable “law”. Indeed, as Mr Fordham QC points out, the *Hardial Singh* principles reflect the basic public law duties to act consistently with the statutory purpose (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030B-D) and reasonably in the *Wednesbury* sense (*Associated Provincial Picture House’s Ltd v Wednesbury Corporation* [1948] 1 KB 223). But they are not exhaustive. If they were exhaustive, there could be no room for the public law duty of adherence to published policy, which was rightly acknowledged by the Court of Appeal at paras 51, 52 and 58 of their judgment. I therefore accept the submission of Mr Husain QC and Mr Fordham that the Court of Appeal’s criticisms of *Nadarajah* were misplaced.

31. I should interpolate that there is in any event an obvious difference between rules which require the review of a detention to be undertaken at prescribed intervals and rules which prescribe the criteria by which a person is to be released or to be subjected to continuing detention. The fact that a policy states that only persons of a specified category will be considered for release is at least as substantively important as the *Hardial Singh* principles which determine, for example, that a person may not be detained for an unreasonable period.

32. There is further support in the ECtHR jurisprudence for the proposition that paragraph 2 of Schedule 3 to the 1971 Act and the *Hardial Singh* principles are not exhaustive of the “law”. In *Medvedyev v France* (Appln no 3394/03, 29 March 2010), the Grand Chamber said at para 80: “where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined.” The case of *Gillan v United Kingdom* (2010) 50 EHRR 45 concerned the stop and search powers conferred on the police by the Terrorism Act 2000. For present purposes, the relevant issue was whether the powers were “in accordance with the law” within the meaning of article 8(2) of the ECHR. A Code of Practice was issued by the Secretary of State

to guide police officers in the exercise of their powers of stop and search. The ECtHR said:

“77.....Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. The level of precision required of domestic legislation---which cannot in any case provide for every eventuality---depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.”

33. The ECtHR noted at para 83 that the Code of Practice “governs essentially the mode in which the stop and search is carried out, rather than providing any restriction on the officer’s decision to stop and search. That decision is, as the House of Lords made clear, one based exclusively on the ‘hunch’ or ‘professional intuition’ of the officer concerned”. In the opinion of the court, there was a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. At para 87, they concluded that, despite the existence of the Code of Practice, the statutory powers were not “in accordance with the law” because they were “neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse”.

34. The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements.

35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. In *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, para 26 Lord Steyn said:

“Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. ”

36. Precisely the same is true of a detention policy. Notice is required so that the individual knows the criteria that are being applied and is able to challenge an adverse decision. I would endorse the statement made by Stanley Burnton J in *R (Salih) v Secretary of State for the Home Department* [2003] EWHC 2273 at para 52 that “it is in general inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by statute.” At para 72 of the judgment of the Court of Appeal in the present case, this statement was distinguished on the basis that it was made “in the quite different context of the Secretary of State’s decision to withhold from the individuals concerned an internal policy relating to a statutory scheme designed for their benefit”. This is not a satisfactory ground of distinction. The terms of a scheme which imposes penalties or other detriments are at least as important as one which confers benefits. As Mr Fordham puts it: why should it be impermissible to keep secret a policy of compensating those who have been unlawfully detained, but permissible to keep secret a policy which prescribes the criteria for their detention in the first place?

37. There was a real need to publish the detention policies in the present context. As Mr Husain points out, the Cullen policies provided that certain non-serious offenders could be considered for release. The failure to publish these policies meant that individuals who may have been wrongly assessed as having committed a crime that rendered them ineligible for release would remain detained, when in fact, had the policy been published, representations could have been made that they had a case for release.

38. The precise extent of how much detail of a policy is required to be disclosed was the subject of some debate before us. It is not practicable to attempt an exhaustive definition. It is common ground that there is no obligation to publish drafts when a policy is evolving and that there might be compelling reasons not to publish some policies, for example, where national security issues are in play. Nor is it necessary to publish details which are irrelevant to the substance of decisions made pursuant to the policy. What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made.

39. For all these reasons, the policies which were applied to Mr Lumba and Mr Mighty were unlawful. But Mr Husain submits (with the support of Mr Rabinder Singh QC and Mr Fordham) that the policies were also unlawful because they included a “presumption” of detention.

Presumption of detention

40. Davis J held at paras 114 to 116 of his judgment that the provisions of paragraph 2 of Schedule 3 to the 1971 Act operate to prevent the Secretary of State from operating a policy of a presumption in favour of detention of FNPs pending deportation. He applied *R (Sedrati) v Secretary of State for the Home Department* [2001] EWHC 210 (Admin) in which, by consent, Moses J had granted a declaration that the terms of paragraph 2 of Schedule 3 do “not create a presumption in favour of detention upon completion of the sentence”. On the Secretary of State’s cross-appeal against the declaration, the Court of Appeal said at para 65:

“..... there is no reason in principle why paragraph 2.1 of Schedule 3 to the 1971 Act, which clearly does require continued detention unless the Secretary of State otherwise orders (i.e. a presumption of detention), should not be construed as a presumption of detention pending deportation. Equally, the Secretary of State may lawfully adopt a policy for the purposes of paragraph 2(2) or (3) that involves a presumption. A presumption that those who have committed serious crimes (e.g. most of those listed in Cullen 1 and 2) should be detained is unobjectionable.”

They went on at para 66 to say that for these reasons the declaration granted by Moses J was wrong and allowed the Secretary of State’s cross-appeal.

41. Mr Husain, supported by Mr Singh and Mr Fordham, say that the judge was right and the Court of Appeal wrong on this issue. The primary case advanced by Mr Husain is that the policy that was applied between April 2006 and September 2008 was not properly described as a “presumptive policy” at all, but rather was a blanket policy. But whether that is right or not, Mr Lumba continued to be detained between September 2008 (when the Secretary of State published a policy in favour of detention) and 22 January 2009 (when the order of Davis J was implemented). It follows that even if, as I have accepted, the Court of Appeal was justified in holding that the policy was a blanket policy until September 2008, the “presumption of liberty” issue is of more than academic interest in this appeal.

42. It is important at the outset to define clearly what a “presumption” means in this context. It is the Secretary of State’s case that paragraph 2 of Schedule 3 to the 1971 Act permits the operation of a policy in which she states that a FNP will *normally* be detained in certain prescribed circumstances. Such a policy serves as a guide to the caseworkers who make the decisions on the ground and as an indication to the FNPs of what they can *normally* expect in the circumstances

specified in the policy. I shall refer to such a policy as “normal practice”. It need not, and usually does not say anything about the burden of proof. Normal practice is to be distinguished from presumptions in the strict sense. *Phipson on Evidence* 17th ed (2009) at 6-16 to 6-31 categorises “presumptions” in this sense into rebuttable presumptions of law, irrebuttable presumptions of law and rebuttable presumptions of fact. Such a presumption usually regulates the burden of proof in legal proceedings. Thus, a presumption that a deprivation of liberty is unlawful regulates the burden of proof in relation to that issue: the burden is on the detainer to show that there was a power to detain. I shall refer to a presumption in the strict sense as a “legal presumption”.

43. The distinction between normal practice and a legal presumption is fundamental to the present issue. The fact that in legal proceedings the burden of proving a certain issue is allocated to one party rather than the other does not assist in deciding whether the Secretary of State may, in principle, lawfully give guidance that when certain factors are present, the decision should normally be to detain. This distinction was not articulated in the courts below.

44. A further preliminary point needs to be made. The legality of a decision may be considered at two stages: first at the administrative stage when the decision is taken and secondly, if the decision is challenged, at the stage of legal proceedings. At the administrative stage, the individual against whom the decision is taken often plays no part. It is not appropriate to talk of a burden of proof at this stage: see, for example, *R v Lichniak* [2003] 1 AC 903 at para 16 per Lord Bingham. At the stage of legal proceedings, the Secretary of State rightly accepts that the burden of proof is on her to justify the detention. This has long been established: *Allen v Wright* (1838) 8 C & P 522 and Lord Atkin’s dissenting speech in *Liversidge v Anderson* [1942] AC 206, 245 “every detention is prima facie unlawful and that it is for a person directing imprisonment to justify his act.”

45. Mr Husain submits that there is a “presumption of liberty” both under the jurisprudence of the ECtHR or at common law. I shall start with the jurisprudence on article 5 of the ECHR which Mr Husain submits establishes that there is such a presumption. He refers to *Ilijkov v Bulgaria* (Application No 33977/96) (unreported) 26 July 2001 where the ECtHR said:

“84. The court reiterates that continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. Any system of mandatory detention on remand is *per se* incompatible with article 5(3) of the Convention.....Where the law provides for a presumption in respect of factors relevant to the

grounds for continued detention.....the existence of the concrete facts outweighing the rule of respect for individual liberty must be nevertheless convincingly demonstrated.

85. Moreover, the court considers that it was incumbent on the authorities to establish those relevant facts. Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases....”

46. This was a decision in relation to an alleged violation of article 5(3) which provides:

“Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial....”

47. Mr Husain submits that, although these principles were articulated in the context of detention pending trial, they are more widely applicable as expressions of the right to liberty protected by article 5: see also *Bykov v Russia* (Application No 4378/02, 10 March 2009) at para 61 and *Bordikov v Russia* (Application no 921/03, 9 October 2009) at para 88. However, these cases only concern legal presumptions that regulate burdens of proof in legal proceedings. They are not concerned with normal practice contained in a policy of the kind with which these appeals are concerned.

48. In *Ilijkov*, the national courts rejected a series of applications for bail pending trial. They did so relying on the Bulgarian Code of Criminal Procedure, which provided that, for certain crimes, detention on remand was mandatory in the absence of exceptional circumstances. The ECtHR held that the initial decision to detain was lawful, but that the continuing application of the presumption of detention by the national judicial authorities was unlawful (paras 78-9 and 87). The case was not concerned with the lawfulness of any decision to detain taken at an administrative stage. It is clear from para 84 of the judgment that the court held that there was a breach of article 5(3). There is, however, no provision in article 5(1)(f) corresponding with article 5(3) and there is nothing to indicate that the court intended its ruling in relation to article 5(1)(c) and 5(3) to apply to article 5(1)(f).

49. The decisions in *Bykov* and *Bordikov* do not advance the argument. Para 61 of the judgment in *Bykov* merely reiterates what the court has repeatedly said in relation to article 5(3). The reference to the presumption of release under article 5 is a reference to the second limb of article 5(3). The case is concerned with the decisions of “judicial authorities” and not administrative decision-makers. Similarly, para 88 of the judgment in *Bordikov* makes it clear that the court in that case too was only concerned with the decisions of the courts.

50. The principal ECtHR authority on article 5(1)(f) is *Saadi v UK* (2008) 47 EHRR 427. The applicant sought judicial review of the decision to detain him for a short period while his asylum claim was being subject to fast-track processing. The decision was made pursuant to a policy under which all asylum claimants falling within defined criteria (usually by nationality) were normally detained at Oakington while their claims were determined in an accelerated process. This was a normal practice case and not a case about legal presumptions. The ECtHR held *inter alia* that deprivation of liberty must not be “arbitrary”. It must comply with the substantive and procedural rules of national law and the detention must be in good faith. At para 69, the court said:

“The condition that there be no arbitrariness further demands that both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of article 5(1). There must in addition be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention.”

51. And at para 72:

“Similarly, where a person has been detained under article 5(1)(f), the Grand Chamber, interpreting the second limb of this sub-paragraph, held that, as long as a person was being detained ‘with a view to deportation’, that is, as long as ‘action [was] being taken with a view to deportation,’ there was no requirement that the detention be reasonably considered necessary, for example, to prevent the person concerned from committing an offence or fleeing. The Grand Chamber further held in *Chahal* (1997) 23 EHRR 413 that the principle of proportionality applied to detention under article 5(1)(f) only to the extent that the detention should not continue for an unreasonable length of time...”

52. It was this statement which led the Court of Appeal to conclude at para 62 that “a national law that authorises detention with a view to deportation may be

compatible with article 5 even if it imposes a presumption of detention pending deportation.” It is not clear in what sense the Court of Appeal was using the phrase “presumption of detention” in this passage. But if it is construed as a reference to normal practice, I agree with it, provided that it requires the Government to justify the detention with reasons that are closely connected to the statutory purpose of effecting deportation.

53. I turn to the position at common law. It is not in dispute that the right to liberty is of fundamental importance and that the courts should strictly and narrowly construe general statutory powers whose exercise restricts fundamental common law rights and/or constitutes the commission of a tort. The Court of Appeal said at para 63 that there is no rule of our domestic law “that precludes the application of a presumption in favour of detention pending deportation, subject, of course, to the limitations in *Ex P Hardial Singh* [1984] 1 WLR 704, none of which involves consideration of risk of reoffending or absconding”. Such risks, they said, are relevant to the reasonableness of the period during which it is lawful to detain a FNP, but the absence of such a risk “does not of itself render detention unlawful”. If by “presumption in favour of detention” the Court of Appeal meant “the normal practice as to the circumstances in which a FNP will be detained”, then I would agree with them, provided that it is understood that (i) the *Hardial Singh* principles are observed and (ii) each case is considered individually.

54. The Court of Appeal set aside the declaration granted by Davis J. They were right to do so. For the reasons I have given, it is lawful for the Secretary of State to operate a policy which sets out the practice that she will normally follow in deciding whether or not to detain FNPs pending their deportation provided that the criteria that I have set out at para 53 above are satisfied. Such a policy is not prohibited by paragraph 2 of Schedule 3 to the 1971 Act.

55. The Court of Appeal also held at para 66 that the declaration granted by Moses J in *Sedrati* [2001] EWHC Admin 418 was wrong in law. I find this somewhat puzzling. The declaration stated that the terms of paragraph 2 of Schedule 3 do not create a presumption in favour of detention. Whatever the position may be in relation to paragraph 2(1) and the parenthesis in paragraph 2(3), paragraph 2(2) and the remainder of paragraph 2(3) do not *create* any presumption at all. They simply give the Secretary of State a discretion to detain. In relation to paragraph 2(2) and (3), therefore, so far as it goes, the declaration granted by Moses J is correct.

Were the detentions unlawful?

56. In summary, the appellants' case is that their claims in false imprisonment should have succeeded: the Secretary of State's unlawful unpublished policy which operated between April 2006 and September 2008 influenced the initial decisions to detain them and the subsequent decisions to continue to detain them. Davis J accepted the argument advanced on behalf of the Secretary of State that, where the unlawful policy was of no causative effect because the claimants could and would have been lawfully detained if the published policy had been applied, their detention was not unlawful.

57. The Court of Appeal agreed. They distinguished *Christie v Leachinsky* [1947] AC 573 and *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662 on the footing that in those cases there was no lawful authority to detain the plaintiff. In the present case, however, they said at para 87:

“there is no doubt that the statutory powers relied on by the Secretary of State were apt for the purpose, and the case is not based on the breach of any specific regulation on which the legality of detention was dependent. Rather it is about the manner in which the power was exercised.”

58. And at para 89:

“The mere existence of an internal, unpublished policy or practice at variance with, and more disadvantageous to the FNP than, the published policy will not render a decision to detain unlawful. It must be shown that the unpublished policy was applied to him. Even then, it must be shown that the application of the policy was material to the decision. If the decision to detain him was inevitable, the application of the policy is immaterial, and the decision is not liable to be set aside as unlawful.”

59. In short, since Mr Lumba and Mr Mighty would inevitably have been detained even if the published policy had been applied to them, their detentions were lawful. The court therefore applied what it is convenient to call “the causation test”.

60. Davis J and the Court of Appeal were right to hold that the detention of the appellants would have been inevitable in the light of the risk of absconding and re-offending that they both posed. This appeal therefore raises the important question

of whether it was right to apply the causation test and for that reason to hold that the detentions were lawful.

61. A somewhat similar problem arose in *R (SK Zimbabwe) v Secretary of State for the Home Department*. In that case the unlawfulness lay in the failure of the Secretary of State to comply with her policy which prescribed the *procedural* requirements for reviews of FNPs who are already in detention. The present case concerns the *substantive* requirements for the initial detention of FNPs as well as their continued detention.

62. What follows is to a considerable extent based on the submissions of Mr Husain. The introduction of a causation test in the tort of false imprisonment is contrary to principle both as a matter of the law of trespass to the person and as a matter of administrative law. Neither body of law recognises any defence of causation so as to render lawful what is in fact an unlawful authority to detain, by reference to how the executive could and *would have* acted if it had acted lawfully, as opposed to how it *did in fact* act. The causation test entails the surprising proposition that the detention of a person pursuant to a decision which is vitiated by a public law error is nevertheless to be regarded as having been lawfully authorised because a decision to detain could have been made which was not so vitiated. In my view, the law of false imprisonment does not permit history to be rewritten in this way.

63. The Court of Appeal were right to say at para 89 that the mere existence of an unlawful policy is not sufficient to establish that any particular exercise of a statutory discretion is unlawful. The decision to detain and/or continue detention will not be vitiated on the grounds of an unlawful policy unless the policy has been applied or at least taken into account by the decision maker. But this does not shed any light on the correctness of the causation test.

64. Trespassory torts (such as false imprisonment) are actionable *per se* regardless of whether the victim suffers any harm. An action lies even if the victim does not know that he was imprisoned: see, for example, *Murray v Ministry of Defence* [1988] 1 WLR 692, 703A where Lord Griffiths refused to redefine the tort of false imprisonment so as to require knowledge of the confinement or harm because “The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage.” By contrast, an action on the *case* (of which a claim in negligence is the paradigm example) regards damage as the essence of the wrong.

65. All this is elementary, but it needs to be articulated since it demonstrates that there is no place for a causation test here. All that a claimant has to prove in order to establish false imprisonment is that he was directly and intentionally imprisoned by the defendant, whereupon the burden shifts to the defendant to show that there was lawful justification for doing so. As Lord Bridge said in *R v Deputy Governor of Parkhurst Prison, Ex p Hague* [1992] 1 AC 58, 162C-D: “The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it.”

66. The causation test shifts the focus of the tort on to the question of how the defendant *would* have acted on the hypothesis of a lawful self-direction, rather than on the claimant’s right not *in fact* to be unlawfully detained. There is no warrant for this. A purported lawful authority to detain may be impugned either because the defendant acted in excess of jurisdiction (in the narrow sense of jurisdiction) or because such jurisdiction was wrongly exercised. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 established that both species of error render an executive act *ultra vires*, unlawful and a nullity. In the present context, there is in principle no difference between (i) a detention which is unlawful because there was no statutory power to detain and (ii) a detention which is unlawful because the decision to detain, although authorised by statute, was made in breach of a rule of public law. For example, if the decision to detain is unreasonable in the *Wednesbury* sense, it is unlawful and a nullity. The importance of *Anisminic* is that it established that there was a single category of errors of law, all of which rendered a decision *ultra vires*: see *Boddington v British Transport Police* [1999] 2 AC 143, 158D-E.

67. Mr Beloff submits that there are inherent problems in what I consider to be the correct and principled approach. First, it fails to take account of the nature or extent of the public law error. For example, he suggests that it treats for the purposes of liability as equally unlawful a decision to detain made by an official one grade lower than that specified in the detention policy (but which is otherwise unimpeachable) and a decision to detain for which there is no statutory authority at all. Secondly, it allows what is in essence a public law challenge to be made under the guise of a private law action without any of the procedural safeguards which apply in a judicial review application. In particular, the normal time limits for judicial review proceedings are circumvented. Thirdly, judicial review is a discretionary remedy. A minor public law error may result in no substantive relief being granted at all in judicial review proceedings, whereas a claimant can bring proceedings for false imprisonment as of right.

68. I do not consider that these arguments undermine what I have referred to as the correct and principled approach. As regards Mr Beloff’s first point, the error must be one which is material in public law terms. It is not every breach of public law that is sufficient to give rise to a cause of action in false imprisonment. In the

present context, the breach of public law must bear on and be relevant to the decision to detain. Thus, for example, a decision to detain made by an official of a different grade from that specified in a detention policy would not found a claim in false imprisonment. Nor too would a decision to detain a person under conditions different from those described in the policy. Errors of this kind do not bear on the decision to detain. They are not capable of affecting the decision to detain or not to detain.

69. Lord Walker and Lord Hope would prefer the more demanding test of the wrongful use of a statutory power amounting to an abuse of power. It is true that the phrase “abuse of power” is used in certain contexts in public law. For example, it has been held that the court will in a proper case decide whether to frustrate the legitimate expectation of a substantial benefit “is so unfair that to take a different course will amount to an abuse of power”: see *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 para 57. In that context, the phrase “abuse of power” denotes a degree of unfairness. It is not clear to me in what sense the phrase “abuse of power” is being suggested in the present context. Suppose that a detention policy states that no FNP who has been sentenced to less than 12 months’ imprisonment is to remain in detention pending deportation for more than 6 months. Suppose further that, by an administrative oversight, a FNP who has been sentenced to 9 months’ imprisonment is detained for 12 months. There can be little doubt that the FNP would have a good claim for substantial damages for false imprisonment in respect of the period of 6 months when he should not have been detained. It would be odd to say that his detention during that period was the result of an “abuse of power”. I would say that the FNP would be the victim of a material public law error. The error was one which was relevant to the decision to detain him. It was capable of affecting the decision to continue to detain him and did in fact do so.

70. As for Mr. Beloff’s other points, such force as they have derives from the fact that the detention in these cases is unlawful because it is vitiated by a public law error. The significance and effect of that error cannot be affected by the fortuity that it is also possible for a victim to challenge the decision by judicial review proceedings (which are subject to tighter time limits than private law causes of action) and that judicial review is a discretionary remedy. It is well established that a defendant can rely on a public law error as a defence to civil proceedings and that he does not need to obtain judicial review as a condition for defending the proceedings: see, for example, *Wandsworth London Borough Council v Winder* [1985] AC 461. The same applies in the context of criminal proceedings: see *Boddington v British Transport Police* [1999] 2 AC 143. Mr Beloff submits that the position of a claimant who relies on a public law error to found his cause of action and a defendant can sensibly be differentiated. But it is difficult to see how or why.

71. I can see that at first sight it might seem counter-intuitive to hold that the tort of false imprisonment is committed by the unlawful exercise of the power to detain in circumstances where it is certain that the claimant could and would have been detained if the power had been exercised lawfully. But the ingredients of the tort are clear. There must be a detention and the absence of lawful authority to justify it. Where the detainer is a public authority, it must have the power to detain and the power must be lawfully exercised. Where the power has not been lawfully exercised, it is nothing to the point that it could have been lawfully exercised. If the power could and would have been lawfully exercised, that is a powerful reason for concluding that the detainee has suffered no loss and is entitled to no more than nominal damages. But that is not a reason for holding that the tort has not been committed.

72. Both Mr Husain and Mr Beloff have referred to much authority. I shall refer to some of it. But there is nothing in the cases which shows that the conclusion which I consider is dictated by principle is questionable, still less that it is wrong.

73. Mr Husain relies on dicta of Lord Diplock in *Holgate-Mohamed v Duke* [1984] AC 437. Lord Diplock recognised that a claim for false imprisonment may be made out where police powers of arrest are unlawfully exercised by reference to common law principles. The statutory power for an arrest without warrant (section 2(4) of the Criminal Law Act 1967) made it a “condition precedent” that the constable should have reasonable cause to suspect the person to be guilty of the arrestable offence in respect of which the arrest was being made. On the facts, the condition precedent was made out. Lord Diplock said at p 443B that this left the officer with an executive discretion whether to arrest or not. The lawfulness of the way in which the discretion had been exercised could not be challenged except on *Wednesbury* grounds. He then continued:

“The *Wednesbury* principles...are applicable to determining the lawfulness of the exercise of the statutory discretion of a constable under section 2(4) of the Criminal Law Act 1967, not only in proceedings for judicial review *but also for the purpose of founding a cause of action at common law for damages for that species of trespass to the person known as false imprisonment*, for which the action in the instant case is brought.” (emphasis added)

74. Lord Diplock then applied the *Wednesbury* principles and concluded that the officer’s action was not unlawful. It follows that his comments about false imprisonment were *obiter dicta*. Nevertheless, it is clear that, if he had concluded that the officer had exercised his statutory discretion unlawfully, Lord Diplock would have held that he was liable in tort for false imprisonment. I accept, however, that these are no more than *dicta*, albeit from a source of high authority,

and that the issue does not seem to have been the subject of much if any argument in the House of Lords.

75. Other authorities relied on by Mr Husain as rejecting the causation test include *Christie v Leachinsky* [1947] AC 573, *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662 and *Langley v Liverpool City Council* [2006] 1 WLR 375. In addition, Mr Singh relies on *Cooper v The Board of Works for the Wandsworth District* (1863) 14 C.B. (N.S) 180.

76. In *Christie v Leachinsky*, Viscount Simon explained that where an arrest was unlawful because it did not comply with the procedural requirements imposed by the common law—communication of the true and good ground of arrest to the detainee—there would be a false imprisonment notwithstanding that the arrest could have been effected in a proper manner. At p 588H he said:

“I entertain no doubt that in the present case the appellants are not exonerated from liability for false imprisonment by satisfying the judge that they had a reasonable suspicion that the respondent had been guilty of theft or of receiving stolen goods knowing they had been stolen, when they never told the respondent that this was the ground of his arrest. Instead of doing so, they gave a different ground which, as Christie admitted, was not a good excuse for arresting him at all.”

77. Mr Beloff submits that this case should be distinguished on the basis that it concerned the giving of reasons for detention which was a condition precedent to a lawful arrest. He argues that it says nothing about the causation test in cases where the alleged error is not a failure to satisfy a condition precedent. I do not see why the failure to provide a detainee with the reasons for the arrest should be regarded as a failure to satisfy a condition precedent to lawful arrest rather than an unlawful exercise of the power to arrest. In any event, it would be remarkable if the question whether a cause of action in false imprisonment exists should depend on such fine distinctions of classification. More fundamentally, such distinctions have no justification in the light of *Anisminic*.

78. In *Roberts v Chief Constable of the Cheshire Constabulary*, the Court of Appeal held that a failure by the custody officer to conduct a review as required by section 40 of the Police and Criminal Evidence Act 1984 rendered the plaintiff's continued detention unlawful until the next review. The defence was raised that the plaintiff could only prove false imprisonment if he could show that, if the review had been carried out at the appropriate time, he would have been released. This

“causation defence” was rejected by Clarke LJ (with whom Stuart-Smith and Schiemann LJ agreed) at p 667B as being “nothing to the point”.

79. Mr Beloff emphasises the fact that the plaintiff was not being detained in accordance with the relevant statutory provisions and that the statute stipulated an express condition precedent to the lawful continuation of the detention, namely a review of detention, and that condition was not satisfied. This argument has no more force than Mr Beloff’s corresponding argument in relation to *Christie*.

80. *Langley v Liverpool City Council* [2006] 1 WLR 375 concerned child protection. The Court of Appeal held that a constable who had wrongfully removed a child under section 46 of the Children Act 1989 was liable in false imprisonment. He should instead have facilitated the exercise of a different power of removal through the execution of an emergency protection order (“EPO”) obtained by the local authority under section 44 of the 1989 Act. I gave the main judgment (with which Thorpe and Lloyd LJ agreed).

81. I held (para 32) that the power to remove a child under section 46 can be exercised even where an EPO is in force. I said (para 36) that where a police officer knows that an EPO is in force, he should not *exercise* the power of removing a child under section 46 unless there are compelling reasons to do so. On the facts of the case, there were no compelling reasons for the constable to exercise the section 46 power. The constable was in error in failing to ask himself whether there were compelling reasons why he should invoke section 46 rather than leave it to the council to execute the EPO. I held, therefore, that the removal of the child was unlawful. It was not in issue that, if the removal of the child was unlawful, the Chief Constable was liable to the child in false imprisonment.

82. Mr Beloff submits that the effect of my reasoning was that the constable had no jurisdiction (in the narrow pre-*Anisminic* sense) to do what he did. As an EPO was in force, it was in effect mandatory to invoke section 44 rather than section 46. I do not accept this analysis. I drew a clear distinction between the existence of the statutory authority to use the section 46 powers (which the constable had) and the exercise of those powers (which was wrongful on the facts of that case).

83. In *Cooper v The Board of Works for the Wandsworth District* 14 CB (NS) 180, the defendant board had the statutory power to demolish a house that was in the course of construction. It was held that this power was subject to the common law qualification that it should not be exercised without giving the builder notice and an opportunity to be heard. It was held that the board had exercised its statutory power unlawfully and that the builder was entitled to damages for

trespass to property. But I agree with Mr Beloff that this decision does not shed any light on the question whether detention pursuant to an unlawful exercise of a power to detain is itself unlawful. As Byles J put it at p 195, the board “contravened the words of the statute”. In effect, therefore, the court held that the decision to demolish the house was one which the board had no jurisdiction to make in the narrow pre-*Anisminic* sense.

84. I should deal with the authorities relied on by Mr Beloff. In *R (Saadi) v Secretary of State for the Home Department* [2002] 1 WLR 3131 as I have set out at para 50 above, the issue was whether the policy of detaining certain categories of asylum seekers whose claims could be processed quickly at the Oakington detention centre was lawful. The House of Lords held that it was. At first instance, Collins J had also considered the fact that when detaining the claimants the Home Office had used standard forms which did not reflect the new policy, and that therefore the true reasons for the detention had not been given. Collins J said that this did not affect the lawfulness of the detention. Lord Slynn at para 48 agreed that “the failure to give the right reason for detention and the giving of no or wrong reasons did not in the end affect the legality of the detention.” But para 48 is not part of the *ratio* of the decision of the House. In any event, in so far as it was argued at all that the giving of untrue reasons for the detention rendered the detention unlawful, the Secretary of State did not advance a causation defence and contend that the giving of untrue reasons was immaterial because the true reasons were lawful.

85. In *Nadarajah v Secretary of State for the Home Department* [2004] INLR 139, the Secretary of State’s published policy was that, if legal proceedings were initiated, removal would not be treated as imminent even if it otherwise was. The Secretary of State also had an unpublished policy, namely that information that proceedings were about to be initiated would be disregarded, however credible that information might be. At paras 68 and 69 of the judgment of Lord Phillips MR, the Court of Appeal said that the Secretary of State could not rely on the unpublished policy “as rendering lawful that which was, on the face of it, at odds with his policy, as made public” and for that reason the detention of N was unlawful. There is no hint of the causation test here. But the court went on to say that, if N’s solicitors had been aware of the unpublished policy, they would have instituted proceedings sooner. N therefore suffered because his solicitor could not foresee the consequences of her conduct and his detention did not satisfy the requirement of lawfulness imposed by article 5(1)(f) of the ECHR. I accept that this was a causation point. But it was unnecessary for the court to adopt this additional reason for holding that the detention was unlawful. Further, it requires a huge leap to argue from this that the causation test must be satisfied as an element of the tort of false imprisonment. In short, neither *Saadi* nor *Nadarajah* bears the weight that Mr Beloff seeks to place on them.

86. Recognising that the court might reject the causation test, Mr Beloff suggested a number of alternative approaches. The first is that false imprisonment should be confined to “no authority” cases ie cases in which there was in fact no authority to detain, without recourse to the legal “fiction” that, because of a public law error, an authority to detain which was in fact given should be treated as if it had no legal effect because it was *ultra vires*. The second is that detention should be vitiated only by pre-*Anisminic* error of law. The third is that vitiating circumstances should be restricted to bad faith and improper purpose. The fourth is that authority to detain should be vitiated only by failure to have regard to a material consideration which had an effect on the detention. The fifth is that it should be a requirement that the claimant shall have successfully applied in judicial review proceedings for the decision to detain to be quashed.

87. The first two of these suggestions seek to put the clock back to the pre-*Anisminic* era. For reasons given earlier, this is unwarranted. As regards the third and fourth suggestions, I have accepted at paras 68 and 69 above that the detention must be vitiated by an error which is material in public law terms and have attempted to explain there what I mean by that. The fifth seeks unjustifiably to impose a procedural hurdle where none currently exists either at common law or in statute. To accede to this suggestion would be to engage in an unacceptable exercise of judicial legislation.

88. To summarise, therefore, in cases such as these, all that the claimant has to do is to prove that he was detained. The Secretary of State must prove that the detention was justified in law. She cannot do this by showing that, although the decision to detain was tainted by public law error in the sense that I have described, a decision to detain free from error could and would have been made.

Overall conclusion on liability on the basis that the policies applied were unlawful

89. I conclude, therefore, that since it is common ground that the unlawful policies in force between April 2006 and September 2008 were applied to Mr Lumba and Mr Mighty, they were unlawfully detained and their claims in false imprisonment must succeed. I turn to consider the assessment of damages.

Compensatory or nominal damages?

90. Having found that there was no liability in false imprisonment, the Court of Appeal did not need to decide whether the claimants were entitled to damages. They did, however, say at para 96:

“If, on the evidence, it was clear that, even assuming a lawful consideration, there was no realistic possibility of a different decision having been reached, and no realistic possibility of earlier release, then we do not see why that should not be reflected in an award of nominal damages only.”

91. Mr Husain and Mr Westgate submit that, even if it was inevitable that the appellants would have been detained if the statutory power to detain had been lawfully exercised, they are nevertheless entitled to substantial and not merely nominal damages. They emphasise that false imprisonment is a tort of strict liability which is actionable without proof of special damage. The focus is on the claimant’s right rather than the culpability of the defendant’s conduct. They rely on two authorities in support of their argument. The first is *Roberts v Chief Constable of the Cheshire Constabulary* to which I have already referred at para 75 above. The plaintiff issued proceedings for false imprisonment arising from his detention by the police between 5.25 a.m. (when his detention should have been reviewed as required by statute) and 7.45 a.m. the same morning when it was reviewed and his continued detention authorised. It was found by the judge that the detention between 5.25 a.m. and 7.45 a.m. was unlawful, but that, if a review had taken place at 5.25 a.m., his continued detention would have been authorised. The judge awarded the plaintiff £500. The defendant’s appeal on both liability and damages was dismissed by the Court of Appeal.

92. Clarke LJ gave the leading judgment. He said at p 668 D that there was an infringement of the plaintiff’s legitimate right to have his case reviewed “and that, although the outcome may not have been affected by the failure to review in time, this infringement cannot be regarded as a purely nominal matter or a matter compensatable by entirely nominal damages. There are rules, the police must stick to them”. He added at p 668G:

“As a matter of general principle such a plaintiff is entitled to be put into the position in which he would have been if the tort had not been committed. It is therefore important to analyse what the tort is. The plaintiff’s claim was not for damages for breach of duty to carry out a review at 5.25 a.m. but for false imprisonment.

As I tried to explain earlier, the reason why the continued detention was unlawful was that no review was carried out. The wrong was not, however, the failure to carry out the review but the continued detention. If the wrong had not been committed the plaintiff would not have been detained between 5.25 a.m. and 7.45 a.m.”

93. I do not consider that this case was correctly decided on the issue of damages. I agree that the plaintiff was entitled to be put into the position in which he would have been if the tort of false imprisonment had not been committed. But I do not agree that, if the tort had not been committed, the plaintiff would not have been detained between 5.25 a.m. and 7.45 a.m. On the judge's findings, if the tort had not been committed, he *would* have been detained during this period. It seems to me that the fallacy in the analysis in *Roberts* is that it draws no distinction between a detainee who would have remained in detention if the review had been carried out (and therefore no tort committed) and a detainee who would *not* have remained in detention if the review had been carried out. But the position of the two detainees is fundamentally different. The first has suffered no loss because he would have remained in detention whether the tort was committed or not. The second has suffered real loss because, if the tort had not been committed, he would not have remained in detention.

94. The second authority relied on in support of the appellants' case is *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883. It was held there that it is no answer to a claim in conversion of goods for a defendant to say that the goods were or would have been subsequently converted by a third party: see the discussion by Lord Nicholls at paras 81 to 84 of his speech. But questions of causation in relation to cases of successive conversion by different tortfeasors have no application in the present context.

95. The question here is simply whether, on the hypothesis under consideration, the victims of the false imprisonment have suffered any loss which should be compensated in more than nominal damages. Exemplary damages apart, the purpose of damages is to compensate the victims of civil wrongs for the loss and damage that the wrongs have caused. If the power to detain had been exercised by the application of lawful policies, and on the assumption that the *Hardial Singh* principles had been properly applied (an issue which I discuss at paras 129-148 below), it is inevitable that the appellants would have been detained. In short, they suffered no loss or damage as a result of the unlawful exercise of the power to detain. They should receive no more than nominal damages.

96. I should add that this approach is consistent with the observation by Lord Griffiths in *Murray v Ministry of Defence* [1988] 1WLR 692, 703A –B: “if a person is unaware that he has been falsely imprisoned and has suffered no harm, he can normally expect to recover no more than nominal damages.”

Vindictory damages

97. Mr Westgate submits that, if the appellants are entitled to no more than nominal damages, then they should also be awarded vindictory damages. It has been said that the award of compensatory damages can serve a “vindictory purpose”: see, for example, *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] AC 962 per Lord Scott at para 22 and Lord Rodger at para 60. But “vindictory damages” serve a wider purpose than simply to compensate a successful claimant. The phrase “vindictory damages” seems to have been coined by Sharma CJ in the Court of Appeal of Trinidad and Tobago in *Attorney General of Trinidad and Tobago v Ramanoop* as a head of loss in claims for breach of constitutionally protected rights and freedoms: see address given by the President of the Caribbean Court of Justice to a Symposium entitled “Current Developments in Caribbean Community Law” in Port of Spain on 9 November 2009. Lord Collins has traced the history of the use of the phrase in other contexts.

98. The concept of vindictory damages was explained and endorsed by the Privy Council in the appeal in the *Ramanoop* case [2005] UKPC 15, [2006] 1 AC 328. Lord Nicholls said:

“18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of constitutional right will not always be coterminous with the cause of action at law.

19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements had a place in this additional award. ‘Redress’ in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where

called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions ‘punitive damages’ or ‘exemplary damages’ are better avoided as descriptions of this type of additional award”.

99. It will be seen, therefore, that the Privy Council endorsed the principle of vindictory damages for violation of constitutional rights. Should this principle be extended further? In *Ashley* at para 22 Lord Scott *obiter* said that vindictory damages might be awarded for the tort of battery or trespass to the person by the police resulting in the death of the victim. But the issue in that case was whether a claimant should be allowed to continue with an action in order to establish whether an assault had been committed, where there could be no award of further compensatory damages because these had already been paid in full as a result of a concession by the police. Lord Scott’s view that vindictory damages have a role in the compensation for civil wrongs and the breach of ECHR rights was endorsed, at least to some extent, in *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB). In awarding damages for breach of the claimant’s right to privacy, after recognising the compensatory nature of damages for infringements of privacy, Eady J said at paras 216-7 that there was another factor which “probably” had to be taken into account, namely vindication to mark the infringement of the right.

100. It is one thing to say that the award of compensatory damages, whether substantial or nominal, serves a vindictory purpose: in addition to compensating a claimant’s loss, it vindicates the right that has been infringed. It is another to award a claimant an additional award, not in order to punish the wrongdoer, but to reflect the special nature of the wrong. As Lord Nicholls made clear in *Ramanoop*, discretionary vindictory damages may be awarded for breach of the Constitution of Trinidad and Tobago in order to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches. It is a big leap to apply this reasoning to any private claim against the executive. *McGregor on Damages* 18th ed (2009) states at para 42-009 that “It cannot be said to be established that the infringement of a right can in our law lead to an award of vindictory damages”. After referring in particular to the appeals to the Privy Council from Caribbean countries, the paragraph continues: “the cases are therefore far removed from tortious claims at home under the common law”. I agree with these observations. I should add that the reference by Lord Nicholls to reflecting public outrage shows how closely linked vindictory damages are to punitive and exemplary damages.

101. The implications of awarding vindictory damages in the present case would be far reaching. Undesirable uncertainty would result. If they were awarded

here, then they could in principle be awarded in any case involving a battery or false imprisonment by an arm of the state. Indeed, why limit it to such torts? And why limit it to torts committed by the state? I see no justification for letting such an unruly horse loose on our law. In my view, the purpose of vindicating a claimant's common law rights is sufficiently met by (i) an award of compensatory damages, including (in the case of strict liability torts) nominal damages where no substantial loss is proved, (ii) where appropriate, a declaration in suitable terms and (iii) again, where appropriate, an award of exemplary damages. There is no justification for awarding vindictory damages for false imprisonment to any of the FNPs.

Application of Hardial Singh principles to the appeal of Mr Lumba

102. In addition to the issues that are raised which are common to both appeals, it is submitted on behalf of Mr Lumba (but not Mr Mighty) that his detention is unlawful on the grounds that there has been a breach of the *Hardial Singh* principles. This part of the appeal raises a number of points about the reach of those principles. I refer to the encapsulation of the principles set out in my judgment in *R (I)* [2003] INLR 196 at para 22 above.

103. A convenient starting point is to determine whether, and if so when, there is a realistic prospect that deportation will take place. As I said at para 47 of my judgment in *R (I)*, there may be situations where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a period that is reasonable in all the circumstances, having regard in particular to time that the person has already spent in detention. I deal below with the factors which are relevant to a determination of a reasonable period. But if there is no realistic prospect that deportation will take place within a reasonable time, then continued detention is unlawful.

104. How long is a reasonable period? At para 48 of my judgment in *R (I)*, I said:

“It is not possible or desirable to produce an exhaustive list of all the circumstances that are, or may be, relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of Schedule 3 to the Immigration Act 1971. But in my view, they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in

which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences.”

105. So far as I am aware, subject to the following qualifications, the relevance of these factors has not been questioned. The qualifications are first that the relevance of the risk of offending on release is challenged on behalf of the appellants in the present case. Secondly, “the nature of the obstacles” begs two questions that have been raised on this appeal, namely what is the relevance, if any, of delays attributable to the fact that a detained person (i) is challenging the decision to deport him by appeal or judicial review and will generally not be deported until his challenges have been determined; and (ii) has refused to return voluntarily to his country of origin?

Risk of re-offending

106. Mr Husain accepts that, where there is a risk that the detained person will abscond, the risk of re-offending is relevant to the assessment of the duration of detention that is reasonably necessary to effect deportation. But he submits that, where there is no real risk of absconding, the risk of re-offending cannot of itself justify detention. Where there is no such risk, detention is not necessary to facilitate deportation, because it will be possible to effect the deportation without the need for detention. The underlying purpose of the power to detain is not to prevent the commission of criminal offences, but to facilitate the implementation of a deportation order.

107. I have some difficulty in understanding why the risk of re-offending is a relevant factor in a case where there is a risk of absconding, but not otherwise. It seems to me that it is possible to construe the power to detain either (more narrowly) as a power which may only be exercised to further the object of facilitating a deportation, or (more broadly) as a power which may also be exercised to further the object which it is sought to achieve by a deportation, namely, in the present case, that of removing an offender whose presence is not conducive to the public good. The distinction between these two objects was clearly drawn by the Court of Appeal in *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804. Toulson LJ said at para 55:

“A risk of offending if the person is not detained is an additional relevant factor, the strength of which would depend on the magnitude of the risk, by which I include both the likelihood of it occurring and the potential gravity of the consequences. Mr Drabble

submitted that the purpose of the power of detention was not for the protection of public safety. In my view, that is over-simplistic. The purpose of the power of deportation is to remove a person who is not entitled to be in the United Kingdom and whose continued presence would not be conducive to the public good. If the reason why his presence would not be conducive to the public good is because he has a propensity to commit serious offences, protection of the public from that risk is the purpose of the deportation order and must be a relevant consideration when determining the reasonableness of detaining him pending his removal or departure.”

Para 78 of Keene LJ’s judgment is to similar effect.

108. I acknowledge that the principle that statutory powers should be interpreted in a way which is least restrictive of liberty if that is possible would tend to support the narrower interpretation. But I think that the Court of Appeal was right in *R (A)* to adopt the interpretation which gives effect to the purpose underlying the power to deport and which the power to detain is intended to facilitate. Perhaps a simpler way of reaching the same conclusion is to say, as Simon Brown LJ said in *R (I)* at para 29, that the period which is reasonable will depend on the circumstances of the particular case and the likelihood or otherwise of the detainee re-offending is “an obviously relevant circumstance”.

109. But the risk of re-offending is a relevant factor even if the appellants are right in saying that it is relevant only when there is also a risk of absconding. As Lord Rodger pointed out in argument, if a person re-offends there is a risk that he will abscond so as to evade arrest or if he is arrested that he will be prosecuted and receive a custodial sentence. Either way, his re-offending will impede his deportation.

110. The risk of re-offending is, therefore, a relevant factor.

Delay attributable to challenges to deportation

111. Mr Beloff submits that the time taken to resolve legal challenges brought by an individual against deportation should generally be left out of account in considering whether a reasonable period of detention has elapsed. He concedes that this general rule should be subject to two qualifications: (i) if the Secretary of State has caused delay in the resolution of the legal challenge, then that time may be taken into account; and (ii) the time during which a legal challenge is being resolved should be taken into account if removal is not possible for reasons

unrelated to the legal challenge. I shall call this general rule “the exclusionary rule”.

112. In support of this submission, Mr Beloff makes the following points. First, it is the individual’s choice to challenge the removal and, if the time taken to resolve legal challenges were taken into account, the length of detention would be outside the control of the Secretary of State and would be entirely within the control of the detained person. Secondly, if the position were otherwise, those who (if at large) would be a danger to the public or who would be likely to thwart a deportation order by absconding, would be able to increase their prospects of release by pursuing every conceivable point by way of legal challenges and by doing everything possible to delay the legal process. Thirdly, if the legality of detention is capable of depending on the merits of a challenge to the decision to deport, it will be necessary for the High Court to decide for itself the merits of the underlying challenge, in advance of consideration of the case by the specialist tribunal appointed by Parliament to undertake that task. That is undesirable.

113. At para 102 of their judgment, the Court of Appeal said:

“In our judgment, the fact that a FNP is refusing to return voluntarily, or is refusing to cooperate in his return (for example, by refusing to apply for an emergency travel document, as initially did WL) is relevant to the assessment of the legality of his continued detention: see *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804. So is the fact that the period of his detention had been increased, and his deportation postponed by his pursuit of appeals and judicial review proceedings seeking to challenge his deportation order or his application for asylum or leave to remain, particularly if his applications and appeals are obviously unmeritorious. In our judgment, as a matter of principle, a FNP cannot complain of the prolongation of his detention if it is caused by his own conduct.”

114. It is not clear whether the Court of Appeal were accepting the exclusionary rule in its entirety. To say that the fact that the length of the detention is attributable to the pursuit of legal proceedings is *relevant* to the assessment of the legality of the detention suggests a rejection of the exclusionary rule. But to say that FNPs cannot complain of the prolongation of their detention caused by their own conduct suggests an acceptance of it.

115. The question of the relevance of the pursuit of legal proceedings has been considered in a number of authorities. I do not propose to analyse them. None is

binding on this court. The discussion of the issue which I have found most helpful is that of Davis J in *R (Abdi) v Secretary of State for the Home Department* [2009] EWHC 1324 (Admin). In that case, the exclusionary rule (with the same two exceptions) was urged on the court on behalf of the Secretary of State. In rejecting it, Davis J pointed out at para 25 of his judgment, that it was undesirable, where the core question is an assessment of what is reasonable in all the circumstances, to be astute to look for mandatory restrictions or rules in what ought to be a fact-specific exercise. I agree. The *Hardial Singh* principles should not be applied rigidly or mechanically.

116. There are several problems with the exclusionary rule. First, it seems to require the exclusion of consideration of the individual circumstances of an applicant pending what may be a long appellate process. Suppose two FNPs who both embark on a meritorious appeal process which takes a number of years. The only difference between them is that A poses a very high risk of absconding and re-offending and B poses a very low risk. If the exclusionary rule is applied, no difference can be drawn between them from the time proceedings are commenced. In both cases, the several years during which they are detained while the appeal process is continuing are to be disregarded in assessing whether the period of detention is reasonable. Or suppose that the effect of detention on A is to cause serious damage to his health or that of members of his family, whereas there is no such effect in the case of B. I can see no warrant for such a mechanistic approach to the determination of what is reasonable in all the circumstances.

117. Secondly, the exclusionary rule seems to involve the exclusion from consideration of any delays occurring within the appeal process which are not the fault of the applicant or (as is conceded by Mr Beloff) the Secretary of State. I see no reason why such delays, for example, delays on the part of the tribunal or court, should be disregarded in a determination of whether the period of detention is reasonable.

118. Thirdly, the consequence of the exclusionary rule is that a person can be detained for many years while pursuing a *prima facie* meritorious appeal but he cannot by judicial review or *habeas corpus* challenge his detention on *Hardial Singh* or related article 5(1)(f) of the ECHR principles. It precludes such judicial scrutiny (i) however long the detention and appeals have lasted and (ii) regardless of the effects of prolonged detention on the detainee, provided that (iii) the appeals are being diligently pursued and there is no concurrent independent reason why deportation cannot be effected. I accept the submission of Mr Husain that bail is not a sufficient answer to the fundamental objection that the exclusionary rule constitutes an impermissible restriction on judicial oversight of the legality of administrative detention. Paragraph 29 of Schedule 2 to the 1971 Act gives the First Tier Tribunal power to grant bail pending an appeal, but this is subject to the restrictions stated in paragraph 30. Paragraph 30(1) provides that an appellant shall

not be released under paragraph 29 without the consent of the Secretary of State if removal directions are currently in force. There is nothing in the schedule which requires the tribunal to apply the *Hardial Singh* principles in deciding whether or not to grant bail and, in particular, to have regard to the past and likely future length of a detention. Bail is not a determination of the legality of detention, whether at common law or for article 5(4) purposes.

119. Fourthly, the exclusionary rule is inconsistent with the decision of the ECtHR in *Chahal v United Kingdom* (1996) 23 EHRR 413. In deciding whether the detention complied with the requirements of article 5(1)(f), the court had regard to the length of the detention, including the time taken for the various domestic proceedings to be completed: see paras 114, 115 and 123 of the judgment of the court. There is a close analogy between the *Hardial Singh* principles and the article 5 requirement that detention for the purposes of deportation must not be of excessive duration.

120. I would reject Mr Beloff's *in terrorem* argument that, unless the exclusionary rule applies, detained FNPs will be able to procure their release from detention by the simple expedient of pursuing hopeless legal challenges. Time taken in the pursuit of hopeless challenges should be given minimal weight in the computation of a reasonable period of detention. Nor do I accept that it is undesirable (or indeed unduly difficult) to identify hopeless or abusive challenges. There exist statutory mechanisms to curb unmeritorious appeals. If a claim is "clearly unfounded", certification under section 94(2) of the Nationality, Immigration and Asylum Act 2002 precludes an in-country appeal. If a claim relies on a matter which could have been raised earlier in response to an earlier immigration decision or in response to a "one-stop notice", certification under section 96 of the 2002 Act precludes any appeal at all. In any event, a court considering the legality of a detention will often be able to assess the *prima facie* merits of an appeal. Where, as in the case of Mr Lumba, there have been orders for reconsideration, or where there has been a grant of permission to appeal to the Court of Appeal, the court will easily recognise that the challenge has some merit. Conversely, there may be one or more determinations from immigration judges dismissing claims as wholly lacking in credibility.

121. To summarise, I would reject the exclusionary rule. If a detained person is pursuing a hopeless legal challenge and that is the only reason why he is not being deported, his detention during the challenge should be given minimal weight in assessing what is a reasonable period of detention in all the circumstances. On the other hand, the fact that a meritorious appeal is being pursued does not mean that the period of detention during the appeal should necessarily be taken into account in its entirety for the benefit of the detained person. Indeed, Mr Husain does not go so far as to submit that there is any automatic rule, regardless of the risks of absconding and/or re-offending, which would compel an appellant's release if the

appeals process lasted a very long time through no fault of the appellant. He submits that the weight to be given to time spent detained during appeals is fact-sensitive. This accords with the approach of Davis J in *Abdi* and I agree with it. The risks of absconding and re-offending are always of paramount importance, since if a person absconds, he will frustrate the deportation for which purpose he was detained in the first place. But it is clearly right that, in determining whether a period of detention has become unreasonable in all the circumstances, much more weight should be given to detention during a period when the detained person is pursuing a meritorious appeal than to detention during a period when he is pursuing a hopeless one.

Non-cooperation with return

122. The most common examples of non-cooperation are (i) a refusal by a person who does not have a valid passport to cooperate with the obtaining of travel documents to enable him to return and (ii) a person's refusal to avail himself of one of the Home Office schemes by which he may leave the United Kingdom voluntarily. Most of the discussion in the cases has centred on (ii).

123. It is common ground that a refusal to return voluntarily is relevant to an assessment of what is a reasonable period of detention if a risk of absconding can properly be inferred from the refusal. But I would warn against the danger of drawing an inference of risk of absconding in every case. It is always necessary to have regard to the history and particular circumstances of the detained person. What is, however, in issue is whether a failure to return voluntarily can of itself justify a period of detention which would otherwise be unreasonable and therefore unlawful. In *R (I)*, I said in the Court of Appeal:

“50. As regards the significance of the appellant's refusal of voluntary repatriation, there appears to be agreement between Simon Brown LJ and Mummery LJ that this is a relevant circumstance, but Mummery LJ considers that it is decisively adverse to the appellant, whereas Simon Brown LJ considers that it is of relatively limited relevance on the facts of the present case. I too consider that it is a relevant circumstance, but in my judgment it is of little weight. [Counsel for the Secretary of State] submits that a refusal to leave voluntarily is relevant for two reasons. First, the detained person has control over the fact of his detention: if he decided to leave voluntarily, he would not be detained. Secondly, the refusal indicates that he would abscond if released from detention. It is this second feature which has weighed heavily with Mummery LJ.

51. I cannot accept that the first of [the Secretary of State's] reasons is relevant. Of course, if the appellant were to leave voluntarily, he would cease to be detained. But in my judgment, the mere fact (without more) that a detained person refuses the offer of voluntary repatriation cannot make reasonable a period of detention which would otherwise be unreasonable. If [the Secretary of State] were right, the refusal of an offer of voluntary repatriation would justify as reasonable any period of detention, no matter how long, provided that the Secretary of State was doing his best to effect the deportation.

52. I turn to [the Secretary of State's] second reason. I accept that if it is right to infer from the refusal of an offer of voluntary repatriation that a detained person is likely to abscond when released from detention, then the refusal of voluntary repatriation is relevant to the reasonableness of the duration of a detention. In that event, the refusal of voluntary repatriation is no more than evidence of a relevant circumstance namely the likelihood that the detained person will abscond if released.

53. But there are two important points to be made. First, the relevance of the likelihood of absconding, if proved, should not be overstated. Carried to its logical conclusion, it could become a trump card that carried the day for the Secretary of State in every case where such a risk was made out regardless of all other considerations, not least the length of the period of detention. That would be a wholly unacceptable outcome where human liberty is at stake.

54. Secondly, it is for the Secretary of State to satisfy the court that it is right to infer from the refusal by a detained person of an offer of voluntary repatriation that, if released, he will abscond. There will no doubt be many cases where the court will be persuaded to draw such an inference. I am not, however, satisfied that this is such a case. It is not at all surprising that this appellant has refused voluntary repatriation. He has not yet exhausted the asylum process, which, if successful, would permit him to remain in the United Kingdom. In these circumstances, why should one infer from the refusal of voluntary repatriation that, if released, he would abscond? In my judgment, the most that can be said is that there is a risk that if he is released the appellant will abscond. But that can be said of most cases. I do not consider that the fact that he has refused the offer of voluntary repatriation adds materially to the evidence that such risk is present in the instance case.”

124. Simon Brown LJ adopted a somewhat different approach at para 31. He said that, since in *Hardial Singh* Woolf J had regarded it as a factor in the applicant's favour that he was "quite prepared to go to India", he could not see why the converse should not be relevant. The court should not "ignore entirely" the applicant's ability to end his detention by returning home voluntarily.

125. The point was considered again by the Court of Appeal in *R (A) Somalia v Secretary of State for the Home Department* [2007] EWCA Civ 804 Toulson LJ (with whom Longmore LJ agreed) said:

"54. I accept the submission on behalf of the Home Secretary that where there is a risk of absconding and a refusal to accept voluntary repatriation, those are bound to be very important factors, and likely often to be decisive factors, in determining the reasonableness of a person's detention, provided that deportation is the genuine purpose of the detention. The risk of absconding is important because it threatens to defeat the purpose for which the deportation order was made. The refusal of voluntary repatriation is important not only as evidence of the risk of absconding, but also because there is a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return there at once. In the latter case the loss of liberty involved in the individual's continued detention is a product of his own making."

126. Keene LJ said at para 79:

"I am not persuaded by Mr Giffin that the refusal by this detainee to return to Somalia voluntarily when it was possible to do so is some sort of trump card. On this I see the force of what was said by Dyson LJ in *R (I)* at paragraph 52, namely that the main significance of such a refusal may often lie in the evidence it provides of a likelihood of the individual absconding if released. After all, if there is in a particular case no real risk of his absconding, how could detention be justified in order to achieve deportation, just because he has refused voluntary return? The Home Office in such a case, *ex hypothesi*, would be able to lay hands on him whenever it wished to put the deportation order into effect. Detention would not be necessary in order to fulfil the deportation order. Having said that, I do not regard such a refusal to return as wholly irrelevant in its own right or as having a relevance *solely* in terms of the risk of absconding. It is relevant that the individual could avoid detention by his voluntary

act. But I do not accept that such a refusal is of the fundamental importance contended for by the Secretary of State”

127. It is necessary to distinguish between cases where return to the country of origin is possible and those where it is not. Where return is not possible for reasons which are extraneous to the person detained, the fact that he is not willing to return voluntarily cannot be held against him since his refusal has no causal effect. But what if return would be possible, but the detained person is not willing to go? Here it is necessary to consider whether the detained person has issued proceedings challenging his deportation. If he has done so, then it is entirely reasonable that he should remain in the United Kingdom pending the determination of those proceedings (unless the proceedings are an abuse). In those circumstances his refusal to accept an offer of voluntary return is irrelevant. The purpose of voluntary return is not to encourage foreign nationals to return to their countries of origin where, if their legal challenges succeed, it is likely to have been demonstrated that they would face a risk of persecution within the meaning of the Convention and Protocol relating to the Status of Refugees (1951) (Cmd 9171) and (1967) (Cmnd 3906) or treatment contrary to article 3 of the ECHR. Rather, it is to facilitate removal where that is justified because the FNPs have *not* proved that they would face the relevant risk on return. In accepting voluntary return, the individual forfeits all legal rights to remain in the United Kingdom. He should not be penalised for seeking to vindicate his ECHR or Refugee Convention rights and be faced with the choice of abandoning those rights or facing a longer detention than he would face if he had not been offered voluntary return.

128. What about those who have no outstanding legal challenges? Here, the fact that the detained person has refused voluntary return should not be regarded as a “trump card” which enables the Secretary of State to continue to detain until deportation can be effected, whenever that may be. That is because otherwise, as I said at para 51 of my judgment in *R (I)*, “the refusal of an offer of voluntary repatriation would justify as reasonable any period of detention, no matter how long, provided that the Secretary of State was doing his best to effect the deportation.” If the refusal of voluntary return has any relevance in such cases even if a risk of absconding cannot be inferred from the refusal, it must be limited. That was the view of Simon Brown LJ in *R (I)* and Keene LJ in *R (A)* and I agree with them.

The appeal of Mr Lumba

129. I can now turn to the particular case of Mr Lumba. He entered the United Kingdom unlawfully on 10 April 1994 and claimed asylum on the same day. His claim was refused on 20 February 2000. He was, however, granted exceptional leave to remain until 20 February 2004. He has a bad criminal record which

includes convictions for assault occasioning actual bodily harm (six months' imprisonment); two offences of using threatening and abusive behaviour (twelve months' probation); two offences of shoplifting (non-custodial sentences); assault occasioning actual bodily harm (six months' imprisonment); assaulting a constable (four months' imprisonment); and wounding with intent contrary to section 18 of the Offences Against the Person Act 1861 (4 years' imprisonment).

130. He married MP, another national of the Democratic Republic of Congo ("DRC"). Their son, PAS, was born on 5 July 2003.

131. As I have already said, on 3 April 2006, the Secretary of State decided to deport Mr Lumba. Notwithstanding that his son is a British citizen, the Secretary of State also decided to deport his wife and son, although the orders against them were subsequently revoked. He was notified of the decision to detain him under the 1971 Act on 22 June 2006, the day before his release date. His first detention review was in February 2007. He appealed against the decision to deport him. On 7 September 2006, while the appeal was still pending, he refused to attend a travel document interview with the immigration authorities to facilitate his return to the DRC.

132. His appeal against deportation was dismissed by the Asylum and Immigration Tribunal ("AIT") on 15 December 2006. In about January 2007, he was transferred from prison to Dover Immigration Removal Centre, since when he remained in detention.

133. On 1 March 2007, he attended an interview with an immigration officer at which he explained that his passport was missing. He was asked to complete an application for an Emergency Travel Document ("ETD") but refused to do so, stating that he did not wish to be returned to the DRC because "the problem which formed the initial basis of his asylum claim is still true." By 20 March 2007, the Secretary of State's caseworkers had discovered that they had a copy of Mr Lumba's passport on file.

134. His indefinite leave to remain was terminated only after service on him of the signed deportation order on 21 March 2007. The discovery of the copy of his passport on file obviated the need for his cooperation in completing a travel document application. On 29 March, a completed application for an ETD, accompanied by copies of his passport and identity card, was sent to the Embassy of the DRC. The Embassy claimed to have lost the initial application and the application for an ETD was resubmitted on 26 April 2007. The application was granted by the DRC Embassy on 25 July 2007 and on the following day directions were set for Mr Lumba's removal from the United Kingdom on 20 August 2007.

135. On 15 August 2007, his new solicitors submitted fresh representations challenging his deportation. These noted that a country guidance case (*BK (DRC)*) concerning the safety of returns to the DRC of failed asylum seekers/ deportees was to be heard by the AIT on 17 September 2007. On 16 August 2007, the Secretary of State refused to treat those representations as a fresh asylum claim and on the following day, Mr Lumba issued judicial review proceedings challenging that refusal. On 14 September 2007, these proceedings were stayed by consent until the outcome of the pending country guidance case before the AIT was known.

136. On 23 October 2007, Mr Lumba issued the claim for judicial review challenging his detention which has given rise to the present appeal. On 18 December 2007, the AIT promulgated its determination in *BK (Democratic Republic of Congo) v Secretary of State for the Home Department* and decided that failed asylum seekers were not, as such, at risk in the DRC: [2007] UKAIT 98. Mr Lumba made applications for bail on 23 January 2008, 4 February 2008 and 4 March 2008. They were all rejected by the immigration judge principally on the ground that there was a real risk that if he was released he would re-offend.

137. On 23 April 2008, permission was granted to appeal the AIT's decision in *BK (DRC)* to the Court of Appeal.

138. Mr Lumba's claim for judicial review in respect of his detention was heard by Collins J on 4 July 2008. His judgment is reported at [2008] EWHC 2090 (Admin). He concluded that the detention was lawful on *Hardial Singh* principles and that it would continue to be so until the Court of Appeal gave judgment in *BK (DRC)*, on the assumption that judgment was given by the end of December 2008. In fact judgment was given by the Court of Appeal on 3 December 2008 after the hearing before Davis J, but before he gave judgment: [2008] EWCA Civ 1322.

139. Davis J agreed with the reasoning and conclusion of Collins J as to the lawfulness of the detention. The findings made by Davis J are set out in full by the Court of Appeal at para 99 of their judgment. There is no need to repeat them in this judgment. In summary, Davis J said at para 203 that (i) Mr Lumba posed a high risk of absconding and a high risk of serious reoffending; (ii) at all stages there was a prospect of removing him within a reasonable period; and (iii) there had been no lack of due expedition on the part of the Secretary of State.

140. On 11 February 2009, Mr Lumba's solicitors made fresh representations on his behalf to the Secretary of State, and applied for the revocation of the deportation order. They said that his marriage had broken down and that he was seeking contact with his son. He relied on article 8 of the ECHR. This application

was rejected by the Secretary of State on 1 July 2009. Mr Lumba appealed on 8 July 2009. The appeal was dismissed by the AIT on 28 September 2009. A reconsideration was ordered by a senior immigration judge on 26 October 2009. At the reconsideration, the Secretary of State conceded that the original tribunal had erred in law.

141. By a judgment given on 19 February 2010, the Court of Appeal dismissed Mr Lumba's appeals against the decisions of Collins J and Davis J. The Court of Appeal said at para 100 that they had seen nothing to justify interfering with Davis J's findings at para 203 of his judgment. They said in relation to the application of the *Hardial Singh* principles that the real attack was on the judgment of Collins J. There had been no material error in the approach or conclusions of Collins J who had taken into account the high risk of absconding and re-offending, the fact that Mr Lumba could have returned to the DRC voluntarily, and that his deportation had been delayed by his pursuit of several unsuccessful applications for asylum or leave to remain and appeals against their refusal.

142. The Court of Appeal had been asked to consider the period which had elapsed since the judgment of Davis J and subsequent evidence, including a psychiatric report, and to determine the legality of Mr Lumba's current detention in the light of it. They said at para 108 that it would be inappropriate for them to consider as a first instance decision whether Mr Lumba's mental condition rendered his continued detention unlawful. Apart from that, they said that:

“having reviewed the history of [Mr Lumba's] detention and the reasons given for continuing it, and for the refusals of bail, and his several hitherto unmeritorious appeals and applications, we are satisfied that his detention for the purposes of his deportation continues to be lawful”.

143. On behalf of Mr Lumba it is submitted that the Court of Appeal should have concluded that his detention was unreasonably long by the time of the hearing before Collins J on 4 July 2008; alternatively by the time of the hearing before Davis J on 11-14 November 2008; alternatively by the time of the hearing before them between 30 November and 2 December 2009. By the time of the appeal, of particular importance were the facts that (i) Mr Lumba had been in detention for 41 months; (ii) he could not be deported while he was pursuing his appeal against the Secretary of State's refusal to revoke the deportation order; and (iii) there was evidence from the Croydon Mental Health Team and consultant psychiatrist Dr Dinakaran which showed that the risk of re-offending and psychotic relapse could be managed in the community.

144. Mr Lumba has now been in detention for 54 months. At first sight, his detention seems to have been of unreasonable duration. There must come a time when, however grave the risk of absconding and however the grave the risk of serious offending, it ceases to be lawful to detain a person pending deportation. Moreover, in certain respects the courts below have not applied the *Hardial Singh* principles correctly. In particular, they have wrongly regarded the fact that Mr Lumba has been able to delay his deportation by pursuing applications and appeals which, thus far, have been unsuccessful as being relevant to the assessment of a reasonable period of detention. It has not been suggested by the Secretary of State that any of these applications or appeals have been hopeless and abusive. For the reasons given above, the fact that the applications and appeals delayed the deportation should have been regarded as irrelevant. The courts below also appear to have taken into account Mr Lumba's refusal of voluntary return without making it clear how this is relevant to the assessment of a reasonable period. As I have said, it is of limited relevance as a free-standing reason (see paras 122-128 above). It would be legitimate to infer from the refusal of voluntary return that there is a risk of absconding. But it is not clear that Collins J or Davis J drew such an inference in this case.

145. Mr Husain submits that it was incumbent on the Court of Appeal to consider the legality of the continuing executive detention by reference to the situation current at the time of the appeal and that they erred in failing to do so. He says that they should have considered what the prospects were of removal within a reasonable period. I accept that, where the facts are the same as they were before the first instance judge and the only difference is the passage of further time, there is no reason why the Court of Appeal should not decide for themselves whether a continuing detention is unlawful. I also accept that, where there is fresh evidence, the Court of Appeal are entitled to apply the *Hardial Singh* principles and consider for themselves on the basis of all the up-to-date material whether a continuing detention is lawful. Indeed, that was the course that the Court of Appeal took in *R (I)*. But there are some circumstances where that course is not appropriate.

146. In the present case, the Court of Appeal took the view that such a course was inappropriate. They said at para 108 that they "should not embark on a first instance decision on matters, such as whether the deportation order should be revoked on account of [Mr Lumba's] mental condition, that Parliament has entrusted to a specialist tribunal". That was an entirely proper reason for the Court of Appeal not making a first instance decision in this case.

147. Mr Husain submits that the Supreme Court should allow Mr Lumba's appeal. I would allow the appeal of both appellants for the generic reasons that I have stated earlier. But I would not decide whether the detention of Mr. Lumba for almost 56 months was in breach of the *Hardial Singh* principles. The reasons which led the Court of Appeal to refuse to make a first instance decision apply

with even greater force in an appeal to the Supreme Court. It is only in the most exceptional case that this court should embark on a task that is normally to be performed by a court of first instance.

148. In view of the passage of further time since the decision of the Court of Appeal as well as the fact that the courts below failed to apply the *Hardial Singh* principles correctly, I would remit Mr Lumba's claim for damages for breach of those principles to the High Court for reconsideration in the light of all the evidence as to the current position.

The case of Mr Mighty

149. As I have already said, Mr Mighty was detained between 19 May 2006 and 28 July 2008. He issued proceedings on 29 May 2008 alleging that his detention was for longer than a reasonable period and *inter alia* that, on a proper application of the *Hardial Singh* principles, he should have been released. His *Hardial Singh* case was rejected by Davis J. There was no appeal on this aspect of the case to the Court of Appeal and the point has not been raised on behalf of Mr Mighty before this court.

Exemplary damages

150. The relevant principles are not in doubt. Exemplary damages may be awarded in three categories of case: see per Lord Devlin in *Rookes v Barnard* [1964] AC 1129. The category which is relevant for present purposes is that there has been "an arbitrary and outrageous use of executive power" (p 1223) and "oppressive, arbitrary or unconstitutional action by servants of the government" (p 1226). In this category of case, the purpose of exemplary damages is to restrain the gross misuse of power: see *AB v South West Water Services Ltd* [1993] QB 507, 529F per Sir Thomas Bingham MR. It must be shown that the "conscious wrongdoing by a defendant is so outrageous, his disregard of the plaintiff's rights so contumelious, that something more [than compensatory damages] is needed to show that the law will not tolerate such behaviour" as a "remedy of last resort": see per Lord Nicholls *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 at para 63.

151. Both Davis J and the Court of Appeal addressed the question of exemplary damages, although in view of their findings on the issue of liability, it was not necessary for them to do so. Davis J said at para 205 of his judgment that:

“I add, briefly, that, even if I had concluded there was unlawful detention in any of these cases justifying an award of damages, I would not in any event have awarded exemplary damages on the footing of unconstitutional, oppressive or arbitrary conduct, in so far as sought. While the Home Office has, to put it mildly, not covered itself in glory in this whole matter of the new policy, I think the failings were in essence one of failing, promptly and directly, to confront and address a perceived legal difficulty: whether through concerns at being bearers of unwelcome news to the Ministers or through an instinct for ducking an apparently intractable problem or through institutional inertia or some other reason, I cannot really say. I am not prepared, however, to conclude on the material before me that there was a conscious decision within the Home Office to operate tacitly an unpublished policy, known to be highly suspect, in the hope it would not be uncovered or, if it was uncovered, against a plan, if the courts intervened, to present that reversal as being due solely to the courts or the Human Rights Act. In my view what happened here, in any of these five cases, cannot fairly, I think, be described as sufficiently outrageous to justify an award of exemplary damages. In any event, I emphasise that individual consideration was given to the cases of each of the claimants.”

152. By the time of the appeal, the Secretary of State had disclosed more material than was before the judge. The Court of Appeal said that, even taking account of the additional material, they agreed with the assessment of the judge. They said:

“122. We give weight to that assessment by the judge at the end of his very careful and comprehensive judgment. It also accords with our own view, even taking account of the additional material which has been disclosed. We consider that there was a failure, which to put it very mildly indeed, was very regrettable, on the part of the department to face up to the basic problem that the published policy had not caught up with the much more restrictive approach implicit in ministerial statements on the subject. However, we find it difficult to describe such conduct as ‘unconstitutional, oppressive or arbitrary’, in circumstances where the Home Secretary had an undoubted power to detain for the purposes in question, and it has been held that on the facts of the case he could lawfully have exercised that power with the same effect; at any rate, if it can be so described, these circumstances mean that the conduct is at the less serious end of unconstitutional, oppressive or arbitrary. We also bear in mind also that the claimants had the right to apply for bail to an independent tribunal, at which it was possible for the continuing

reasonableness of their detention to be challenged. An award of exemplary damages would be an unwarranted windfall for them, and it would have little punitive effect since it will not be borne by those most directly responsible. Rather it would be a drain on public resources which in itself is unlikely to add significantly to the remedial effect of a declaration of unlawfulness.

123. Moreover, it is difficult to see on what basis exemplary damages could be assessed in lead cases such as these. The conduct of the Home Secretary complained of in the present case was common to a large number of detainees who have brought proceedings against him. The selection of lead claimants such as [Mr Lumba] and [Mr Mighty] does not depend on the merits of their individual cases, which have not been assessed other than for the purposes of the grant of permission to apply for judicial review or permission to appeal. Other claimants may have equally or even more meritorious claims to damages, and if appropriate exemplary damages, than the present claimants. There would be no principled basis, therefore, to restrict an award of exemplary damages to the present lead claimants. If an award of exemplary damages is made to the present lead claimants, a similar award would have to be made in every case. Exemplary damages are assessed by reference to the conduct of the tortfeasor. The court would, we think, have to assess an appropriate sum as exemplary damages and divide it between all successful claimants. But we do not know how many successful claimants there will ultimately be. These considerations demonstrate that exemplary damages, in a case such as the present, may be ill suited to be a remedy in judicial review proceedings, and would be in the present cases.”

153. Yet further material has been disclosed by the Secretary of State since the hearing before the Court of Appeal. Mr Westgate submits that it can now be seen that this is indeed one of those exceptional cases where awards of exemplary damages are merited.

154. His submissions are detailed and elaborate. I shall endeavour to concentrate on the essential points. He submits that the conditions for an award of exemplary damages have been established because (i) from April 2006 until September 2008 the Secretary of State operated a hidden blanket policy which did not give effect to the *Hardial Singh* principles; (ii) the Secretary of State actively discouraged disclosure of her true detention policy with the consequence that the integrity of written reasons for detention was compromised; (iii) there was a deliberate decision not to publish the hidden policy; and (iv) the Secretary of State and/or her officials knew that, or were reckless as to whether, their actions were unlawful,

preferring for political reasons to leave it to the courts to remedy the illegality. In addition, Mr Westgate submits that the Secretary of State in this litigation has fallen short of the duties of candour owed to the courts in that (v) the courts have been intentionally or recklessly misled by the Secretary of State's officials; (vi) elementary safeguards necessary to promote compliance with a public authority's duty of candour in judicial review proceedings have not been observed: in particular, the Deputy Chief of Staff of the Chief Executive of the UK Border Agency was selected as the person responsible for overseeing disclosure, when the responsibility for disclosure was that of the Treasury Solicitor; and (vii) there remain significant lacunae in the disclosure.

155. I find it convenient to take (i) to (iv) together. I have already referred at paras 16-39 above to the hidden blanket policy which did not give effect to the *Hardial Singh* principles. There is no doubt that such a policy was operated between April 2006 and November 2007 when a slight relaxation was effected by the introduction of Cullen 1. To a large extent, the policy that was applied until September 2008 was a blanket policy. It certainly remained a hidden policy during the whole period. But that of itself comes nowhere near being sufficient to justify an award of exemplary damages. It is the reasons why the policy was not published that are the matters of real concern. There is undoubtedly evidence to support submissions (ii) to (iv). I shall refer to some of it. A more detailed description of the internal material relating to the period between April 2006 and September 2008 that was disclosed to Davis J appears at para 43 of his judgment.

156. At least from 17 May 2006, senior officers within the Home Office, including lawyers of the Home Office Legal Advisers' Branch ("HOLAB"), expressed concern to, among others, Lin Homer (Chief Executive of the Border and Immigration Agency) ("BIA") that the policy was unlawful on the grounds that it did not satisfy the *Hardial Singh* principles and that it differed from the published policy. Thus, for example, on 20 July 2006, Ms Rogerson (Head of Policy for the BIA) said in an email "we are increasingly vulnerable and we should probably publish revised criteria". She suggested that they should review the criteria and consider being prepared to release FNPs in some cases, with public protection as a priority. She added that Ministers' "preferred position may be to continue to detain all FNPs and let immigration judges take any hit which is to be had by releasing on bail."

157. On 19 January 2007, Joy Munro (Deputy Director, Border Control) wrote to Ms Rogerson asking for written evidence of the lawfulness of detaining FNPs whom they were unable to remove. She referred to there being "unrest in the CCD about the power in law to detain some of those held if they are not removable". Ms Rogerson replied: "We shouldn't be dealing with this—or any such policy discussions—on email in this way. I believe a meeting would be the most profitable way forward".

158. On 13 March 2007, Stephen Braviner-Roman of HOLAB wrote to Ken Sutton (Deputy Director of the Immigration and Nationality Directorate) saying: “if the courts were to find we had not been following our policy in these cases we would face criticism, but also claims for compensation.” He also referred to the fact that Simon Harker (from the Treasury Solicitor’s Department) had pointed out that they “have a duty of candour to the court and cannot mislead.”

159. First-hand evidence of the attitude of the Secretary of State herself is to be found in an email dated 16 July 2007 sent to Lin Homer in response to a draft bail proposal: “Is this an issue primarily about legal vulnerability rather than capacity? If so, what is the reason for worrying about this now? Have we been threatened with legal action?”

160. This prompted a series of internal emails, some of which referred to the test case of *R (A) (Somalia) v Secretary of State for the Home Department* [2007] EWCA Civ 804. In an email dated 17 July 2007, Mr Braviner-Roman referred to the impending hearing and said that there was “an on-going legal vulnerability”. If it materialised, “we would face a liability in damages as well as severe criticism if it was said that we have maintained a policy of detaining people which was unlawful (as opposed to having a lawful policy but just getting it wrong on the facts from time to time, which is inevitable)”. But the unpublished policy was not disclosed in that litigation.

161. The response to the Secretary of State’s question was given in an email dated 19 July 2007 which stated that the issue was one of legal vulnerability. To this the Private Secretary of the Secretary of State replied that there did not seem to be “a strong enough or immediate enough reason to be releasing or not detaining people at this point”.

162. A further insight into the thinking of the senior officers can be derived from the draft policy submission that had been circulated in May 2007. It referred to the legal advice that the Secretary of State was open to legal challenge for the reasons to which I have earlier referred. It also said: “if we were to lose a test case, we could present any change in FNP detention practice as having been forced on us by the courts”. I agree with what Davis J said about this document at para 43.12 of his judgment:

“That may or may not be good politics: but it is deplorable practice, especially when it is seen that almost from day one the new unpublished policy was perceived in virtually all quarters within the department to be at least legally ‘vulnerable’ and in some quarters positively to be untenable and legally invalid. The tone of this draft

is further confirmed by the subsequent comments that the longer the delay the more likely it would be that a court judgment ‘would force us to pay out significant sums in compensation to FNPs whose detention was held to be unlawful’ as well as exposing the department to criticism in the media and to reputational damage.”

163. Mr Westgate is able to point to clear evidence that caseworkers were directed to conceal the true reason for detention, namely the unpublished policy, and to give other reasons which appeared to conform with the published policy. This material was disclosed seven days before the start of the hearing before the Court of Appeal. It comprises an exchange of emails in relation to a Liverpool case. On 21 March 2007, Philip Muirhead of the Criminal Casework Directorate (“CCD”) in Liverpool said of the FNP under consideration that there was no valid reason to detain him. Nichola Samuel, a lawyer of HOLAB, said that if detention was appropriate in that case, this suggested that they were applying a different policy, ie that all FNPs should be detained pending deportation. Gareth Lloyd (Assistant Director of the CCD) responded that he had an email from Mandie Campbell (Director of CCD) “telling me that we must detain all FNPs until removal”. In an email dated 22 March 2007, Mr Lloyd said that this was not only a Liverpool issue and in an email sent on the following day, he said: “We just detain as instructed and choose the most defensible option in our opinion.”

164. From the above, it seems to me to be clear that there was a deliberate decision not to publish the hidden policy. The material that has now been disclosed suggests that the assessment made by Davis J at para 205 may have been somewhat generous to the Secretary of State and her senior officials. It is true that they did not know and could not have known that the policy that was being applied was bound to be struck down as unlawful, but they certainly knew that it was “vulnerable to legal challenge” and that it did not accord with the published policy.

165. Nevertheless, the question remains whether, regrettable though the behaviour of the Secretary of State and her senior officials may have been, it was sufficiently outrageous and sufficiently “unconstitutional, oppressive or arbitrary” to merit awards of exemplary damages. I approach this question without regard to the allegations of lack of candour in the litigation. This is because the role of exemplary damages is to punish the commission of the underlying tort and not the subsequent conduct of the litigation. Any disapproval of the conduct of the litigation can be marked by an appropriate order for costs or by an increased award of (compensatory) aggravated damages: *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 517D per Lord Woolf MR.

166. Whether the high threshold for the award of exemplary damages has been crossed in any particular case is ultimately a matter of judgment. Opinions can reasonably differ on whether a defendant’s conduct has been so outrageous and so

unconstitutional, oppressive or arbitrary as to justify the imposition of the penalty of exemplary damages. An appellate court should not interfere with the judgment of the court below unless that judgment is plainly wrong. On the material that was before him, Davis J was entitled to reach the conclusion that he reached. In my view, the Court of Appeal were also entitled to reach the conclusion that they reached on the more extensive material that was before them. Both the judge and the Court of Appeal applied the correct test. In particular, the Court of Appeal were right to place some weight on the fact that the Secretary of State had the statutory power to detain the appellants pending deportation and that, although she in fact exercised that power unlawfully, she could have done so lawfully. They were also right to say that, if her conduct is properly to be described as “unconstitutional, oppressive or arbitrary”, it was at the less serious end of the scale. It is material that there is no suggestion that officials acted for ulterior motives or out of malice towards the appellants. Nevertheless, there was a deliberate decision taken at the highest level to conceal the policy that was being applied and to apply a policy which, to put it at its lowest, the Secretary of State and her senior officials knew was vulnerable to legal challenge. For political reasons, it was convenient to take a risk as to the lawfulness of the policy that was being applied and blame the courts if the policy was declared to be unlawful.

167. The Court of Appeal identified at para 123 of their judgment a further point which militated against awards of exemplary damages to the appellants. Where there is more than one victim of a tortfeasor’s conduct, one award of damages should be made which should be shared between the victims, rather than separate awards of exemplary damages for each individual: see *Riches v News Group Newspapers Ltd* [1986] QB 256. This is because the purpose of the award is to punish conduct rather than compensate the claimants. In *Riches*, the victims of the tort were a small class who were all before the court. But where (as in the present case) there is potentially a large number of claimants and they are not all before the court, it is not appropriate to make an award of exemplary damages: see *AB v South West Water Services Ltd* [1993] QB 507, 527B-D per Stuart-Smith LJ and p 531D-E per Sir Thomas Bingham MR. Unless all the claims are quantified by the court at the same time, how is the court to fix and apportion that punitive element of the damages? If the assessments are made separately at different times for different claimants, how is the court to know that the overall punishment is appropriate? The Court of Appeal were right to regard this a further reason why it was not appropriate to award exemplary damages in the present case.

168. There is yet one further point. It is unsatisfactory and unfair to award exemplary damages where the basis for the claim is a number of serious allegations against named officials and Government Ministers of arbitrary and outrageous use of executive power and those persons have not been heard and their answers to the allegations have not been tested in evidence. In a private law action, they would almost certainly have been called to give evidence. But oral evidence is

rarely adduced in judicial review proceedings and, understandably, it was not adduced in the present case.

Overall conclusion

169. I would, therefore, allow these appeals. For the reasons that I have given, the Secretary of State is liable to both appellants in the tort of false imprisonment on the narrow ground that she unlawfully exercised the statutory power to detain them pending deportation because she applied an unpublished policy which was inconsistent with her published policy. The appellants are, however, only entitled to nominal damages because, if the Secretary of State had acted lawfully and applied her published policy, it is inevitable that both appellants would have been detained. As regards the discrete question whether the detention of Mr Lumba was in any event unlawful on the grounds of a breach of the *Hardial Singh* principles, I would remit this to a High Court judge. Finally, neither appellant is entitled to exemplary damages.

LORD HOPE

170. In agreement with Lord Walker, Lady Hale, Lord Collins, Lord Kerr and Lord Dyson I would hold that the Secretary of State is liable to the appellants in the tort of false imprisonment because she applied to them an unpublished policy which was inconsistent with her published policy, and I too would remit to a High Court judge the question whether Mr Lumba's detention was unlawful as being in breach of the *Hardial Singh* principles. As I am anxious to avoid adding to the length of the court's judgment, I shall simply say that I am in full agreement with all the reasons that Lord Dyson has given on these issues except that I do not have the same difficulty as he has with the use of the phrase "abuse of power" by Lord Walker (see para 69, above). There are only three points on which I wish to comment.

171. First, as Lord Phillips has noted (see para 258, below), it was common ground in these appeals that Lord Dyson correctly summarised the effect of Woolf J's judgment in *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704. Nevertheless he has indicated that he does not consider that the first and second principles that Lord Dyson has extracted from it can properly be derived from what Woolf J said in that judgment. For my part, I think that Lord Dyson's summary, which he has taken from his judgment in *R (I) v Secretary of State for the Home Department* [2003] INLR 196, para 46, is accurate and I would endorse it.

172. We can, of course, read what Woolf J said for ourselves, and there are no doubt various ways of expressing what Lord Dyson has taken from it. The essential point, as Lady Hale has explained (see para 199, below), is that the detention must be for the statutory purposes of making or implementing a deportation order and for no other purpose. Lord Phillips says that he can see no justification for reading the terms of the statute in this way, that it places an unjustified restriction on the Secretary of State's power of detention and that he does not believe that Woolf J intended to say what Lord Dyson has attributed to him. He would read *Hardial Singh* as concerned only with the length of time that was reasonably necessary to effect deportation and not the purpose of the detention. I am unable, with respect, to agree with this interpretation of Woolf J's judgment.

173. There are two points that need to be considered. The first is, what do the words that Woolf J used actually mean? The second is whether, if they have the meaning that Lord Dyson has attributed to them, this limitation on the statutory power can properly be read into the statute. As to the first point, in the second sentence of the relevant paragraph (see para 262 of Lord Phillips's judgment) Woolf J makes it plain that in his view the statutory power can only authorise detention if the individual is being detained pending the making of a deportation order or pending his removal "and for no other purpose". I think that his judgment could not be clearer on this issue, and that Lord Dyson has captured the essential points that Woolf J made accurately in his summary.

174. As for the second, it must be recognised that until now Woolf J's statement of the limitations to the statutory power has never been questioned. I think that there are good reasons for this. To confine the limitation to the period of the detention only and release the Secretary of State from the limitation as to purpose which Woolf J identified would greatly reduce the protection which, as I read it, his judgment was designed to give to the detainee. For obvious reasons that, if it were to happen, would be regrettable. It would, as Lord Phillips indicates in para 269, enable the Secretary of State to exercise the power to detain simply because he believed that the detainee would, if released, pose a threat to national security. I do not think that article 5(1)(f) of the European Convention on Human Rights permits this interpretation of the statutory power. If Parliament had intended that the power to detain could be used for a purpose other than the making or effecting of a deportation order, it would have had to have said this expressly and it has not done so. It is hard also to see how the limitation as to time which Lord Phillips accepts can be read into the statute can be tested without having regard to the purpose for which the detainee is being held. The limitation as to time and the limitation as to purpose are really two sides of the same coin. They cannot be separated from each other. I think that Woolf J was right to recognise this and that there are sound reasons for all that he said about the limitations that must be understood to qualify the statutory power.

175. Second, I cannot accept Lord Phillips's conclusion that the application of the secret policy did not render the detention of the appellants unlawful. The basis for that view is that, if the published policy had been applied they would have been detained anyway and that, had they challenged their continued detention, they would have had no legitimate expectation of obtaining an order for their release. This is the causation argument which, for the reasons Lord Dyson gives in paras 62-68 with which I agree, he rejects. The key point, as I see it, are that we are dealing in this case with the tort of false imprisonment. Torts of this kind are actionable per se regardless of whether the individual suffers any harm. While not every breach of public law will give rise to a cause of action on this ground, the history of this case shows that there was here a serious abuse of power which was relevant to the circumstances of the appellants' detention. If the rule of law is to be sustained, the detention must be held to have been unlawful. The appellants were being detained without regard to the purpose for which the Secretary of State was authorised to exercise the power by the statute. The court must insist that powers of detention are exercised according to law. If they are not, those who have abused their powers must accept the consequences. It is no answer for them to say that they could, had they put their mind to it, have achieved the same result lawfully by other means.

176. Third, I agree that this is not a case for exemplary damages. But, for the reasons given by Lord Walker and Lady Hale, I would hold that the breach of the appellants' fundamental rights that has occurred in these cases should not be marked by an award only of nominal damages. An award on ordinary compensatory principles is, of course, out of the question. It is plain that the appellants would not have had any prospect of being released from detention if the Secretary of State had acted lawfully. So they cannot point to any quantifiable loss or damage which requires to be compensated. But the conduct of the officials in this case amounted, as Lord Walker says (see para 194, below), to a serious abuse of power and it was deplorable. It is not enough merely to declare that this was so. Something more is required, and I think that this is best done by making an award of damages that is not merely nominal.

177. The principles on which damages for breaches of fundamental rights are to be assessed in situations such as this are not greatly developed, as Elias CJ pointed out in the Supreme Court of New Zealand in *Taunoa and others v Attorney General and another* [2007] 5 LRC 680, para 108. But some guidance is available from judgments which the Judicial Committee of the Privy Council has given where a constitutional right has been infringed. In *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 Lord Nicholls of Birkenhead added his own words to those of the Board in *Harriskissoon v Attorney General of Trinidad and Tobago* [1980] AC 265 as to how an award of damages should be assessed in such a case. In para 18 he observed that when exercising its constitutional jurisdiction the court is concerned to uphold, or to vindicate, the constitutional

right. In para 19 he said that an award, not necessarily of substantial size, might be needed to reflect the sense of public outrage, emphasise the gravity of the breach and deter further breaches. The law on this matter is still in the process of being worked out, so I should like to say just a little more about it.

178. Although such an award is likely in financial terms to cover much the same ground as an award by way of punishment in the sense of retribution, punishment in that sense is not its object. The expressions “punitive damages” or “exemplary damages” are therefore best avoided. Allowance must be made for the importance of the right and the gravity of the breach in the assessment of any award. Its purpose is to recognise the importance of the right to the individual, not to punish the executive. It involves an assertion that the right is a valuable one as to whose enforcement the complainant has an interest. Any award of damages is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard.

179. As for the amount to be awarded, an award is referred to as a conventional award when it is incapable of being calculated arithmetically as there is no pecuniary guideline which can point the way to a correct assessment: *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, 189G-H, per Lord Scarman. In most cases the sum to be awarded can be derived from experience and from awards in similar cases: *Ward v James* [1966] 1 QB 273, 303, per Lord Denning MR. But that cannot be said of this case. So I would turn for guidance to what Lord Bingham of Cornhill said in *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309, para 8. The conventional award that he had in mind in that case to mark the injury and loss due to the unwanted child was not, and was not intended, to be compensatory. It was not the product of calculation, nor was it derived from awards in other similar cases. But it was not a nominal, let alone a derisory, award. Its purpose was to afford some measure of recognition of the wrong done.

180. In agreement with Lord Steyn, I regarded the idea of a conventional award under the tort system in that case as contrary to principle: *Rees v Darlington Memorial Hospital NHS Trust* paras 46, 70-77. But I do not think that it is open to the same objection in the present context. In this case the factors referred to by Lord Nicholls in *Ramanoop* must be the primary consideration. There must be some recognition of the gravity of the breach of the fundamental right which resulted in false imprisonment, and account should be taken of the deterrent effect of an award lest there be the possibility of further breaches. But account should also be taken of the underlying facts and circumstances which indicate that it should not be more than a modest one. It should do no more than afford some recognition of the wrong done, without being nominal or derisory. Lord Walker has suggested that an award of £1,000 to each appellant would be appropriate. We have no yardstick by which that sum can be measured to test its accuracy. Given

the purpose of the award, I see no reason to disagree with his assessment although I, for my part, would have arrived at a substantially lower figure.

LORD WALKER

181. The issue on which Lord Brown differs from Lord Dyson is one of high importance and great difficulty. Its high importance is obvious. Lord Dyson cites Lord Bridge in *R v Deputy Governor of Parkhurst Prison Ex p Hague* [1992] 1AC 58, 162, “The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it”. It is a species of trespass to the person and as such a tort actionable without the need for proof of special damage. The notion that no more than nominal damages should ever be awarded for false imprisonment by the executive arm of government sits uncomfortably with the pride that English law has taken for centuries in protecting the liberty of the subject against arbitrary executive action. It would in Lord Brown’s view seriously devalue the whole concept of false imprisonment. The difference of opinion between two Justices with so much expert knowledge in the field of public law, on a point of such high importance, demonstrates its difficulty. I hardly need say that it is with diffidence that I make any contribution to the debate.

182. Lord Brown’s approach to the solution to the problem is to distinguish between cases where there is no lawful authority to detain a person (including cases where a precondition to lawful detention has not been satisfied) and cases where there is a power to detain, but in the exercise of that power the decision-maker has been in breach of some public law duty. In cases (or at any rate some cases) of the flawed exercise of a power to detain there is (so the argument goes) no false imprisonment at all, and so the question of awarding damages, whether nominal or otherwise, simply does not arise.

183. This solution has considerable attractions. The proposed distinction is based on the difference between the *existence* (or rather non-existence) of a lawful authority to detain, and a defective *exercise* of an authority which does exist: see the observations of Lord Brown in *R (Khadir) v Secretary of State for the Home Department* [2006] 1AC 207, para 33. The difficulty that I feel is whether the distinction, though clear enough in theory, can cope with the variety and complexity of the problems that arise in practice, as illustrated by the numerous decided cases cited to the court. I also have difficulty (or perhaps this is another way of putting the same point) in reconciling the basic existence/exercise distinction with the four categories which Lord Brown extracts from his analysis of successful claims for false imprisonment by executive action. His four categories are (1) no power to detain; (2) failure to satisfy a precondition to exercising the

power to detain; (3) detention beyond the scope of the power to detain; and (4) power to detain limited by published official policy.

184. The distinction is clear enough in extreme cases. *R v Governor of Brockhill Prison Ex p Evans (No 2)* [2001] 2AC 19 was a case (in Lord Brown's category (1)) in which there was simply no lawful authority for the claimant's detention after the date of expiration of her term of imprisonment, when properly adjusted for time spent on remand (the complicated statutory provisions as to allowances for multiple periods spent on remand had been misinterpreted). At or near the other extreme was the breach of a public law duty to see that an asylum-seeker detained at a detention centre received a medical examination within 24 hours. The omission to provide a medical examination was an administrative failing but it did not render the detention unlawful: *R (HK (Turkey)) v Secretary of State for the Home Department* [2007] EWCA Civ 1357.

185. Lord Brown supplements his category (1) by category (2) so as to let in a range of cases in which there is *for the time being* no lawful authority to detain because some precondition has not been satisfied. A well-known example of this is *Christie v Leachinsky* [1947] AC 573, where a man arrested without a warrant was not correctly informed of the offence which gave rise to the power of arrest without a warrant. Moreover categories (1) and (2) must be expanded to cover cases in which detention, although initially lawful, has become unlawful because of a failure to carry out some procedure or satisfy some condition of precedent fact required by statute. A procedural example is *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1WLR 662, where the provisions of the Police and Criminal Evidence Act 1984 required detention in police custody to be reviewed every six hours. The claimant had been detained at 11.25pm and the police officers' failure to review his detention by 5.25 am on the next day made his detention unlawful until it was reviewed (and his detention continued) at 7.45 am, and the Court of Appeal refused to overturn or reduce the award of £500 damages, even though it accepted that his detention would have continued if a review had been carried out at the right time. By contrast in *R (Saadi) v Secretary of State for the Home Department* [2002] 1WLR 3131 the statement of incorrect and inappropriate reasons on an official form handed to detained asylum seekers was not treated as a failure to satisfy a condition precedent affecting the legality of their continued detention.

186. The distinction between these two cases is that the relevant statutes were interpreted in one case as imposing a condition which had to be satisfied if continued detention was to be lawful, and as not imposing such a condition in the other case. It is, as Laws LJ emphasised in *R (SK (Zimbabwe)) v Secretary of State for the Home Department* [2009] 1WLR 1527, paras 21 and 25, an issue of statutory construction. In that case the Court of Appeal held that compliance with rule 9 of the Detention Centre Rules 2001 (calling for a monthly review of

detention with written reasons given to the detained person) was not a precondition to the continuation of lawful detention. (See Laws LJ at paras 31-35 and Keene LJ agreeing, with some hesitation, at para 47.)

187. Lord Brown's category (3) is detention beyond the "scope" of the relevant power. Laws LJ in *SK (Zimbabwe)*, para 21, referred to the "reach" of the power. These expressions, as I understand them, approximate to the object or purpose for which Parliament has conferred the power. The importance of the statutory purpose has been recognised since *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 and (as Lord Dyson notes in para 30 of his judgment) the *Hardial Singh* principles (see *R v Governor of Durham Prison Ex p Hardial Singh* [1984] 1 WLR 704) reflect the application of the wide general principle of not deviating from the statutory purpose to the particular field of the detention of foreign nationals pending deportation. Woolf J made this clear in *Hardial Singh* itself at p 706.

188. The wide general principle of not deviating from the statutory purpose is of such fundamental importance in public law that it can be seen as going to the existence of the power, rather than merely to its exercise. In law the power exists only for the purposes for which Parliament has conferred it on the executive. In *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, 113, the Privy Council put it very simply: "If removal is not pending . . . the director has no power at all." So I would see Lord Brown's category (3) as fitting reasonably comfortably into his basic existence/exercise classification.

189. Determining the purpose for which Parliament has conferred a power is also a process of statutory construction. That process should not, in my opinion, be minutely elaborated. I entirely accept the exposition of the *Hardial Singh* principles by Dyson LJ (as he then was) in *R (I) v Secretary of State for the Home Department* [2003] INLR 196, para 46. It goes no further than spelling out clearly what is necessarily implicit in the purpose of detention with a view to deportation, and it has been widely cited and followed. I have more of a problem in seeing *Langley v Liverpool City Council* [2006] 1 WLR 375 as a case where the police departed from the statutory purpose in exercising their power of removal under section 46 of the Children Act 1989 when an emergency protection order under section 44 of that Act had already been made. The purpose of both statutory powers (one conferred on the police, the other on the court) was child protection in an emergency situation. I regard *Langley* as a finely-balanced decision in which the Court of Appeal held that well-intentioned police action, directed to child protection and taken under pressure of circumstances, was nevertheless an unlawful manner of exercising the section 46 power. Thorpe LJ (at para 79) reached that conclusion with some reluctance.

190. It is with Lord Brown's category (4), however, that I have the greatest difficulty. Here the issues are concerned with official policies – how rigid or flexible they may be, whether and in how much detail they should be published, whether (in these appeals) a policy with a presumption towards detention is permissible. Official decision-makers need policies for obvious reasons. Although decisions in the field of immigration law are all taken in the name of the Secretary of State, only a tiny handful of cases are actually decided by the Secretary of State personally. Decisions are taken by a small army of officials at different levels, and they need guidance in order to achieve consistency in decision-making. Members of the public, or those of the public liable to be affected, should know where they stand, and so they are entitled to know, at least in general terms, the content of the official policies. This is not a matter of being faithful to the purposes of statutory powers, but of seeing that they are exercised consistently and fairly. There is a helpful discussion of these points in the judgment of the Court of Appeal in these appeals, prepared by Stanley Burnton LJ, at paras 53-58.

191. It is here that Lord Diplock's dictum in *Holgate-Mohammed v Duke* [1984] AC 437 calls for consideration. In a passage (at p.444) quoted by both Lord Brown and Lord Dyson, Lord Diplock expressed the view that *Wednesbury* principles are applicable to determining the lawfulness of the exercise of a statutory power of arrest not only in proceedings for judicial review but also in an action for damages for false imprisonment. As Lord Dyson says, there seems to have been little argument on this point in the House of Lords. Nor has there been much discussion of it in later authorities. It was cited and followed by the Court of Appeal in *D v Home Office (Bail for Immigration Detainees intervening)* [2006] 1 WLR 1003 (see especially Brooke LJ at para 111). In *SK (Zimbabwe)*, *Holgate-Mohammed* was cited by counsel but not referred to in the judgments in the Court of Appeal. *Holgate-Mohammed* and *D v Home Office (Bail for Immigration Detainees intervening)* were both discussed at some length in the Court of Appeal in these appeals (paras 50-52, and, in relation to causation, paras 82-84). The Court of Appeal rightly regarded itself as bound by the latter decision.

192. This court is not bound to follow the Court of Appeal's acceptance of Lord Diplock's dictum, and for my part I would refrain from giving it unequivocal approval. Mr Beloff QC (appearing for the Secretary of State in this court) put forward some persuasive submissions in favour of an alternative approach. They are noted in paras 76 and 86 of Lord Dyson's judgment. The first two submissions would make a qualification or exception, for the purposes of a private law claim for damages for false imprisonment, to the *Anisminic* equation of any significant public law error with lack of jurisdiction (see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147). Lord Dyson, in para 87, dismisses these in a single sentence as putting the clock back to pre-*Anisminic* days.

193. With great respect, I think there may be more to be said about it. *Anisminic* was one of the seminal cases in the development of modern public law. But its full implications are still open to debate. The context in which it equated wrongful exercise of jurisdiction with excess of jurisdiction (the court's response to an ouster clause in the Foreign Compensation Act 1950) was far removed from a private law claim for damages for false imprisonment. It is a big step to extend the principle to a claim for damages for false imprisonment, where a defendant may have his professional reputation at stake and may not enjoy the procedural protections which attend judicial review (strict time limits, and the discretionary nature of the remedy granted). I would prefer a more demanding test, that in a case where an extant statutory power to detain has been wrongly used there would be a private law claim only if the misuse amounted to an abuse of power (including but not limited to cases of misfeasance or other conscious misuse of power).

194. However, it is in my opinion unnecessary to decide the point in these appeals because the conduct of officials, including some senior officials, of the Home Office between April 2006 and September 2008 amounted to a serious abuse of power. Lord Dyson has in paras 154-165 of his judgment described in restrained language how senior officials were well aware of the risk (indeed the likelihood) of challenge and decided to run the risk, (including the proposal to "let immigration judges take any hit"), and how further damaging facts were disclosed by stages, some before Davis J, some before the Court of Appeal, and some only in this Court. Wherever the line is to be drawn (if, as I think, a line does need to be drawn between public law errors in detention policies which do or do not give rise to an action for false imprisonment) these appeals must in my view fall on the wrong side of the line from the Secretary of State's point of view.

195. I agree with Lord Dyson (paras 165-168) that despite the deplorable official conduct this is not a case for exemplary damages. But in my view it is not a case for nominal damages either. Apart from cases concerned with constitutional rights in the Caribbean, (the line of authority starts with *Attorney-General of St Christophers, Nevis and Anguilla v Reynolds* [1980] AC 637), the common law has always recognised that an award of more than nominal damages should be made to vindicate an assault on an individual's person or reputation, even if the claimant can prove no special damage. (See Mayne & McGregor on Damages, 18th ed. (2009) paras 42-008 to -009). In these appeals, each claimant had a very bad criminal record and would undoubtedly have been kept in custody under the Secretary of State's published policies. They cannot therefore establish a claim to special damages. But the argument on causation does not completely defeat their claims. I would award each claimant the sum of £1,000 damages. I would remit the case of Mr Lumba as Lord Dyson proposes. On every point on which I have not expressed disagreement or doubt I am in respectful agreement with the judgment of Lord Dyson.

LADY HALE

196. I agree entirely with Lord Brown that far and away the most important issue in this case, as it is in the case of *SK (Zimbabwe)* [2009] 1 WLR 1527, is whether the breach of a public law duty on the part of the person authorising detention is capable of rendering that detention unlawful. If it is, the second question is which breaches of public law duties have that consequence; and the third question is whether it makes any difference that the person authorising the detention both could and would have done so lawfully, without breaching the public law duty in question, had the point been drawn to his attention. If that does not make a difference to liability, a fourth question is whether the fact that the person detained both could and would have been lawfully detained is of any relevance to the assessment of his damages for false imprisonment.

197. But I differ from Lord Brown in his view that the answer to the last of these questions should govern the answer to the first, second or third question: in other words, that if we take the view that no compensatory damages are payable in a case such as this it should follow that there is no liability in the first place. Forcefully and attractively though that argument is made, it does put the cart before the horse. It also fails to acknowledge that false imprisonment is a trespass to the person, actionable *per se* without proof that the claimant has suffered any harm for which the law would normally grant compensation.

198. As to the first question, this is a stronger case than is still before the Court in *SK (Zimbabwe)* because the illegality alleged (and now admitted) went to the criteria for detention rather than to the procedure for authorising it. The statutory power to detain under paragraph 2(2) and (3) of schedule 3 to the Immigration Act 1971 (quoted by Lord Dyson at paragraph 4 of his judgment) is, on its face, very broad. Provided that the detainee has been notified of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained pending the actual making of the order (para 2(2)). Once the deportation order is made, he may be detained pending his removal or departure from the United Kingdom (para 2(3)). However, since at least the case of *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704, it has been recognised that there are limitations implicit in these powers: the detention must be for the statutory purpose of making or implementing a deportation order and for no other purpose; hence it cannot be continued once it becomes clear that it will not be possible to effect deportation within a reasonable period; the Secretary of State must act with reasonable diligence and expedition to bring this about; and in any event the detention cannot continue for longer than a period which is reasonable in all the circumstances.

199. These limitations were devised long before the Human Rights Act and have been accepted without question ever since. They stem from the long-established principle of United Kingdom public law that statutory powers must be used for the purpose for which they were conferred and not for some other purpose: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. They were not inspired by article 5(1)(f) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and it does not follow that, because detention would be permissible under article 5(1)(f), it is also permissible under United Kingdom law.

200. The last restriction referred to above has not hitherto been questioned but it is the most questionable, for the Secretary of State may genuinely be doing all that she can to effect deportation, and deportation may still be a realistic possibility, but even so the deportee may have been detained for so long that it is no longer lawful to keep him there. That this has never until now been questioned indicates how strong are the objections to indefinite detention by order of the executive. But it undoubtedly gives rise to some difficult questions, as is amply shown by Lord Dyson's discussion, in paragraphs 102 to 128 of his judgment, of the matters to be taken into account in deciding whether or not the period of detention is reasonable.

201. In addition to such substantive limitations, the law has also imposed procedural requirements upon apparently open-ended statutory powers. In common with Lord Dyson, I do not think that it matters whether these are characterised as implied conditions precedent or implied procedural requirements. The effect is the same. The best known example is *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 143 ER 414. The Board had power to alter or demolish a house if the builder had not given 7 days' notice of his intention to build. The Court held that the common law imposed upon the Board a requirement to notify the builder before they decided to demolish the house, so that he could present arguments why they should not. As the Board had not given the builder such an opportunity before demolishing the house, they were liable to him in damages for trespass. It is true that Byles J founded his opinion partly on the basis that the Board had *also* failed in their express statutory duty to notify the builder of their demolition order: but the majority based their opinions on the broader principle that he had a right to be heard *before* the order was made: in other words, there were public law duties inherent in the apparently open-ended statutory power. Another example of the same principle is *Christie v Leachinsky* [1947] AC 573 where the common law implied a duty, when exercising a power of arrest, to tell the arrested person the power under which he was being arrested, so that he might know whether or not he could resist arrest. Once again, the police were liable in false imprisonment.

202. The question is whether the same principles apply where the requirement in question is the duty, imposed by the common law, for the Secretary of State and

his officials to comply with a published policy, unless there is good reason not to do so. As I understand it, Lord Brown accepts that they may indeed do so, for he agrees that if the published policy further narrows and defines the circumstances in which the power will be exercisable, the Secretary of State may not lawfully depart from that. It is on that basis that he considers *R (Nadarajah) v Secretary of State for the Home Department* [2004] INLR 139 to have been correctly decided.

203. Support for the proposition that the ordinary requirement to observe public law duties may restrict the lawful exercise of a statutory (or common law) power which would otherwise authorise a trespass can be found in the dictum of Lord Diplock in *Holgate-Mohammed v Duke* [1984] 1 AC 437, 443, quoted by Lord Dyson at para 73 of his judgment. On the face of it, this was a lawful arrest. The argument was that the police officer had arrested the claimant for the wrong reason: to get her to confess. There can be little doubt that, had the House of Lords concluded that this was indeed an impermissible consideration, they would have held that the arrest was unlawful and that the claimant was entitled to the damages she sought. This was, after all, an action for damages for false imprisonment in which the claimant had succeeded in the county court. If the House had thought that she would not have been entitled to damages in any event, it would surely have said so.

204. I agree with Lord Walker that it is not necessary to hold that every single departure from policy, or even failure in the decision-making process, attracts these consequences in order to hold that they apply in this case. The discrepancy between what the policy said should happen in these cases and what was actually happening is stark. The claimants were being dealt with, not under the published, lawful policy, but under an unpublished, unlawful policy or practice. Yet it is difficult not to have some sympathy for the officials involved. The Government had been hit by a perfect storm in April 2006 when the popular press discovered that foreign national prisoners were being released after serving their sentences without any consideration being given to whether or not they should be deported. It had cost the then Home Secretary his job. The immediate answer was not to let any of them go. This was at odds with the published policy, which presumed against the use of detention powers. Officials knew this and they also knew that the policy needed amendment. But they found it very difficult to devise a policy for publication which would be both lawful and acceptable to ministers. Ministers wanted a near blanket ban on release, whereas the law requires some flexibility to respond to the circumstances of the particular case. So the situation dragged on for many, many months.

205. These are just the sort of circumstances, where both Ministers and their civil servants are under pressure to do what they may know to be wrong, in which the courts must be vigilant to ensure that their decisions are taken in accordance with the law. To borrow from the civil servants' correspondence, the courts must

be prepared to take the hit even if they are not. The law requires that decisions to detain should be made on rational grounds and in an open and transparent way and not in accordance with arbitrary rules laid down by Government and operated in secret. One of the most disturbing features of this sorry tale is that the case-handling officials had to give reasons for their decisions which were not what their real reasons were.

206. The European Convention on Human Rights and the Strasbourg Court have not imposed the same requirements of proportionality upon detention with a view to deportation under article 5(1)(f) as they have upon detention under other provisions in article 5(1). But any deprivation of liberty has to be ‘in accordance with a procedure prescribed by law’. Unless the ‘law’ has certain essential characteristics, there is a risk that detentions may be arbitrary. That is why the open-ended common law power to detain people who lack the capacity to make decisions for themselves on grounds of necessity was found incompatible with article 5(1)(e): see *L v United Kingdom* (2005) 40 EHRR 32. There is every reason to think that Strasbourg would find a secret policy which presumed in favour of the detention of every foreign national prisoner open to the same objections. The common law is just as respectful of the liberty of the person, and just as distrustful of arbitrary and secret decision-making by officials acting on behalf of Government, as is the Convention.

207. I would therefore answer ‘yes’ to the first question. I would also answer the second question in the way proposed by Lord Dyson. In other words, the breach of public law duty must be material to the decision to detain and not to some other aspect of the detention and it must be capable of affecting the result – which is not the same as saying that the result would have been different had there been no breach.

208. The third question is whether it makes any difference that, in these particular cases, if the officials had been operating the published policy they both could and would have authorised the detention of these appellants. This would not normally make any difference. In *Christie v Leachinsky*, the officers could have made a lawful arrest and only chose to make an unlawful arrest ‘for convenience’, but they were still liable for false imprisonment. In *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662, the custody officer could have reviewed the case when he should have done and would no doubt have authorised the continued detention then, but there was still liability in false imprisonment. For all the reasons given by Lord Dyson, there is no basis for drawing a distinction according to the reason why the detention is unlawful, permitting what has been referred to as a ‘causation defence’ in some cases but not in others.

209. The most difficult question is whether this should make any difference to the measure of damages awarded. I quite agree with Lord Brown that the importance of strict adherence to the law when depriving people of their liberty should not be devalued. Awarding the same measure of damages, irrespective of whether or not the person could and would have been lawfully detained, serves to reinforce the importance of this principle. Also, if no distinction, according to the reason why the detention is unlawful, is to be drawn in relation to the second question, there should be no such distinction in relation to damages. If we are to hold that a person who could and inevitably would have been detained lawfully had the correct criteria or procedures been applied is not to be compensated for the loss of liberty, then this must apply irrespective of the reason why depriving him of his liberty was unlawful. We cannot single out these public law cases for special treatment.

210. In most cases of false imprisonment, the problem will not arise, because the detainer does not have a choice between acting lawfully and acting unlawfully. The prison governor in *R v Governor of Brockhill Prison, Ex p Evans (No 2)* [2001] 2 AC 19 had no power to detain the prisoner beyond the properly calculated term of her imprisonment: the fact that he was acting in compliance with the law as it had previously been thought to be was neither here nor there. The police officer in *Langley v Liverpool City Council* [2006] 1 WLR 375 had, as the Court of Appeal found in what I agree with Lord Walker was a finely-balanced decision, no power to use his power to take a child into police protection under section 46 of the Children Act 1989 when the child could and should have been protected by social workers' implementing an emergency protection order under section 44. The immigration officers in *Kuchenmeister v Home Office* [1958] 1 QB 496 had no power to detain the claimant in such a way as to prevent his transiting from one aircraft to another at London airport.

211. However, where the defendant has failed to comply with a procedural requirement, there is always the possibility that the deed might have been done lawfully. But the whole point of procedural requirements, such as those in *Cooper v Wandsworth Board of Works* or *Christie v Leachinsky*, is that the person whose rights are being infringed should have an opportunity of challenging this. So it will rarely be possible to be confident that, had the correct procedure been followed, the outcome would have been the same. *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662 is an example where it was possible. This case is another, because it would appear that, had the decision-makers applied the published, lawful policy rather than the unpublished, unlawful policy, they would inevitably have reached the same conclusion.

212. Insofar as damages for false imprisonment are meant to compensate for the loss of liberty, it is difficult to see why a claimant should be compensated for the loss of something which he would never have enjoyed. But, left to myself, I would

not regard this as the end of the story. Trespass, whether to person or property, has always been actionable *per se*, without proof of anything which the law regards as damage. The tort is complete when a direct interference with person or property without lawful justification is established. Usually, there will also be some harm done which the wrongdoer must remedy, either by damages or in some other way. Take, for example, the case of the neighbour who put a row of ridge tiles on his neighbour's roof. They did no harm to the roof; they did not diminish the value of the house in any way; indeed many might think them an enhancement; but the claimant did not want them there and successfully sued for trespass. The obvious remedy was to remove the tiles or pay the cost of the claimant's doing so.

213. But suppose there is no such harm. The claimant has nevertheless been done wrong. Let us also assume, as is the case here, that the circumstances are not such as to attract punitive or exemplary damages. Is our law not capable of finding some way of vindicating the claimant's rights and the importance of the principles involved? A way which does not purport to compensate him for harm or to punish the defendant for wrongdoing but simply to mark the law's recognition that a wrong has been done?

214. As Lord Collins explains, the concept of vindicatory damages has been developed in some Commonwealth countries with written constitutions enshrining certain fundamental rights and principles and containing broadly worded powers to afford constitutional redress (and also in New Zealand, which has no written Constitution but does have a Bill of Rights: *Taunoa v Attorney General* [2008] 1 NZLR 429). In an early article on the Canadian Charter, 'Damages as a remedy for infringement of the Canadian Charter of Rights and Freedoms' (1984) 62(4) Canadian Bar Review 517, Marilyn Pilkington argued that an award of damages under section 24(1) of the Charter should not be limited by the common law principles of compensation. In a proper case it might be designed to deter repetition of the breach, or to punish those responsible or to reward those who expose it. In *Attorney General of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 607, the Privy Council upheld a modest award of exemplary damages for breach of a constitutional right. But there can be a middle course between compensatory and exemplary damages. In *Jorsingh v Attorney General* (1997) 52 WIR 501, de la Bastide CJ and Sharma JA in the Court of Appeal of Trinidad and Tobago both said, albeit *obiter*, that the remedies available under section 14(2) of the Constitution were not limited by common law principles. Sharma JA said, at p 512, that

“The court is mandated to do whatever it thinks appropriate for the purpose of enforcing or securing the enforcement of any of the provisions dealing with the fundamental rights. . . . Not only can the court enlarge old remedies; it can invent new ones as well, if that is

what it takes or is necessary in an appropriate case to secure and vindicate the rights breached.”

215. Since then, the concept of vindictory damages for breach of constitutional rights has been recognised by the Judicial Committee of the Privy Council, in *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2006] 1 AC 328 and *Merson v Cartright and Attorney General* [2005] UKPC 38 (Bahamas); applied to breach of constitutional provisions other than the fundamental rights and freedoms, in *Fraser v Judicial and Legal Services Commission* [2008] UKPC 25 (St Lucia) and *Inniss v Attorney General* [2008] UKPC 42 (St Kitts), which involved the dismissal of respectively a magistrate and a High Court registrar in breach of the procedures laid down in the Constitution; and applied to the breach of fundamental rights in *Takitota v Attorney General* [2009] UKPC 11 (Bahamas), where the Board quoted from Lord Nicholls in *Ramanoop*, at para 19:

“An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter future breaches. . . . Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions ‘punitive damages’ or ‘exemplary damages’ are better avoided . . .”

216. We are not here concerned with a written constitution with a broadly drawn power to grant constitutional redress. But neither are we concerned with a statutory provision, such as section 8(3) and (4) of the Human Rights Act 1998, with a narrowly drawn power to award damages. We are concerned with a decision taken at the highest level of Government to detain certain people irrespective of the statutory purpose of the power to detain. The common law has shown itself capable of growing and adapting to meet new situations. It has recently invented the concept of a conventional sum to mark the invasion of important rights even though no compensatory damages are payable. In the view of the majority of the House of Lords in *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309, there were sound reasons of public policy why damages should not be recoverable for the cost of bringing up a healthy child born as a result of a negligent sterilisation. Nevertheless, an award limited to the stress and trauma associated with the pregnancy and birth was insufficient to mark the legal

wrong which had been done to the mother. This should be marked by a fixed, non-negligible, conventional sum (in that case £15,000).

217. *Rees* was concerned with the rights to bodily integrity and personal autonomy, the right to limit one's family and to live one's life in the way planned: see Lord Bingham of Cornhill at paragraph 8. These are important rights indeed. But no-one can deny that the right to be free from arbitrary imprisonment by the state is of fundamental constitutional importance in this country. It is not the less important because we do not have a written constitution. It is a right which the law should be able to vindicate in some way, irrespective of whether compensatable harm has been suffered or the conduct of the authorities has been so egregious as to merit exemplary damages. Left to myself, therefore, I would mark the false imprisonment in these cases with a modest conventional sum, perhaps £500 rather than the £1000 suggested by Lord Walker, designed to recognise that the claimant's fundamental constitutional rights have been breached by the state and to encourage all concerned to avoid anything like it happening again. In reality, this may well be what was happening in the older cases of false imprisonment, before the assessment of damages became such a refined science.

218. I therefore agree, and (subject to the additional points made above) for the reasons given by Lord Dyson, that both these appeals should be allowed. When considering what was a reasonable period for which to detain Mr Lumba in accordance with the *Hardial Singh* principles, however, I would stress that his psychiatric condition must be among the factors to be taken into account.

LORD COLLINS

219. I agree with Lord Dyson that the appeals should be allowed, substantially for the reasons which he gives. This is a case in which on any view there has been a breach of duty by the executive in the exercise of its power of detention. Fundamental rights are in play. Chapter 39 of Magna Carta (1215) said that "no free man shall be seized or imprisoned ... except ... by the law of the land" and the Statute of Westminster (1354) provided that "no man of what state or condition he be, shall be ... imprisoned ... without being brought in answer by due process of the law." That the liberty of the subject is a fundamental constitutional principle hardly needs the great authority of Sir Thomas Bingham MR (see *In re S-C (Mental Patient: Habeas Corpus)* [1996] QB 599, 603) to support it, but it is worth recalling what he said in his book *The Rule of Law* (2010), at p 10, about the fundamental provisions of Magna Carta: "These are words which should be inscribed on the stationery of the ... Home Office."

220. The evidence shows that concern was expressed in the Home Office from an early stage about the lawfulness of the policy, and that a deliberate decision was taken to continue an unlawful policy. As Lord Dyson says, caseworkers were directed to conceal the true reason for detention, namely the unpublished policy, and to give other reasons which appeared to conform with the published policy. Home Office officials recognised that “Ministers’ preferred position may be to continue to detain all FNPs and let the immigration judges take any hit which is to be had by releasing on bail.” The draft policy submission circulated in May 2007 recommended a change in policy, but also set out continued detention as one of the options, recognising that legal advisers considered that the department would lose on any legal challenge. The draft added: “... we could present any change in our approach as having been forced on us by the courts”.

221. I am satisfied that the serious breach of public law in this case has the result that the detention of the appellants was unlawful. Any other result would negate the rule of law. *Christie v Leachinsky* [1947] AC 573 shows that where an arrest was unlawful because it did not comply with the requirements imposed by the common law there would be a false imprisonment even if the arrest could have been effected in a proper manner. *Holgate-Mohammed v Duke* [1984] AC 437, 443, is high authority for the proposition that breach of principles of public law can found an action at common law for damages for false imprisonment.

222. Are they entitled to more than nominal damages? In particular are they entitled to “vindicatory damages”? The expression “vindicatory damages” has been in common use in the context of proceedings for violation of constitutional rights since *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2006] 1 AC 328 and *Merson v Cartright and Attorney General* [2005] UKPC 38.

223. It would seem that the expression had its origin in the United States, where it was sometimes used as a synonym for exemplary or punitive damages (e.g. *Cole v Tucker*, 6 Tex 266 (1851); *Blair Iron & Coal Co v Lloyd*, 3 WNC 103 (Pa (1874)), but at other times used to mean damages designed to vindicate a right but which were compensatory in nature (e.g. *McBride v McLaughlin*, 5 Watts 375 (Pa 1836); *Hallmark v Stillings*, 648 SW 2d 230 (Mo 1983)). In England the expression first emerged in a sense somewhat different from, but in a sense related to, that in which it is now used. In *Broome v Cassell & Co Ltd* [1972] AC 1027, 1071, Lord Hailsham of Marylebone LC said:

“In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitutio in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a

purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge. As Windeyer J well said in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 115, 150: ‘It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways—as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.’”

See also, e.g. *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153; *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670; *Purnell v Business F1 Magazine Ltd* [2007] EWCA Civ 744, [2008] 1 WLR 1.

224. Any consideration of the Privy Council decisions on vindictory damages must be prefaced by three points. First, they were concerned with alleged violations of constitutional rights. Second, the constitutions contained provision in relation to such violations for “redress” (Trinidad and Tobago, section 14(1) (without prejudice to any other action which is lawfully available); Bahamas, article 28(1) (but not if adequate means of redress are available under any other law), or “relief” together with “such remedy” as the court considers appropriate (Saint Christopher & Nevis, section 96(1), (3); Saint Lucia, section 105(1), (3)). Third, although the distinction has sometimes been blurred (as perhaps in *Takitota v Attorney General* [2009] UKPC 11, 13), the decisions are concerned with two heads of damage, compensatory damages and vindictory damages.

225. In *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2006] 1 AC 328, at 18-19 Lord Nicholls, speaking for the Board, dealt with both heads of damages in this way:

“[18] When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the

award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law.

[19] An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. ‘Redress’ in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions ‘punitive damages’ or ‘exemplary damages’ are better avoided as descriptions of this type of additional award.”

226. In *Merson v Cartright and Attorney General* [2005] UKPC 38 the gravity of police misconduct was such as to attract an award of \$100,000 for violations of the Constitution in addition to \$90,000 in damages for assault, battery and false imprisonment, and \$90,000 for malicious prosecution. It was held by the Privy Council that the awards were not duplicative. Lord Scott said (at 18):

“... The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant ... to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.”

227. A vindicatory award of \$50,000 was made in *Inniss v Attorney General* [2008] UKPC 42. In *Subiah v Attorney General of Trinidad and Tobago* [2008] UKPC 47, at 11 Lord Bingham noted that when deciding whether to award

vindictory damages, the answer “is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this is not already reflected in the compensatory award”. See also *Durity v Attorney General of Trinidad and Tobago* [2008] UKPC 59, 35. But in *Suratt v Attorney General of Trinidad and Tobago (No 2)* [2008] UKPC 38 and *James v Attorney General of Trinidad and Tobago* [2010] UKPC 23 declaratory relief was sufficient.

228. The availability of damages for constitutional wrongs, and in particular, exemplary or vindictory damages, is, or has been, controversial in many countries. In the United States, nominal damages can be awarded for the deprivation of a constitutional right without proof of actual injury, but substantial damages can be awarded only to compensate for actual injury: e.g. *Elkins v District of Columbia*, 710 F Supp 2d 53, 63-64 (DDC 2010), citing *Carey v Phipus*, 435 US 247 (1978); *Memphis Community School District v Stachura*, 477 US 299 (1986).

229. In *Ntandazeli Fose v Minister of Safety and Security* in the Constitutional Court of South Africa [1998] 1 LRC 198 Ackermann J considered whether “appropriate relief” for infringements of the Interim Constitution of South Africa justified, in addition to compensatory damages for assault, an award for vindication of the rights and for punitive damages. After a full account of the law in other countries he said that he had considerable doubts whether, even where the infringement of the right caused no damage, an award of constitutional damages in order to vindicate the right would be appropriate, and suggested that the court might conclude that a declaratory order combined with a suitable order for costs would be a sufficiently appropriate remedy to vindicate the right even in the absence of an award of damages. But in any event there was no place for constitutional punitive damages: 68, 69.

230. In *Taunoa v Attorney General* [2008] 1 NZLR 429 the Supreme Court of New Zealand was more sympathetic to vindictory damages. Elias CJ said (at para 109) that damages in such cases should be limited to what is adequate to mark any additional wrong in the breach and, where appropriate, to deter future breaches. See also Tipping J at 317 (the interests of the victim require the court to consider what compensation is due, but society is a victim also, and the court must consider also what is necessary by way of vindication to protect fundamental rights and freedoms); also Blanchard J at 258; McGrath J at 370.

231. The most recent consideration of the question was by the Supreme Court of Canada in *Vancouver (City of) v Ward* [2010] 2 SCR 28, in relation to damages for breach of the Canadian Charter of Rights and Freedoms. McLachlin CJ said that Charter damages had the functions of compensation, vindication and deterrence.

By vindication she meant the affirmation of constitutional values, focusing on the harm which breach of the Charter did to society. The fact that the claimant had not suffered personal loss did not preclude an award of damages where the objectives of vindication or deterrence clearly called for an award, and the view that constitutional damages were only available for pecuniary or physical loss had been widely rejected in other constitutional democracies: 28, 30.

232. The present claims are not, of course, for constitutional damages. Exemplary damages are available where the executive has acted in a way which is oppressive, arbitrary or unconstitutional. In *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122, 63 Lord Nicholls said:

“The availability of exemplary damages has played a significant role in buttressing civil liberties, in claims for false imprisonment and wrongful arrest. From time to time cases do arise where awards of compensatory damages are perceived as inadequate.... The nature of the defendant’s conduct calls for a further response from the courts. On occasion conscious wrongdoing by a defendant is so outrageous, his disregard for the plaintiff’s rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour. Without an award of exemplary damages, justice will not have been done. Exemplary damages, as a remedy of last resort, fill what would otherwise be a regrettable lacuna.”

233. But this is not a case for exemplary damages falling within the first head of *Rookes v Barnard* [1964] AC 1129. Nor do I consider that the concept of vindictory damages should be introduced into the law of tort. In truth, despite the suggestions to the contrary in the Privy Council in *Ramanoop and Merson*, vindictory damages are akin to punitive or exemplary damages (as in *Attorney General of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 607).

234. In *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] AC 962 the question was whether there was an abuse of process to allow a claim against the police for the wrongful death of James Ashley to proceed where the police admitted liability for all damages. The House of Lords held by a majority that for the claim to proceed was not an abuse. Lord Scott (obiter) suggested that the claim should proceed in order that vindictory damages could be available. He referred to Lord Hope’s observation in *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134, 87 that “the function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached”. Lord Scott said at para 22:

“Although the principal aim of an award of compensatory damages is to compensate the claimant for loss suffered, there is no reason in principle why an award of compensatory damages should not also fulfil a vindicatory purpose. But it is difficult to see how compensatory damages can could ever fulfil a vindicatory purpose in a case of alleged assault where liability for the assault were denied and a trial of that issue never took place.

...

Damages awarded for the purpose of vindication are essentially rights-centred, awarded in order to demonstrate that the right in question should not have been infringed at all. In *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 the Privy Council upheld an award of vindicatory damages in respect of serious misbehaviour by a police officer towards the claimant. These were not exemplary damages; they were not awarded for any punitive purpose. They were awarded, as it was put in *Merson v Cartwright* [2005] UKPC 38, another case in which the Privy Council upheld an award of vindicatory damages, in order ‘to vindicate the right of the complainant ... to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression’: para 18. The rights that had been infringed in the *Ramanoop* case and in *Merson v Cartwright* were constitutional rights guaranteed by the respective constitutions of the countries in question. But the right to life, now guaranteed by article 2 of the European Convention [on Human Rights] and incorporated into our domestic law by the Human Rights Act 1998, is at least equivalent to the constitutional rights for infringement of which vindicatory damages were awarded in *Ramanoop* and *Merson v Cartwright*. ...”

235. But what Lord Hope said in *Chester v Afshar* was not said in the context of damages, and it seems clear that neither Lord Bingham nor Lord Rodger agreed. In particular Lord Rodger said that the right to bodily integrity was protected by the tort actionable per se of trespass to the person, where “the law vindicates that right by awarding nominal damages” (para 60).

236. To make a separate award for vindicatory damages is to confuse the *purpose* of damages awards with the nature of the award. A declaration, or an award of nominal damages, may itself have a vindicatory purpose and effect. So too a conventional award of damages may serve a vindicatory purpose. That is the basis of *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309. As a result of a failed sterilisation negligently performed, the claimant gave birth to a child. The House of Lords held by a majority that although

the health authority was not liable to compensate for the child's upbringing, compensation in respect of stress, trauma and the costs associated with pregnancy and birth were recoverable. In addition the claimant was awarded an additional sum of £15,000 of which Lord Bingham said: "[the] award would not be, and would not be intended to be, compensatory. It would not be the product of calculation. But it would not be a nominal, let alone a derisory, award. It would afford some measure of recognition of the wrong done" (para 8). See also Lords Nicholls, Millett, and Scott: at 17, 123, 148, and the critical views expressed in McGregor, *Damages* 18th ed (2009), paras 35-297–35-299.

237. Neither the minority dicta in *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962 nor the award in *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309 justify a conclusion that there is a separate head of vindictory damages in English law. Consequently I do not consider that there is any basis in the present law for such an award. Nor do I consider that there is a basis in policy for the creation of a head of vindictory damages at common law, distinct from the existing law of compensatory or exemplary damages. I would therefore restrict the remedy in this case to nominal damages for the reasons given by Lord Dyson.

LORD KERR

238. For the reasons given by Lord Dyson, with which I agree, I too would allow this appeal.

A causation test

239. False imprisonment is established if there has been a detention and an absence of lawful authority justifying it. The question whether lawful authority exists is to be determined according to an objective standard. It either exists or it does not. It is for this elementary – but also fundamental – reason that a causation test can have no place in the decision whether imprisonment is false or lawful. By a “causation test” in this context I mean a test which involves an examination of whether the persons held in custody could have been lawfully detained. The fact that a person *could have been* lawfully detained says nothing on the question whether he *was* lawfully detained.

240. The Court of Appeal in the present case decided that, since the claimants could have been detained lawfully had the published policy been applied to them, the fact that an unpublished and unlawful policy was in fact applied was immaterial. With great respect, this cannot be right. The unpublished policy was

employed in the decision to detain the appellants. It was clearly material to the decision to detain. Indeed, it was the foundation for that decision. An *ex post facto* conclusion that, had the proper policy been applied, the appellants would have been lawfully detained cannot alter that essential fact.

241. The inevitability of the finding that the detention was unlawful can be illustrated in this way. If, some hours after making the decision to detain the appellants (based on the application of the unpublished policy), it was recognised that this did not constitute a legal basis on which they could be held, could their detention be said to be lawful before any consideration was given to whether the application of the published policy would have led to the same result? Surely, at the moment that it became clear that there was no lawful authority for the detention and before any alternative basis on which they might be detained was considered, their detention was unlawful.

242. It is, I believe, important to recognise that lawful detention has two aspects. First the decision to detain must be lawful in the sense that it has a sound legal basis and, secondly, it must *justify* the detention. This second aspect has found expression in a large number of judgments, perhaps most succinctly in the speech of Lord Hope in *R v Governor of Brockhill Prison Ex p Evans (No 2)* [2001] 2 AC 19, 32 D where he said “it is of the essence of the tort of false imprisonment that the imprisonment is without lawful justification”. It seems to me to be self evident that the justification must relate to the basis on which the detainer has purported to act, and not depend on some abstract grounds wholly different from the actual reasons for detaining. As Mr Husain QC put it, the emphasis here must be on the right of the detained person not to be detained other than on a lawful basis which justifies the detention. Detention cannot be justified on some putative basis, unrelated to the actual reasons for it, on which the detention might retrospectively be said to be warranted. Simply because some ground for lawfully detaining may exist but has not been resorted to by the detaining authority, the detention cannot be said, on that account, to be lawful.

243. This point was clearly made in *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662. In that case the plaintiff had been lawfully arrested and detained in a police cell. A review of his detention as required by statute was not carried out within the prescribed time. At p 667 B the submission of counsel for the Chief Constable was recorded as being that if circumstances existed which were or would be sufficient to justify continued detention the plaintiff could not fairly be said to be detained without lawful excuse. That submission was roundly – and, in my view, rightly – rejected, Clarke LJ saying, “As I see it, it is nothing to the point to say that the detention would have been lawful if a review had been carried out or that there were grounds which would have justified continued detention”. Likewise it is nothing to the point in this case that if the decision had been taken on the basis of the published policy, it would

have been immune from challenge. As Professor Cane put it in *The Temporal Element in Law* (2001) 117 LQR 5, 7 “imprisonment can never be justified unless *actually* [as opposed to hypothetically] authorised by law”. (The emphasis and the words enclosed in square brackets are mine).

244. The matter might be considered on the following hypothetical basis. Suppose that there were two policies, one lawful published policy for the detention of foreign national prisoners sentenced to more than 5 years’ imprisonment, the other an unlawful secret policy for detention of those sentenced to more than 2 years’ imprisonment. On the respondent’s case an individual detained under the second policy, who would have been detained under the first policy if it had been applied, has not been detained unlawfully. I do not consider that such an argument is viable.

245. A policy may lawfully be devised for the purpose of dealing generally with a regularly occurring species of case but it must always be possible to depart from the policy if the circumstances of an individual case warrant it. As the author of *Wade & Forsyth on Administrative Law* 10th ed (2009) at page 270 states:

“It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time.

246. In the mooted example, consideration would be given to departing from a policy which is different from that which the individual is entitled to have applied to him. The possible justification for departing from the policy would be considered on a different basis from that which ought properly to determine the question. This is, in my view, impermissible in public law terms.

247. A minister exercising his discretion by applying a published policy is acting lawfully. But if the policy which is applied is unlawful, the exercise of discretion is unlawful. The individual has not had applied to his case the proper exercise of discretion to which he is entitled. The application of an unlawful policy will therefore *ipso facto* render the decision to detain unlawful. In this context, I consider that it matters not whether the decision is said to be in violation of a public law principle or ultra vires the power to make the decision. To draw such a distinction would mark a radical departure from how error of law has long been understood. Again, a short extract from *Wade & Forsyth* at p 255 makes the point decisively:-

“‘Void or voidable’ was a distinction which could formerly be applied without difficulty to the basic distinction between action which was ultra vires and action which was liable to be quashed for error of law on the face of the record. That distinction no longer survives since the House of Lords [in *Anisminic* and subsequent cases] declared all error of law to be ultra vires.”

The nature of the public law breach required to invalidate the detention

248. In *R (SK Zimbabwe) v Secretary of State for the Home Department* [2009] 1 WLR 1527 it was accepted by the appellant that not every type of public law breach, committed after an initially valid detention, would render continued detention unlawful. On the present appeal the argument on behalf of the detained persons is put thus: a public law error that bears directly on the decision to detain will mean that the authority for detention is ultra vires and unlawful, and will sound in false imprisonment. But breaches which have no direct bearing on the decision to detain do not have that effect. Since, therefore, for instance, statutory obligations to permit a detainee to consult with his legal advisers (*Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763) or to be provided with food or clothing, or to be held in certain conditions (*R v Deputy Governor of Parkhurst Prison Ex p Hague* [1992] 1 AC 58) did not bear on the legality of detention, breach of those obligations did not render detention unlawful nor did it give rise to a claim for false imprisonment.

249. Lord Walker has analysed the existence/exercise of power to detain dichotomy in a way that I find compelling. This has led him to the conclusion that the essential test as to the validity of continued detention which is said to be beyond the scope of the power to detain is whether there has been a departure from the statutory purpose. Again, I find his reasoning on this wholly convincing. I do not agree, however, that it is necessary to establish abuse of power in order to show that the decision is beyond the scope of the power to detain, if by ‘abuse of power’ it is meant that some deliberate misuse of power is required. If a review of a person’s detention was inadvertently overlooked and it subsequently became clear that, had the review taken place, he would certainly have been released, it surely could not be suggested that the detention that had in the meantime occurred did not constitute false imprisonment.

250. The statutory purpose of the power to detain foreign nationals after the expiry of their sentence is to facilitate their deportation. (In this connection I agree fully with Lord Dyson in his analysis of the *Hardial Singh (R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704) principles and with what he had to say about those principles in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, [2003] INLR 196 para 46.) Where the

statutory purpose no longer exists, the power to detain falls away. The means of ascertaining whether the statutory purpose remains achievable is the system of review. Where that system is operated on the basis of a policy, it is of obvious – and critical – importance that the policy be transparent and that those who may be detained on foot of it have the opportunity to make informed representations on its application.

251. Breach of a public law duty which has the effect of undermining the achievement of the statutory purpose will therefore, in my opinion, render the continued detention invalid. A claim of false imprisonment is the natural, indeed inevitable, entitlement of a person whose detention is no longer justified. Since the appellants in the present case were detained by the operation of a secret, unpublished policy, an effective system of review of the justification for their detention was not possible. As a consequence their detention could no longer be said to be justified. As it seems to me, this approach approximates to the way in which the case was put for the appellants but links it more closely to the vital consideration of the statutory purpose of the power to detain.

Does the award of nominal damages devalue the tort of false imprisonment?

252. As various members of the court have pointed out, the fact that false imprisonment is a species of trespass to the person and is actionable without proof of special damage must be carefully taken into account in deciding whether nominal damages can ever be considered appropriate. The impact of a finding that the State has been guilty of false imprisonment (whether or not it is also ordered to pay compensation) should not be underestimated, however. Such a finding has the effect, in the words of Lady Hale, of “mark[ing] the law’s recognition that a wrong has been done”. And it is in the unambiguous recognition and declaration by the law that an individual has been falsely imprisoned that the essential value of the entitlement to assert that claim lies. I do not believe, therefore, that the award of nominal damages will, of itself and as a matter of automatic consequence, bring about a devaluation of the tort.

253. On the question whether the award of nominal damages or some other measure of compensation is required in false imprisonment claims, I believe that a distinction is clearly merited between those cases where it is plain that the detainees *would have been released* and those where it can be shown that they would have been lawfully detained, had the correct procedures been followed. Because false imprisonment is a trespassory tort, it is said that the ‘vindicatory’ dimension to the assessment of compensation is important. I shall examine that claim presently but, whatever may be said about its correctness, it is surely right that the actual impact on the individual who has been falsely imprisoned (or

perhaps more importantly, the impact that could have been avoided) should feature prominently in the assessment of the appropriate amount of compensation.

254. Traditionally, the primary function of damages has been to compensate the individual for the loss that he or she has suffered ('compensatory damages'). More recently the concept of restitutionary damages has been recognised where damages for the tort are measured according to the gain that the defendant has obtained or the value that the right infringed might have had to the claimant where, for instance, unknown to the claimant, the defendant has used the claimant's property. This category of damages is not relevant here. A third type of damages (vindicatory damages) may be. In a number of recent decisions the Judicial Committee of the Privy Council has awarded what might be classified as vindicatory damages where there has been a breach of constitutional rights. *Attorney General for Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 is perhaps the leading of these cases. At para 19 Lord Nicholls, delivering the judgment of the Committee, said :-

“An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches. All these elements have a place in this additional award. ... Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions 'punitive damages' or 'exemplary damages' are better avoided as descriptions of this type of additional award.”

255. Lord Nicholls' recognition that this type of award covered much the same ground as that involved in exemplary or punitive damages is reflected in the more recent decision of the Privy Council in *Takitota v Attorney General* [2009] UKPC 11 where, at para 15, Lord Carswell said :-

“... it would not be appropriate to make an award both by way of exemplary damages and for breach of constitutional rights. When the vindicatory function of the latter head of damages has been discharged, with the element of deterrence that a substantial award

carries with it, the purpose of exemplary damages has largely been achieved.”

256. For the reasons given by Lord Dyson an award of exemplary damages is not warranted in these cases. If there is any scope for the award of vindictory damages where exemplary damages are not appropriate, it must be, in my opinion, very limited indeed. Such an award could only be justified where the declaration that a claimant’s right has been infringed provides insufficiently emphatic recognition of the seriousness of the defendant’s default. That situation does not arise here. The defendant’s failures have been thoroughly examined and exposed. A finding that those failures have led to the false imprisonment of the appellants constitutes a fully adequate acknowledgement of the defendant’s default. Since the appellants would have been lawfully detained if the published policy had been applied to them, I agree that no more than a nominal award of damages is appropriate in their cases.

DISSENTING JUDGMENTS

LORD PHILLIPS

Introduction

257. The appellants are foreign nationals who have served sentences of imprisonment in this country (“FNPs”) They were detained pursuant to Schedule 3 of the Immigration Act 1971 (“Schedule 3”). They challenge the legality of their detention. At the times of the decisions to detain them there existed a policy published by the Secretary of State setting out the circumstances in which her power to detain immigrants would be exercised. Had the decision-maker applied this policy he would have detained each of the appellants. In the event, however, he decided to detain each by the application of a policy which Mr Beloff QC for the Secretary of State has conceded was “unlawful”. Whether the “lawful” or “unlawful” policy had been applied the decision would have been the same. The principal common issues raised by these appeals are first whether, in these circumstances, the detention of each of the appellants was “unlawful”; secondly whether, if it was “unlawful,” the result was that the detention of each of the appellants constituted the tort of false imprisonment and; if so, thirdly, whether and on what basis the appellants are entitled to damages. I have placed the words “lawful” and “unlawful” in parentheses because these appeals raise the question of whether there is a material difference between a policy, or a decision, or an act

which is “unlawful” because it violates principles of public law and a policy, or a decision, or an act which is “unlawful” because it is ultra vires.

258. In the case of Mr Lumba there is a second issue. This is whether his detention was or became unlawful because it infringed what have become known as the *Hardial Singh* principles which date back to the decision of Woolf J in the case of that name over a quarter of a century ago. Lord Dyson at para 22 of his judgment rightly states that it has been common ground in these appeals that he correctly summarised the effect of *Hardial Singh* in the four principles which he set out in *R (I) v the Secretary of State for the Home Department* [2003] INLR 196. As I shall explain I have reservations about the first two principles which, so far as I am aware, have never been the subject of debate.

259. Lord Dyson has set out the relevant facts and statutory provisions and I can turn immediately to the common issues raised by these appeals. Lord Dyson has held that the Secretary of State committed the tort of false imprisonment in relation to each appellant because the decision to detain him was reached in violation of public law. The violation was the failure to apply the Secretary of State’s published policy and the application of a policy to which there were various objections of public law. He has concluded that, because the reasoning offended the requirements of public law, the acts that the decision-maker decided upon were beyond his powers, or ultra vires. I have come to a different conclusion.

260. I propose in this judgment to address the following questions. First, what restrictions are implicit, as a matter of statutory interpretation, in the power to detain conferred on the Secretary of State by Schedule 3? Second, what were the policies published by the Secretary of State in relation to the detention of immigrants? Third, what were the practical implications of those policies? Fourth, what were the legal implications of those policies? Fifth, was the detention of each of the appellants contrary to those policies? Sixth, what were the defects in the policy applied when deciding whether the appellants should be detained? Seventh, what were the circumstances in which this policy was applied? Eighth, did the application of that policy render the detention of the appellants unlawful? If so, ninth, are the appellants entitled to damages for false imprisonment?

Implied limitations on the power to detain conferred by Schedule 3

261. I refer to the four principles that Lord Dyson states at para 22 of his judgment are derived from *Hardial Singh*. The third and fourth principles were an essential part of the reasoning that led Woolf J to the decision that he reached in that case. They are not open to question. This is not true of the first two. The first is that “the Secretary of State must intend to deport the person and can only use the

power to detain for that purpose”. Lord Dyson explains that by this he means that the power to detain must be exercised “for the prescribed purpose of facilitating deportation”. The second principle is that “the deportee may only be detained for a period that is reasonable in all the circumstances”. Neither of these principles was stated in these terms in *Hardial Singh*, although I accept that they are possible interpretations of the words used by Woolf J. Neither of these principles was essential to the conclusion that he reached. I do not myself consider that either principle can properly be derived from his judgment.

262. The applicant in *Hardial Singh* sought a writ of *habeas corpus*. He was an Indian who had entered the United Kingdom lawfully and been granted indefinite leave to remain. He had been convicted of offences of burglary and been sentenced to a total of two years’ imprisonment. Before he was due to be released he was served with a deportation order on behalf of the Secretary of State. He was due for release on 20 July 1983 but was then detained by the Secretary of State pursuant to paragraph 2(3) of Schedule 3. The reason given for his detention was the risk that, if released, he would abscond. Because of delay on the part of the Secretary of State in making arrangements for his return to India he was still detained in December 1983. In these circumstances Woolf J, at p 706, said this about the power of detention under Schedule 3:

“Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Second, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.

In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time.”

263. There is a degree of ambiguity in the earlier part of this passage. “Pending the making of a deportation order” is not a purpose. Nor is “pending his removal”. What then did Woolf J mean when he said that the power to remove “cannot be used for any other purpose”? He goes on to say that the power is given “to enable the machinery of deportation to be carried out” and that the power of detention is limited to such period as is “reasonably necessary for that purpose”. If one takes these two passages together it is possible to interpret Woolf J as saying that you can only detain a person for the purpose of facilitating deportation, as Lord Dyson has done. It is, however, also possible to read him as saying that you can only detain a person while you are pursuing the objective of deporting him and that is how I interpret what he said. I believe that the interpretation given by Lord Dyson places an unjustified restriction on the Secretary of State’s power of detention. It is obvious that detention will almost always make the practical task of deporting the detainee easier to arrange. Most deportees will be in this country through choice and cannot reasonably be expected to do anything to facilitate their deportation even if they do not try actively to prevent this. It is open to the Secretary of State to detain a person in order to facilitate his deportation and this is often the, or one of the, reasons for doing so. But, as I shall explain, I do not consider that detention of a deportee will only be lawful if used for this purpose.

264. The second principle identified by Lord Dyson is that “the deportee may only be detained for a period that is reasonable in all the circumstances”. This I understand to be derived from Woolf J’s statement “The period which is reasonable will depend upon all the circumstances”. But that sentence was immediately preceded by the statement that the power to detain was impliedly limited to a period that was reasonably necessary for the purpose of enabling the machinery of deportation to be carried out. Thus I believe that the “circumstances” that Woolf J had in mind were restricted to those that related to the task of effecting deportation. I am fortified in this belief by the fact that Woolf J went on to cite *R v Governor of Richmond Remand Centre, Ex p Asghar* [1971] 1 WLR 129. In that case the Secretary of State had detained two persons who were awaiting removal with the object that they should testify in a pending criminal trial. Lord Parker CJ rejected the suggestion that the detention could be justified as reasonable in these circumstances, stating at p 132

“it does seem to me that while a reasonable time is contemplated between the giving of the directions and the final removal, that is a reasonable time necessary to effect the physical removal”.

265. In *Hardial Singh* Woolf J was concerned only with the length of time that was reasonably necessary to effect deportation and the relationship that this bore to the power to detain. He was not concerned with the question of whether there were further implied restrictions on the power to detain during that period.

266. The extent of the power to detain pending deportation was an important, albeit not the most important, issue in *Chahal v United Kingdom* where the nature of the domestic proceedings is apparent from the judgment of the European Court of Human Rights when the case reached Strasbourg (1996) 23 EHRR 413. Mr Chahal was a Sikh separatist leader who had been granted indefinite leave to remain in the United Kingdom. On 14 August 1990 the Secretary of State decided that he ought to be deported because his continued presence in the United Kingdom was uncondusive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism. Two days later he was served with a notice of intention to deport. He was then detained pursuant to Schedule 3 and remained in detention up to the time of the judgment of the Strasbourg Court. During this time he pursued an unsuccessful attempt to be granted asylum. He also, by an application for judicial review, challenged his proposed deportation on the ground that this would violate article 3 of the Convention because it would expose him to the risk of torture and persecution if returned to India. He was unsuccessful in the Divisional Court and the Court of Appeal and was refused leave to appeal to the House of Lords. He then applied to Strasbourg, alleging breaches of articles 3 and 5 of the Convention. In November 1995, while he was awaiting a hearing at Strasbourg, he challenged his continued detention by seeking from the Divisional Court a writ of habeas corpus and judicial review. The Secretary of State opposed his application on the grounds that he could not safely be released because of the substantial threat that he posed to national security. It does not appear to have been suggested that his lengthy detention was necessary to facilitate his deportation. His application was refused on the ground that there was no reason to believe that the Secretary of State did not have good reason for his apprehension. MacPherson J ruled that

“the detention *per se* was plainly lawful because the Secretary of State [had] the power to detain an individual who [was] the subject of a decision to make a deportation order” (para 43).

267. It is relevant to see how the Strasbourg Court addressed this matter, if only because any interpretation of Schedule 3 must, if possible, be compatible with the requirements of the Convention. Article 5(1) of the Convention provides, in so far as material:

“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(f) the lawful arrest or detention...of a person against whom action is being taken with a view to deportation...”

The court said this as to the effect of that provision:

“112. The court recalls that it is not in dispute that Mr Chahal has been detained ‘with a view to deportation’ within the meaning of article 5(1)(f). Article 5(1)(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect article 5(1)(f) provides a different level of protection from article 5(1)(c).

Indeed all that is required under this provision is that ‘action is being taken with a view to deportation’. It is therefore immaterial, for the purposes of article 5(1)(f), whether the underlying decision to expel can be justified under national or Convention law.

113. The court recalls, however, that any deprivation of liberty under article 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under article 5(1)(f).”

These observations echo the *Hardial Singh* principles, as I would interpret them. The court went on to consider whether the asylum proceedings, which had delayed the stage at which Mr Chahal would have been deported, had taken an excessive length of time, and concluded that they had not. This indicates that the Strasbourg Court, when considering the time reasonably needed for deportation, accepted that this would be prolonged by delay reasonably attributable to attempts to obtain asylum.

268. The court then considered the requirement that the detention should be “lawful”. It observed at para 119 that there was no doubt that it was lawful under national law but that, because of the extremely long period during which Mr Chahal had been detained it was also necessary to consider whether “there existed sufficient guarantees against arbitrariness”. At para 122 the court concluded that the domestic procedure under which Mr Chahal’s appeal against deportation had been considered by an advisory panel

“provided an adequate guarantee that there were at least prima facie grounds for believing that if Mr Chahal were at liberty, national security would be put at risk and thus, that the executive had not acted arbitrarily when it ordered him to be kept in detention. ”

269. I am not able to accept that under domestic law it had been an implicit requirement of Schedule 3 that Mr Chahal’s detention was necessary to facilitate his deportation. Provided that he was being detained with a view to his removal as soon as reasonably possible I consider that the Secretary of State was entitled to detain him pending that removal on the ground that he would pose a terrorist threat if released.

270. The *Hardial Singh* principles were applied by analogy by the Judicial Committee of the Privy Council when considering the legitimacy under Hong Kong legislation of the detention of four “boat people” from Vietnam in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97. Tens of thousands of these people had arrived unlawfully in Hong Kong. They were steadily being repatriated, but this was taking a long time. Section 2 of the Immigration (Amendment) Ordinance 1991 added to the relevant legislation a provision designed expressly to deal with this situation:

“The detention of a person under this section shall not be unlawful by reason of the period of the detention if that period is reasonable having regard to all the circumstances affecting that person’s detention, including – (a) in the case of a person being detained pending a decision under section 13A(1) to grant or refuse him permission to remain in Hong Kong as a refugee – (i) the number of persons being detained pending decisions under section 13A(1) whether to grant or refuse them such permission; and (ii) the manpower and financial resources allocated to carry out the work involved in making all such decisions; (b) in the case of a person being detained pending his removal from Hong Kong – (i) the extent to which it is possible to make arrangements to effect his removal; and (ii) whether or not the person has declined arrangements made or proposed for his removal.....”(p 106).

Lord Browne-Wilkinson, giving the advice of the Board, said this, at p 111, under the heading “*The Hardial Singh principles*”:

“Section 13D(1) confers a power to detain a Vietnamese migrant ‘pending his removal from Hong Kong’. Their Lordships have no doubt that in conferring such a power to interfere with individual

liberty, the legislature intended that such power could only be exercised reasonably and that accordingly it was implicitly so limited. The principles enunciated by Woolf J in the *Hardial Singh* case [1984] 1 WLR 704 are statements of the limitations on a statutory power of detention pending removal. In the absence of contrary indications in the statute which confers the power to detain ‘pending removal’ their Lordships agree with the principles stated by Woolf J. First, the power can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal. Secondly, if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorised. Thirdly, the person seeking to exercise the power of detention must take all reasonable steps within his power to ensure the removal within a reasonable time.”

This accords with my reading of *Hardial Singh*. His Lordship went on to say, however:

“Their Lordships are unable to agree with the Court of Appeal of Hong Kong that there is any conflict between the *Hardial Singh* principles and the provisions of section 13D. Section 13D(1A), which was inserted in 1991, expressly envisages that the exercise of the power of detention conferred by section 13D(1) will be unlawful if the period of detention is unreasonable. It expressly provides that ‘The detention...shall not be unlawful by reason of the period of the detention *if that period is reasonable* having regard to ...’ (Emphasis added.) What section 13D(1A) does is to provide expressly that, in deciding whether or not the period is reasonable, regard shall be had to all the circumstances including (in the case of a person detained pending his removal from Hong Kong) ‘the extent to which it is possible to make arrangements to effect his removal’ and ‘whether or not the person has declined arrangements made or proposed for his removal.’ Therefore the subsection is expressly based on the requirement that detention must be reasonable in all the circumstances (the *Hardial Singh* principles) but imposes specific requirements that in judging such reasonableness those two factors are to be taken into account.”

The shorthand summary of the *Hardial Singh* principles as “*detention must be reasonable in all the circumstances*” was made in the context of those circumstances that affected the time reasonably necessary to effect removal and, just as in the case of *Hardial Singh* itself, I would restrict its ambit to those circumstances. This I believe was, and remained, the understanding of some, at least, of the judges dealing with claims in respect of the detention of immigrants in

the Administrative Court. Thus in *R (Konan) v Secretary of State for the Home Department* [2004] EWHC 22 (Admin) Collins J, who had appeared as counsel in *Hardial Singh*, held at para 21:

“The power to detain pending removal is not dependent on a fear of absconding or of any other misconduct by the person in question. Provided it is exercised for the purpose of removal, it is lawful. It must be exercised reasonably, but reasonableness in this context relates to whether removal can be achieved within a reasonable time: see *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704 and *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 as applied in *R (Saadi) v Secretary of State for the Home Department* [[2002] 1 WLR 356].”

271. *R (Saadi) v Secretary of State for the Home Department* [2001] EWCA Civ 1512; [2002] 1 WLR 356 raised the question of the legality of the detention at Oakington Reception Centre for up to 10 days of aliens seeking leave to enter whose cases appeared susceptible of speedy processing. The power to detain that was relied on was that afforded by paragraph 16(1) of Schedule 2 to the 1971 Act. Paragraph 2 provides that an immigration officer may examine any person arriving in the United Kingdom to determine whether he should be given leave to enter. Paragraph 16(1) provides:

“A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.”

The Court of Appeal, in a judgment which I delivered, considered both the scope of the power to detain afforded by this paragraph and the effect of article 5(1)(f) of the Human Rights Convention. As to the former the court made the following observations:

“14. Collins J concluded that the only limitation on the power to detain pending examination and the decision whether to grant or refuse leave to enter is that the detention must be for a reasonable time. For the Secretary of State, the Attorney General supported this conclusion. He argued that the power to detain persisted for so long as was reasonably necessary to conduct the examination and to reach a decision whether or not to grant leave to enter. As a matter of statutory interpretation we accept this submission. Were it not correct, the power to grant temporary admission would also be liable

to come to an end before an examination could reasonably be completed and a decision whether to grant or refuse leave to enter reasonably be taken.

15. We are not aware that it has ever been the policy of the Secretary of State that applicants for leave to enter should be detained pending the decision of their applications, however long that might take. A more liberal policy has been adopted whereby he has approved the exercise of the power to grant temporary admission in place of detention. If the basis upon which immigration officers are detaining asylum seekers at Oakington is in conflict with this policy, then, under established principles of public law, they are acting unlawfully.”

As to the Convention the court held:

“66. We consider that the test of proportionality required by article 5(1)(f) requires the Court simply to consider whether the process of considering an asylum application, or arranging a deportation, has gone on too long to justify the detention of the person concerned having regard to the conditions in which the person is detained and any special circumstances affecting him or her. Applying that test no disproportionality is demonstrated in this case.”

This was not a test of proportionality that the Strasbourg Court had laid down in *Chahal* and it received no support from that Court when *Saadi* reached it, as I shall show.

272. Giving the only reasoned speech in a unanimous decision of the House of Lords [2002] UKHL 41; [2002] 1 WLR 3131 Lord Slynn of Hadley referred at para 18 to a statement by the Oakington Project Manager that he accepted that an important consideration in relation to detention powers was that no detention should be longer than reasonably necessary. Lord Slynn went on to express the view at para 22:

“As the judge and the Court of Appeal stressed, paragraph 16 of Schedule 2 gives power to detain ‘pending’ examination and a decision; that in my view means for the period up to the time when the examination is concluded and a decision taken. There is no qualification that the Secretary of State must show that it is necessary to detain for the purposes of examination in that the

examination could not otherwise be carried out since applicants would run away. Nor is it limited to those who cannot for whatever reason appropriately be granted temporary admission. The period of detention in order to arrive at a decision must however be reasonable in all the circumstances.”

The last sentence reflected Government policy, as accepted by the Project Manager.

273. One of the applicants in *Saadi* took his case to Strasbourg (2008) 47 EHRR 427. He claimed that his detention at Oakington had infringed article 5(1)(f). Liberty, and other interveners, contended that a test of necessity and proportionality should be applied to article 5(1)(f), so that an asylum seeker could only be detained if, but for such detention, he would attempt to effect an unauthorised entry into the country. The Grand Chamber rejected this submission. Dealing first with the interpretation of the express provisions of article 5(1)(f) it said:

“64. Whilst the general rule set out in article 5(1) is that everyone has the right to liberty, article 5(1)(f) provides an exception to that general rule, permitting states to control the liberty of aliens in an immigration context. As the court has remarked before, subject to their obligations under the Convention, states enjoy an ‘undeniable sovereign right to control aliens’ entry into and residence in their territory’. It is a necessary adjunct to this right that states are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not. It is evident from the tenor of the judgment in *Amuur* that the detention of potential immigrants, including asylum seekers, is capable of being compatible with article 5(1)(f).

65. On this point, the Grand Chamber agrees with the Court of Appeal, the House of Lords and the Chamber, that until a state has ‘authorised’ entry to the country, any entry is ‘unauthorised’ and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so, can be, without any distortion of language, to ‘prevent his effecting an unauthorised entry’. It does not accept that, as soon as an asylum seeker has surrendered himself to the immigration authorities, he is seeking to effect an ‘authorised’ entry, with the result that detention cannot be justified under the first limb of article 5(1)(f). To interpret the first limb of article 5(1)(f) as permitting detention only of a person who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power

of the state to exercise its undeniable right of control referred to above.”

As to the argument that a test of proportionality applied to the detention, the Court, referring to *Chahal*, held:

“72. Similarly, where a person has been detained under article 5(1)(f), the Grand Chamber, interpreting the second limb of this subparagraph, held that, as long as a person was being detained ‘with a view to deportation’, that is, as long as ‘action [was] being taken with a view to deportation’, there was no requirement that the detention be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing. The Grand Chamber further held in *Chahal* that the principle of proportionality applied to detention under article 5(1)(f) only to the extent that the detention should not continue for an unreasonable length of time; thus, it held that

“[A]ny deprivation of liberty under article 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible.”

73. With regard to the foregoing, the court considers that the principle that detention should not be arbitrary must apply to detention under the first limb of article 5(1)(f) in the same manner as it applies to detention under the second limb. Since states enjoy the right to control equally an alien’s entry into and residence in their country (see the cases cited in para 63 above), it would be artificial to apply a different proportionality test to cases of detention at the point of entry than that which applies to deportation, extradition or expulsion of a person already in the country.

74. To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that:

“[T]he measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country;”

and the length of the detention should not exceed that reasonably required for the purpose pursued.”

274. This passage reinforces the conclusions of the court in *Chahal*. Where a person is detained pending deportation, the only proportionality requirement that Strasbourg imposes, if indeed it is right so to describe it, is that the detention should not be for longer than is reasonably necessary to effect the deportation. Added to this, however, is the important requirement that the exercise of the power to detain must not be arbitrary.

275. Applying this principle the European Commission of Human Rights held manifestly inadmissible an application of infringement of article 5 by a man who had been detained for five years while he used every means to avoid extradition to Hong Kong. See *Osman v United Kingdom* (Application No 15933/89) (unreported) 14 January 1991.

276. The most recent pronouncement of the Grand Chamber on article 5(1)(f) is to be found in *A v United Kingdom* (2009) 49 EHRR 625, where it was held that article 5(1)(f) did not justify detention of the famous Belmarsh detainees. At para 164 the Grand Chamber stated:

“To avoid being branded as arbitrary, detention under article 5(1)(f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued.”

277. Against this background of Strasbourg jurisprudence, I return to domestic consideration of the *Hardial Singh* principles. In *R(I) v Secretary of State for the Home Department* [2003] INLR 196 the appellant was an Afghani asylum seeker who had been given exceptional leave to remain. He was then convicted of indecent assaults and sentenced to 3 years’ imprisonment with a recommendation for deportation. The Secretary of State made a deportation order and detained him pursuant to paragraph 2(3) of Schedule 3 from February 2001 to May 2002. The delay occurred because practical difficulties had caused the Secretary of State to cease removing nationals to that country. He claimed that his further detention was unlawful as there was no reasonable possibility of his being deported within a reasonable period. This raised the question of how such a reasonable period fell to be calculated. Simon Brown LJ addressed three issues of principle that had arisen. The first was the relevance of the fact that he was likely to “go to ground” and re-

offend if released. His counsel contended that this was irrelevant to the question of whether removal would be possible within a reasonable time. Simon Brown LJ disagreed. He held at para 29:

“The likelihood or otherwise of the detainee absconding and/or re-offending seems to me to be an obviously relevant circumstance. If, say, one could predict with a high degree of certainty that, upon release, the detainee would commit murder or mayhem, that to my mind would justify allowing the Secretary of State a substantially longer period of time within which to arrange the detainee’s removal abroad.”

278. The second issue was whether it was relevant that the appellant refused to accept voluntary repatriation. Simon Brown LJ held that it was. The third issue was whether the calculation of the reasonable period should take account of the fact that the appellant had been making asylum applications. Simon Brown LJ held that it should not, because it would not have been possible to deport him in any event. The conclusion that he formed at para 37 was that because the Secretary of State could not establish more than a hope of being able to remove him by the summer

“substantially more in the way of a risk of re-offending (and not merely a risk of absconding) than exists here would in my judgment be necessary to have justified continuing his detention for an indeterminate further period.”

279. Mummery LJ gave a short dissent on the facts rather than the applicable principles.

280. Dyson LJ agreed with Simon Brown LJ. He set out the four principles that he derived from *Hardial Singh* in the same form as he has in his judgment in the present case. He then made the following observations about the application of those principles.

“47. Principles (ii) and (iii) are conceptually distinct. Principle (ii) is that the Secretary of State may not lawfully detain a person ‘pending removal’ for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that

event, principle (iii) applies. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired.

48. It is not possible or desirable to produce an exhaustive list of all the circumstances that are, or may be, relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of Schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences.

49. Simon Brown LJ has identified the three main points of principle which were in issue in the present appeal, namely, the risk of absconding and reoffending, the appellant's refusal to accept voluntary repatriation, and the asylum claim and appeal. As I have already stated, the risk of absconding and offending or reoffending is relevant to the reasonableness of the length of a detention pending deportation. It is, as Simon Brown LJ says 'an obviously relevant circumstance' (at para 29): see also per Lord Phillips of Worth Matravers MR in *R v (Saadi) v Secretary of State for the Home Department* [2001] EWCA Civ 1512, [2002] 1 WLR 356, at paras 65-67."

281. I have accepted that it is possible to derive Lord Dyson's first two principles from the language used by Woolf J in *Hardial Singh*, and explained why I would not do so. The passage from the judgment of the Court of Appeal in *Saadi* that he cites was dealing with the effect of article 5(1)(f) of the Convention and, as I have shown, advanced a test of proportionality which Strasbourg did not endorse. The problems that have been raised by these appeals suggest that Strasbourg may have had very good reason not to do so.

282. The conceptual difficulty inherent in the first two principles identified by Lord Dyson is apparent in the passage that he has quoted at para 107 from the judgment of Toulson LJ in *A*. If the risk of re-offending can be the determinant factor in deciding how long it is reasonable to detain a FNP why should it not be the determinant, or even the sole reason for detaining him in the first place? Why should it be a pre-condition to the power to detain that its use is to facilitate

deportation, even if this is not the real reason for detention, as in the case of *Chahal*? It is that logical inconsistency that underlies the challenge that is made on behalf of Mr Lumba in the present case to the legitimacy of having regard to the risk of his re-offending.

283. The interpretation that I would give to the power to detain conferred by the 1971 Act is as follows. The scheme of the Act is simple, and reflects article 5(1)(f) of the Convention. The Secretary of State is not required to permit an immigrant who has unlawfully entered this country to roam free. Schedule 3 permits her to detain the immigrant for as long as she reasonably requires in order to decide whether he should have leave to enter. If he is not given leave to enter she may detain him for as long as she reasonably requires to effect his deportation, provided always that deportation is a practical possibility.

284. If the 1971 Act confers powers as wide as this on the Secretary of State, she has not availed herself of them. She adopted a policy under which, on her calculation, only 1.5% of those who were liable to detention under her immigration powers were actually detained, see para 285 below. Having chosen to discriminate between those whom she detains and those whom she does not, she is subject to the established principles of public law in choosing between the two. It is these principles which constrain the exercise of her power to detain rather than restrictions to be implied into the 1971 Act as a matter of statutory interpretation. They include the obligation to act rationally, an obligation also imposed by article 5 of the Convention. It is rational and lawful to detain a FNP pending deportation to prevent his re-offending or because he would pose a security risk if at large, just as it is rational and lawful to detain him because of the risk of his absconding. Public law principles include the restraint that a published policy imposes on executive action, a topic that I am about to consider. As I shall show, the guidance published by the Secretary of State includes a requirement to comply with Lord Dyson's first two principles, so that to that extent their enunciation has been self-fulfilling.

The policies published by the Secretary of State in relation to the detention of immigrants.

285. Lord Dyson has referred to the two White Papers in which in 1998 and 2002 the Secretary of State published her policies in relation to detention. The first of these, *Fairer, Faster, Firmer* informed the reader at the beginning of Chapter 12 dealing with "Detention" that at any one time, only about 1.5% of those liable to detention under immigration powers were actually detained. The White Paper dealt with the criteria to be adopted in identifying this small minority of immigrants who were to be detained. FNPs awaiting deportation will have formed only a tiny proportion of those liable to detention under those powers. It is, perhaps, not

surprising that the White Paper predominantly addressed the position of the vast majority of immigrants who were not criminals. Thus, in the passage quoted by Lord Dyson at para 11 of his judgment the White Paper spoke of a presumption in favour of granting temporary admission or release, terms that were not appropriate to those recommended for deportation. In dealing with “Detention Criteria” at 12.3 the White Paper identified three circumstances where detention would normally be justified. The first was where there was a reasonable belief that the individual would fail to keep to the terms of temporary admission or temporary release. The second was to clarify a person’s identity and the basis of their claim on entry. The third was where removal was imminent.

286. 12.11 dealt with detention in relation to removals. It focussed entirely on detention to facilitate removals. Nothing in that White Paper gave any suggestion that those awaiting deportation might be detained because of concern as to the way they might behave if permitted to be at large. There was no focus on the provisions of Schedule 3.

287. These comments are equally true of the second White Paper, *Secure Borders, Safe Haven*, save that this had the following statement in para 4.80 under the heading “Serious Criminals”:

“We will explore what more we can do, as other countries have done, to stop serious criminals abusing our asylum system by seeking to remain in the UK having completed a custodial sentence.”

There is there no indication that such criminals would be liable to detention pending deportation.

288. The two White Papers dealt in broad terms with detention. They were supplemented by Chapter 38, headed “Detention and Temporary Release”, of the Operational Enforcement Manual, which was a published document, available to the public on the internet. The court was provided with the version that was current in April 2006. This included guidance on the law as it was understood to be. Para 38.1.1.1 gave the following summary of the effect of article 5 and the domestic case law:

“(a) The relevant power to detain must only be used for the specific purpose for which it is authorised. This means that a person may only be detained under immigration powers for the purpose of preventing his unauthorised entry or with a view to his removal (not necessarily deportation). Detention for other purposes, where

detention is not for the purposes of preventing unauthorised entry or effecting removal of the individual concerned, is not compatible with article 5 and would be unlawful in domestic law;

(b) The detention may only continue for a period that is reasonable in all the circumstances;

(c) If before the expiry of the reasonable period it becomes apparent that the purpose of the power, for example, removal, cannot be effected within that reasonable period, the power to detain should not be exercised ; and

(d) The detaining authority (be it the immigration officer or the Secretary of State), should act with reasonable diligence and expedition to effect removal (or whatever the purpose of the power in question is).”

This summary of the law reflected aspects of the decision of the Court of Appeal in *I* with which I have differed. None the less the principles that it expounded were consonant with the general policy of the Secretary of State that there was a presumption against detention.

289. Para 38.3 set out the factors that influenced a decision to detain. Those in favour of detention were all matters that bore on the likelihood that the individual would abscond or go to ground if not detained. The manual set out the contents of a standard form IS9IR. This set out 6 possible reasons for detention, with instructions that the Immigration Officer should tick the relevant reasons. In contrast to the general focus on the likelihood of absconding, one of these stated “Your release is not considered conducive to the public good”. Factors forming the basis of the reasons also had to be ticked. These included

- “
- You are excluded from the United Kingdom at the personal direction of the Secretary of State.
 - You are detained for reasons of national security, the reasons are/will be set out in another letter.
 - Your previously unacceptable character, conduct or associates.”

Para 38.5.2 was headed “Authority to detain persons subject to deportation action”. It summarised the effect of Schedule 3 and required that decisions whether to

detain pursuant to the provisions of the Schedule should be made “at senior caseworker level in CCT”. No specific guidance was given, however, as to the criteria that should be applied when making those decisions.

290. In summary, the general message of these published policies was that detention should be used sparingly and, in the case of detention pending removal or deportation, only where necessary to facilitate this in order to prevent individuals from absconding or otherwise evading the immigration system. Officials were instructed that the law was as held by the Court of Appeal in *I* and, in particular, that detention could only continue for a period that was reasonable in all the circumstances. Form IS9IR raised, however, the possibility that detention could be used for reasons of national security or where the individual’s previous character, conduct or associates were unacceptable. Despite this, there was no specific guidance as to the approach to be adopted to criminals whom the Secretary of State had decided to deport.

291. Not only was it open to the Secretary of State to decide to deport, and to detain pending deportation, criminals in respect of whom the court had made no recommendation, she also had to decide whether to accept recommendations for deportation made by the courts. Under paragraph 2(1) of Schedule 3 those subject to a recommendation remained detained pending the Secretary of State’s decision whether to deport them unless released by the court or granted bail pursuant to section 54 of the Immigration and Asylum Act 1999, which came into force in February 2003. It may have been thought that paragraph 2(1) created a presumption in favour of detention of FNPs pending deportation but in *R (Sedrati) v Secretary of State for the Home Department* [2001] EWHC Admin 418, with the agreement of counsel for the Secretary of State, Moses J made a declaration that there was no such presumption.

292. What then, under the Secretary of State’s published policies, was the position of FNPs whom the Secretary of State decided to deport? It seems to me that many of these were likely to tick the boxes of those who, exceptionally, could properly be detained in accordance with those policies. They were in this country because this was where they had chosen to live. They had committed offences that had led the Secretary of State to conclude that their continued presence was no longer conducive to the public good. Most would be unlikely willingly to submit to deportation. There would be a risk both of re-offending and of absconding.

293. As Lord Dyson has explained at paras 14 and 15 of his judgment, on 9 September 2008 the Enforcement Instructions and Guidance, which had replaced the Operational Enforcement Manual, was amended so as to lay down a presumption in favour of detaining immigrants where the deportation criteria were met “in order to protect the public from harm and the particular risk of absconding

in these cases”. I agree with the Court of Appeal and with Lord Dyson that this amendment to her policy was one that it was open to the Secretary of State to make. However, Davis J, at first instance, ruled to the contrary and this led the Secretary of State to withdraw this amendment.

294. The UK Borders Act 2007 has since made provision by section 32 for automatic deportation of “foreign criminals” in specified circumstances. Section 36 requires the Secretary of State to exercise a power of detention of those being deported under section 32 unless “in the circumstances the Secretary of State considers it inappropriate”. These provisions were not in force at the time of the events that have given rise to these appeals.

295. There is thus a picture of a series of changes to policy, and of legislation, that has been influenced by decisions of the courts, not all of which have been sound.

The practical implications of the policies

296. Under this heading I propose to consider the practical implications of complying with the Secretary of State’s published policies, including her directions as to the effect of article 5 and our domestic case law. Compliance with the *Hardial Singh* guidelines, even as I have interpreted them, gives rise to some practical difficulties. Detention pending deportation is permissible for a lengthy period provided that the Secretary of State is taking reasonable steps to effect deportation and provided that there is a reasonable prospect that deportation will be possible. It is the latter proviso that raises particular difficulties for the possibility of deportation may vary from time to time. *R (Khadir) v Secretary of State for the Home Department* [2005] UKHL 39; [2006] 1 AC 207 illustrates this problem. In the case of each detainee it is necessary to keep the practicability of deportation under review. This problem is made more difficult if there is a requirement to detain for no longer than is reasonable “in all the circumstances”, where those circumstances include the nature of the crimes committed by the FNP and the degree of risk of re-offending. The assessment of what period of detention is reasonable in all the circumstances is not an easy one and there will inevitably be cases where, if subjected to judicial review, it will be held not to have been correctly answered. Furthermore the material circumstances are likely to be subject to frequent change, so that frequent reviews will be necessary.

297. This last fact was reflected by the requirements in relation to “Detention reviews” imposed under para 38.8 of the Operational Enforcement Manual which lie at the heart of the appeal in *SK (Zimbabwe)*.

298. Where there are concerns about the risk of absconding, it may be possible to meet these by measures which fall short of detention. The Secretary of State may release a FNP who is subject to deportation under a restriction order setting out terms as to residence, employment or occupation and reporting to the police pursuant to paragraph 2(5) of Schedule 3. The court has the same power in respect of those recommended for deportation under paragraphs 4 to 6 of Schedule 3.

299. Detainees also have the right to apply for bail. In para 12.8 of *Fairer, Faster, Firmer* the Government explained that it believed that there should be a more extensive judicial element in the detention process and proposed that this should be by way of bail hearings, commenting on the resource implications that this would have. Para 4.83 of *Secure Borders, Safe Haven* stated that Part III of the Immigration and Asylum Act 1999 had created a complex system of automatic bail hearings at specific points in a person's detention, that this had never been brought into force and that most of it was to be repealed. There is now a comprehensive statutory scheme for release on bail produced through a series of amendments to Schedule 2 to the 1971 Act.

300. All of this illustrates the practical problems implicit in the implementation of a regime that attempts to give effect to the policy of using the power to detain only as a last resort. Despite efforts to implement this policy there will inevitably be cases where individuals are detained when, under the policy, they should not be. The question arises of whether those who find themselves in this position are entitled to claim damages for false imprisonment.

What are the legal implications of the Secretary of State's published policies?

301. The appellants in this case should have been detained had the Secretary of State's published policy been applied. They claim to be entitled to damages for false imprisonment because those considering their cases reached the right conclusions by applying the wrong policy. Their complaint is as to the manner in which the decisions to detain them were taken, not as to the substance of those decisions. Thus, the question of the legal effect of the Secretary of State's published policies is not directly in issue. Nonetheless, underlying the appellants' case is the premise that it would not have been lawful for the Secretary of State to reach a decision that was in conflict with her published policy. For this reason she was required to reach her decision by applying her published policy, not some other policy. It follows that it is material to consider the effect of the Secretary of State's published policies.

302. I agree with Lord Dyson that, under principles of public law, it was necessary for the Secretary of State to have policies in relation to the exercise of

her powers of detention of immigrants and that those policies had to be published. This necessity springs from the standards of administration that public law requires and by the requirement of article 5 that detention should be lawful and not arbitrary. Decisions as to the detention of immigrants had to be taken by a very large number of officials in relation to tens of thousands of immigrants. Unless there were uniformly applied practices, decisions would be inconsistent and arbitrary. Established principles of public law also required that the Secretary of State's policies should be published. Immigrants needed to be able to ascertain her policies in order to know whether or not the decisions that affected them were open to challenge.

303. What is the effect of a decision to take action that falls within a power conferred by statute but which conflicts with a published policy as to the manner in which that power will be exercised? This is no easy question. It overlaps with the question of the nature and effect of a legitimate expectation. Is a decision that is contrary to policy unlawful, so that action taken pursuant to it is ultra vires? If so a published policy has the same effect as delegated legislation. Is this result dictated by the jurisprudence that has its origin in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147? Mr Husain QC for the appellants submitted that it is. He relied on the oft-cited catalogue of matters rendering the decision of a tribunal void propounded by Lord Reid in *Anisminic* at p 171. This included:

“It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, *under the provisions setting it up*, it had no right to take into account.”

The words that I have emphasised are significant. Lord Reid's proposition cannot necessarily be extended to the situation where the decision-maker fails to have regard to his own policy. *Anisminic* is, however, only the start of the story.

304. The effect of *Anisminic* was the subject of observations by Lord Diplock, which have been treated as authoritative. In *In re Racal Communications Ltd* [1981] AC 374, at pp 382-383 he described *Anisminic* as a legal landmark. It established that when Parliament conferred on an administrative authority the power to decide particular questions defined by the Act conferring the power, and the authority asked itself and answered the wrong question, it did something that the Act did not empower and its decision was a nullity. In *O'Reilly v Mackman* [1983] 2 AC 237, at p 278 he observed that if a tribunal mistook the law it must have asked itself the wrong question and one that it had no jurisdiction to determine, so that its decision was a nullity. In *R v Hull University Visitor, Ex p Page* [1993] AC 682, at pp 701- 702 Lord Browne-Wilkinson endorsed his comment, adding that any error of law made by an administrative tribunal or

inferior court in reaching its decision could be quashed for error of law. Earlier at p 701 he had observed that it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis with the effect that an error of law rendered the decision *ultra vires*. This reasoning cannot readily be extended to a decision which departs from executive policy. It would be totally unrealistic to postulate that when Parliament passes an Act conferring a discretionary power it does so with the intention that if the decision-maker publishes a policy in relation to the exercise of that power he will abide by that policy unless he has good reason not to do so.

305. In *Boddington v British Transport Police* [1999] 2 AC 143 the House of Lords took *Anisminic* a significant step further. The issue was whether the appellant could raise by way of defence to a criminal charge a contention that the bye-law, or an administrative decision taken under it, pursuant to which he was prosecuted, was *ultra vires*. Lord Irvine of Lairg LC, giving the leading speech, said at p 155 that an order made by the Secretary of State in the purported exercise of a statutory power would be regarded as void *ab initio* if it had been made in bad faith, or as a result of taking into account an irrelevant, or ignoring a relevant, consideration. At p 158 he said:

“The *Anisminic* decision established, contrary to previous thinking that there might be error of law within jurisdiction, that there was a single category of errors of law, all of which rendered a decision *ultra vires*. No distinction is to be drawn between a patent (or substantive) error of law or a latent (or procedural) error of law.”

Lord Irvine added, at p 159:

“Also, in my judgment the distinction between orders which are ‘substantively’ invalid and orders which are ‘procedurally’ invalid is not a practical distinction which is capable of being maintained in a principled way across the broad range of administrative action.”

306. Other members of the House were not prepared to reject the possibility that an *ultra vires* act might have legal consequences before its invalidity was recognised by the court: see Lord Browne-Wilkinson, at p 164 and Lord Slynn, at p 165.

307. *Boddington* no longer judged the *vires* of the exercise of a discretionary power by the assumed intention of Parliament. It held that if a decision was vitiated by procedural impropriety it was *ultra vires* and a nullity.

308. In the light of *Boddington* these appeals raise two issues: (i) is a decision of the Secretary of State that, without good reason, conflicts with her published policy outside her powers, so that it is a nullity? (ii) is a decision reached by the Secretary of State by the application of a policy that conflicts with her published policy a nullity, even if the decision itself accords with her published policy? I am currently concerned with the first question. The proposition underlying the appellants' case is that if a minister, without good reason, acts in a way that is contrary to her published policy she acts outside her powers. Her action is unlawful and can found a claim for damages if it infringes a private law right. It is time to look at the law relating to policy and legitimate expectation.

309. Where a public authority gives an undertaking to an individual that a discretionary power will be used in a particular way, this creates a legitimate expectation in the individual that the authority will comply with that undertaking. The courts will require the authority to give due consideration to that legitimate expectation when exercising its power: see *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607; [2002] 1 WLR 237. In an extreme case the courts can require the authority to comply with its undertaking: see *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213. The same principle applies where a minister publishes a policy that sets out the way in which he intends to exercise a discretionary power. This also creates a legitimate expectation in those affected by the power as to the manner in which it will be exercised. In either case the court can intervene in performance of its duty to ensure that the executive acts fairly and does not abuse the powers conferred on it by Parliament.

310. These principles have quite often been applied in relation to immigration decisions. I have already quoted my invocation of them in *Saadi*: see para 271 above. Lord Dyson at para 85 has referred to my judgment in *Nadarajah v Secretary of State for the Home Department* [2003] EWCA Civ 1768. In that case the Court of Appeal held that N's detention was unlawful because it was in conflict with the Secretary of State's policy. The court further held that as the detention was contrary to law, it infringed article 5(1)(f) of the Convention. The Court had earlier stated at para 15 that the consequence of these findings would be that N would be entitled to damages for unlawful detention. The Secretary of State had sought to show that N's detention was not contrary to his policy. He had not challenged the proposition that if the detention was contrary to his policy it would be unlawful, nor that this would lead to liability in damages. There was no discussion of the nature and effect of the doctrine of legitimate expectation in the context of detention under the 1971 Act. There was, however, a sequel to the case in which the nature of the doctrine of legitimate expectation received detailed consideration.

311. The development of the law of legitimate expectation was pellucidly set out at some length by Laws LJ, giving the only reasoned judgment in the Court of

Appeal in *R (Nadarajah) v Secretary of State for the Home Department*, [2005] EWCA Civ 1363, a decision which, amazingly, does not seem to have found its way into the law reports. At the end of his judgment, in paras 68 and 69, Laws LJ set out his conclusions on the principles to be derived from these authorities. This merits citation at length:

“The search for principle surely starts with the theme that is current through the legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. That being so there is every reason to articulate the limits of this requirement – to describe what may count as good reason to depart from it – as we have come to articulate the limits of other constitutional principles overtly found in the European Convention. Accordingly a public body’s promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body’s legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.

This approach makes no distinction between procedural and substantive expectations. Nor should it. The dichotomy between procedure and substance has nothing to say about the reach of the duty of good administration. Of course there will be cases where the public body in question justifiably concludes that its statutory duty (it will be statutory in nearly every case) requires it to override an expectation of substantive benefit which it has itself generated. So also there will be cases where a procedural benefit may justifiably be overridden. The difference between the two is not a difference of

principle. Statutory duty may perhaps more often dictate the frustration of a substantive expectation. Otherwise the question in either case will be whether denial of the expectation is in the circumstances proportionate to a legitimate aim pursued. Proportionality will be judged, as it is generally to be judged, by the respective force of the competing interests arising in the case. Thus where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure. ...On the other hand where the government decision-maker is concerned to raise wide-ranging or 'macro-political' issues of policy, the expectation's enforcement in the courts will encounter a steeper climb. All these considerations, whatever their direction, are pointers not rules. The balance between an individual's fair treatment in particular circumstances, and the vindication of other ends having a proper claim on the public interest (which is the essential dilemma posed by the law of legitimate expectation) is not precisely calculable, its measurement not exact."

312. This passage in Laws LJ's judgment was obiter, as is my approval of it as setting out a compelling analysis of the law. I have, however, some concerns as to the consequences of this extension of the principles of judicial review if a minister's unjustified failure to comply with his policy is to be treated as an unlawful act that subjects him to potential liabilities in private law independently of the discretionary remedies of judicial review. The facts of this case illustrate my concern. Assume that I am correct in concluding that Schedule 3 gives the Secretary of State wide ranging powers to detain those who are illegally in this country, whether pending the processing of their applications for permission to enter or pending their removal when such applications have been refused. The Secretary of State did not choose to exercise those powers to their full extent. The policy of only detaining immigrants as a last resort is a benevolent policy. That policy carries with it, however, as I have explained, the risk that, as a result of erroneous decisions in the application of a difficult test, some immigrants may be detained in breach of that policy. Not all would agree that it is fair that they should be entitled to compensation, in the form of damages for false imprisonment, on the same scale as those whose detention falls outside any statutory power.

313. Notwithstanding these concerns, I have concluded that the detention of a person in circumstances where, under the Secretary of State's published policies he should not have been detained, was both a violation of principles of public law and unlawful so as to exclude any justification for the detention under article 5(1)(f) of the Convention and to give rise to liability for false imprisonment.

Was the detention of each of the appellants contrary to the Secretary of State's published policies?

314. On this question all members of the court are agreed. Each of the appellants, by reason of the risk of re-offending and of absconding, fell into the exceptional category of those who were liable to detention under the Secretary of State's published policies. Had the decision-maker applied those policies each of the appellants would have been detained. On this topic I have nothing to add to the judgment of Lord Dyson.

What were the defects in the policy applied when deciding whether the appellants should be detained?

315. Mr Beloff conceded that the policy, which I shall call "the secret policy", applied by the decision-maker when deciding to detain the appellants was "unlawful" on three counts. The meaning of the word "unlawful" in this context needs clarification. It is not having a policy but implementing a policy that may infringe the law. A policy can be described as "unlawful" if action taken pursuant to it will, or may, be unlawful under private or public law. The first reason why the policy that was applied was unlawful was that it was a "blanket policy". It brooked of no exceptions save rare ones that might be made for compassionate reasons. It was a blanket policy in that it was applied to any FNP recommended for deportation. Thus it paid no regard to the severity of the offence for which the FNP had been convicted nor to the likelihood and consequence of his re-offending. In this I do not consider that it was open to objection on public law grounds. On my interpretation of Schedule 3 it was open to the Secretary of State to decide her own criteria for determining those she wished to detain pending deportation. Secondly the policy was a blanket policy in that it gave no scope for the application of discretion, save on compassionate grounds. I do not consider that this was objectionable on public law grounds. There is a principle of public law that a minister who is granted a discretionary power must not improperly fetter the exercise of his discretion. In a case such as this, however, a minister has to lay down a firm policy in order to ensure consistency of decision-making. The Secretary of State was laying down an exception to the general rule that there was a presumption against detention. I can see no reason why she should not lay down a policy under which all those whom she chose to deport should be detained pending their deportation save in circumstances where there were compassionate reasons for departing from the policy. Where the secret policy was objectionable was that it was to be applied without consideration of whether detention would violate the *Hardial Singh* principles. Under the secret policy FNPs were liable to be detained even if they were nationals of a country to which deportation was not a practical possibility. Thus application of the secret policy would, in some cases, result in detention that was outside the power conferred by the 1971 Act.

316. The second reason why Mr Beloff conceded that the secret policy was unlawful was that it was inconsistent with the Secretary of State's published policy. Inasmuch as the application of the secret policy would result in the detention of some who would not have been detained on the application of the published policy it was plainly open to objection on this ground.

317. The third reason why Mr Beloff conceded that the secret policy was unlawful was that it was secret. This concession was also properly made, for the reasons given by Lord Dyson.

What were the circumstances in which the secret policy was applied?

318. Lord Dyson has summarised the circumstances in which the secret policy was applied. Lord Walker and Lord Collins have described these as a serious abuse of power. Lady Hale has expressed some sympathy for the predicament in which the civil servants found themselves. Having considered the voluminous discovery, some of it very belated, I share both the concern expressed by Lord Walker and Lord Collins and the sympathy expressed by Lady Hale. It was clear to officials that the Secretary of State wished all FNPs to be deported, and to be detained pending deportation. They were concerned at the legality of such a policy, particularly because it conflicted with the published policy. There was a protracted period preparing and circulating draft advices to ministers in which each of a lengthy circulation list was given the chance to comment. Many did, whereupon the draft would be re-circulated. There seems to have been a reluctance to grasp the nettle of presenting advice that would be unpalatable. There were considerable delays caused by the perceived need to obtain counsel's opinion. The picture is of bureaucracy at its worst with the best proving constantly the enemy of the good. The lamentable fact is that approximately two years elapsed between the identification of the need to publish a revised policy on detention and the publication of such a policy in the new Enforcement Instructions and Guidance in September 2008. Although it was suggested that ministers might favour a policy that would appear to make the courts responsible for the release from detention of FNPs, this course was neither advocated nor adopted. There was muddle galore, but I am not persuaded having considered the considerable discovery that there was a deliberate attempt to deceive the courts as to the policy that was being applied.

Did the application of the secret policy render the detention of the appellants unlawful?

319. It is now accepted by the Secretary of State that the decision-maker in the case of each of the appellants decided that he should be detained by applying to

him the secret policy. The power to detain that he purported to apply was that conferred by Schedule 3. Had the appellants been persons whose deportation would not be possible within a reasonable period, so that they fell outside the lawful application of Schedule 3, the application of the secret policy would have resulted in their detention none the less. Had the appellants been persons whose detention would have conflicted with the Secretary of State's published policy, so that their detention would be unlawful under the principles of public law discussed above, the application of the secret policy would have resulted in their detention none the less. In the event each appellant fell within the group of FNPs for whom detention was appropriate, indeed inevitable, if the Secretary of State's published policy was applied to them. Was their detention none the less unlawful because of the process of reasoning that had brought it about? Mr Husain submits that it was. The Court of Appeal held that it was not, because the application of the secret policy was not material; it produced the result that would have been produced had the right policy been applied.

320. This is I believe a novel question, not to be answered by the simple answer that the detention was "unlawful" because the decision that produced it was "unlawful". It is also a complex question because of the novel feature of the existence of a published policy that would have predetermined the decisions in relation to the two appellants had it been applied.

321. It is helpful to unpick the secret policy and consider its effect if each objection to it had been the only objection. I take first the objection that it was a blanket policy. Imagine the Secretary of State had publicly announced that all FNPs who were given deportation orders would henceforth be detained pending deportation, subject to exceptions on compassionate grounds. The application of this policy would have been objectionable in that it would have resulted in the detention of those FNPs whose deportation would not be possible within a reasonable period. Would this fact have rendered unlawful the detention of the majority of FNPs whose deportation was possible? I see no reason of principle why it should.

322. Next I take the objection that the policy was in conflict with the published policy. Had the secret policy not been secret, this objection would have melted away. The public policy would simply have been publicly altered. This would not have been objectionable.

323. What of the objection that the policy was secret? Had this been the only objection to it I do not see how this could have availed the appellants. They were already subject to a policy that would result in their detention. They had no legitimate expectation of being permitted to remain at large. If the secret policy had extended the category of those FNPs who would be detained, those who,

without knowing it, were brought within the category of detainees might have had cause to object to their detention, but I do not see how those who were going to be detained under the previous published policy could legitimately complain.

324. If none of the individual objections to the secret policy would have afforded the appellants legitimate grounds for challenging their detention, does the position change when the objections are considered cumulatively? I can see no reason why it should. Both logically and intuitively my conclusion is that the introduction of the secret policy gave those whose detention resulted from it cause to challenge the legality of their detention, but not those whose legitimate expectation was that they would be detained under the application of the published policy.

325. This was also the reaction of those officials who questioned the application of the secret policy. Their concern was that those whose detention infringed the *Hardial Singh* guidelines or the published policy would have claims for illegal detention, not that every detainee would have such a claim.

326. I now turn to some of the authorities relied upon by the appellants to see how they bear on the unusual problem raised by these appeals.

327. In *Christie v Leachinsky* [1947] AC 573 the plaintiff, who claimed damages for false imprisonment, had been arrested by police officers on a charge of “unlawful possession” under the Liverpool Corporation Act 1921. That Act did not give a power to arrest for this offence. The defendants raised by way of defence a plea that, at the time of the arrest they reasonably suspected him of receiving stolen goods, which provided a valid ground for his arrest. The House of Lords held that this was no defence as at the time of his arrest he had been given a different ground of arrest. This decision is normally cited for the proposition that an arrest will be unlawful if the person arrested is not told the reason for his arrest at the time that he is arrested. It is also authority for the proposition that if a person is arrested for a reason which is not a valid statutory ground of arrest it is no defence to an action for false imprisonment that he could have been validly arrested on alternative grounds. I do not see that this decision bears on the very different facts of the present case.

328. In *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662 the Court of Appeal held that detention by the police without the review required by section 40(1)(b) of the Police and Criminal Evidence Act 1984 was unlawful and the fact that, if the review had taken place authorised detention would have continued was no answer to a claim for substantial damages for false imprisonment. That decision has no bearing on the issue that I am considering, which is whether the detention of the appellants was unlawful.

329. In *Langley v Liverpool District Council* [2005] EWCA Civ 1173; [2006] 1 WLR 375 a constable had purported to exercise a discretionary power under the Children Act 1989 in removing a child from its family. The Court of Appeal held that his exercise of discretion had been wrongful in that, in the circumstances prevailing, it ran counter to the statutory scheme. It followed that the removal of the child was unlawful and the constable had committed the tort of false imprisonment. I have found this decision of no assistance in deciding whether, on the unusual facts of this case, the detention of the appellants was unlawful.

330. One of the cornerstones of the appellants' case was the speech of Lord Diplock, with which all other members of the House agreed, in *Holgate-Mohammed v Duke* [1984] AC 437. A police officer had arrested the plaintiff on suspicion of the theft of jewellery. He did so pursuant to section 2(4) of the Criminal Law Act 1967, which gave him a discretionary power to arrest her. She alleged, however, that the exercise of this power had been unlawful because, when deciding whether to exercise his discretion the officer had been influenced by a consideration which was irrelevant, namely the likelihood that the fact that she had been arrested would be more likely to induce her to confess to her crime when interviewed. Lord Diplock held that this consideration was not irrelevant to the proper exercise of the officer's discretion. It was a matter to which he could legitimately have regard having regard to the objectives of the statutory power to arrest. Thus the comments upon which the appellants have relied were *obiter*. Those comments, at p 443 of Lord Diplock's speech, were as follows:

“The *Wednesbury* principles, as they are usually referred to, are applicable to determining the lawfulness of the exercise of the statutory discretion of a constable under section 2(4) of the Criminal Law Act 1967, not only in proceedings for judicial review but also for the purpose of founding a cause of action at common law for damages for that species of trespass to the person known as false imprisonment, for which the action in the instant case is brought.

The first of the *Wednesbury* principles is that the discretion must be exercised in good faith. The judge in the county court expressly found that Detective Constable Offin in effecting the initial arrest acted in good faith. He thought that he was making a proper use of his power of arrest. So his exercise of that power by arresting Mrs Holgate-Mohammed was lawful, unless it can be shown to have been ‘unreasonable’ under *Wednesbury* principles, of which the principle that is germane to the instant case is: ‘He [sc the exerciser of the discretion] must exclude from his consideration matters which are irrelevant to what he has to consider’.”

331. The way in which the appellants argue that this passage impacts on the facts of the present case is, as I understand it, as follows. The decision to detain the appellants was taken by application of the secret policy. This infringed the *Wednesbury* principles because it failed to have regard to relevant considerations, namely whether the *Hardial Singh* principles precluded detention and whether the appellants' detention complied with the published policy. The answer given by the Court of Appeal to this point is that, so far as the appellants were concerned, the failure to consider these matters was not material because, had they been considered, the conclusion would have been that neither matter posed an impediment to the appellants' detention and had they been considered the decision would inevitably have been the same.

332. The approach of the Court of Appeal involves a refinement of the *Wednesbury* principles. It is an application of the following reasoning of May LJ in *R v Broadcasting Complaints Commissioner, Ex p Owen* [1985] QB 1153, 1177:

“Where the reasons given by a statutory body for taking or not taking a particular course of action are not mixed and can clearly be disentangled, but where the court is quite satisfied that even though one reason may be bad in law, nevertheless the statutory body would have reached precisely the same decision on the other valid reasons, then this court will not interfere by way of judicial review.”

333. I believe that at least in this new area of the effect of public policy, the approach of the Court of Appeal is a sound one. Where a minister publishes a policy as to the circumstances in which he will exercise a statutory power and then he or his officials apply a different policy which results in the exercise of that power in circumstances which range wider than those published, I do not consider that those whose cases fell within the published policy can automatically contend that the application of the power to them has been unlawful. If the facts are that no reasonable decision-maker applying the published policy could have done other than reach the decision which the decision-maker arrived at, the fact that he applied a more expansive, but unpublished, policy when reaching his decision will not invalidate that decision.

334. For these reasons, which accord I believe with the reasoning of both the Court of Appeal and Lord Brown, I have concluded that the application of the secret policy did not render the detention of the appellants unlawful.

Damages

335. In view of my conclusions on liability, the issue of damages does not arise. Had I agreed with Lord Dyson on liability, I would have shared his approach to damages. I also endorse Lord Collins' conclusions in relation to vindicatory damages.

Reviews

336. A word about reviews. If the majority are correct in concluding that the application of the secret policy rendered all decisions taken pursuant to it unlawful, then it seems to me that the moment that the secret policy was applied to reviews of the lawfulness of those detained, their continued detention would have been rendered unlawful, even if they were lawfully detained under the published policy before the secret policy was introduced and even if they remained subject to detention within the terms of the published policy. This would be an extraordinary result.

MR LUMBA'S HARDIAL SINGH APPEAL

337. Mr Lumba has now voluntarily left the country, but the question remains of whether his detention became unlawful in the period before he left. Because of the view that I take of the scope of the *Hardial Singh* principles, I find the issues in relation to this part of Mr Lumba's appeal easier to resolve than has Lord Dyson. The lengthy period during which Mr Lumba was detained largely resulted from his own efforts to avoid deportation. For most of the period his deportation had been a practical possibility. The Secretary of State had not been dragging her feet in her effort to deport Mr Lumba. I agree with the Court of Appeal that Mr Lumba could not be heard to say that it was impossible to deport him within a reasonable time when the difficulty in doing so resulted from his own attempts to avoid deportation and not from extrinsic problems in effecting his deportation.

338. On my view of the interpretation of Schedule 3, whether Mr Lumba posed a risk of re-offending was not relevant to the period for which he could lawfully be detained. It seems to me that para 107 of Lord Dyson's judgment lends support to my belief that the power to detain is not dependent upon an object of the detention being to facilitate deportation. The question remains, however, in Mr Lumba's case of whether his continued detention, having particular regard to his mental condition, remained consistent with the Secretary of State's published policy. He has now voluntarily left the country, but if the issue of the lawfulness of his

detention is to be pursued I agree with Lord Dyson that this is a matter to be considered by the Administrative Court on remission.

339. Subject to this, for the reasons that I have given I would dismiss these appeals.

LORD BROWN (with whom Lord Rodger agrees)

340. Amongst the many issues to be decided on these appeals far and away the most important concerns the true nature of the tort of false imprisonment. Lord Dyson having set out all the relevant facts and the detailed legal context in which the many issues here arise for determination, I shall proceed without more to what I recognise is to be a dissenting judgment on this crucial question.

341. “Freedom from executive detention is arguably the most fundamental right of all.” Thus Lord Bingham of Cornhill in his 2002 Romanes lecture. The tort of false imprisonment is, of course, the remedy provided by law for the violation of this freedom, for the unlawful deprivation of a person’s liberty. The outcome of the appeals proposed by the majority of the court is to hold the appellants – and, indeed, a large number of others similarly placed – to have been unlawfully detained, in many instances for a period of years, and yet to compensate them by no more than a nominal award of damages. They are to be held unlawfully detained because, in his (or her) exercise of the undoubted power to detain them, the Secretary of State breached certain public law duties. But they are to be awarded only nominal damages because, whatever approach had been taken to the exercise of the detaining power, the appellants must inevitably have been detained in any event.

342. Whilst I share to the full the majority’s conclusion that it would be quite wrong in the circumstances of these cases to award the appellants any substantial compensation in respect of their detention, for my part I would reach that conclusion by a very different route. I would hold that a public law breach of duty in the course of exercising an executive power of detention does not invariably, and did not here, result in the subsequent detention itself being unlawful - in short, that these appellants were not the victims of false imprisonment.

343. Naturally I recognise the beguiling simplicity and apparent purity of the majority’s approach. Ever since the House of Lords decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, decisions made within the decision-maker’s jurisdiction but containing a public law error have generally been regarded as precisely equivalent to decisions made entirely without jurisdiction.

Thus, it is said, a decision to detain which is flawed by a public law error is ultra vires and the detention which follows is necessarily unauthorised and therefore unlawful. Logically, indeed, this must be so however minor the public law error involved in the making of the decision and however inevitable it is that the decision to detain would have been made in any event. (At one stage in the argument Mr Husain QC for the appellants accepted that some public law failures might be too inconsequential to require this conclusion but unsurprisingly he was unable to formulate any test by which to determine such cases and, indeed, he had argued before this court on behalf of the appellant in *R (SK (Zimbabwe)) v Secretary of State for the Home Department* [2009] 1WLR 1527 that false imprisonment must follow inexorably even from periodic failures to comply with the Secretary of State's self-imposed monthly review process.) Given, moreover, that the tort of false imprisonment is actionable *per se* – that “it is of the essence of the tort of false imprisonment that the imprisonment is without lawful justification” (Lord Hope in *R v Governor of Brockhill Prison ex parte Evans* [2001] 2 AC 19, 32) – logic also suggests that the notion of nominal damages should have no part to play in determining the compensation payable. Why should someone imprisoned without lawful justification be paid nominal damages only? If the answer is that they would have been imprisoned anyway, under the same power and in just the same way, then in reality the Court is saying that the tort may be committed merely in a technical way. I have to say that such an approach would to my mind seriously devalue the whole concept of false imprisonment.

344. It is true that in *Murray v Ministry of Defence* [1988] 1 WLR 692, whilst confirming that an action for false imprisonment lies even if the detainee does not know that he has been imprisoned, Lord Griffiths added (p703 A-B):

“If a person is unaware that he has been falsely imprisoned and has suffered no harm, he can normally expect to recover no more than nominal damages”.

In my opinion, however, there is a very real difference between a detainee who is in fact unaware of being under physical restraint (perhaps because he is asleep or because he simply does not know that the door has been locked) and a detainee who is fully aware of his loss of freedom. To award the latter nominal damages only, on the basis that, even had he been dealt with lawfully he would still have been deprived of his freedom anyway, is really to say that he was in truth rightly in detention. That seems to me very different from saying that he was wrongly imprisoned but happily unaware of it. I have difficulty, therefore, with Lord Dyson's criticism (at paras 92 and 93) of the passage on damages in Clarke LJ's judgment in *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662, 668. To compensate (or rather to deny compensation) on the basis that the detainee “has suffered no loss because he would have remained in detention whether the tort was committed or not” is in my opinion the very negation of the

tort: it is to hold that the detainee was at one and the same time both rightly and wrongly imprisoned.

345. Search as one may in the judgments both of the Court of Appeal and of the House of Lords in *Christie v Leachinsky* (respectively [1946] KB 124 and [1947] AC 573), there is no hint of a suggestion that the false imprisonment which followed upon the unlawful arrest in that case might properly attract only a nominal award of damages. I do not say that those falsely imprisoned should be compensated identically irrespective of how deserving they were of liberty rather than restraint during the relevant period of detention; I do say, however, that rather than hold a detainee simultaneously both rightly detained and falsely imprisoned, the law should instead recognise that, notwithstanding a flaw in the decision-making process such as to involve the breach of a public law duty, the decision-maker has not in those circumstances committed the tort of false imprisonment. A court which speaks with two voices risks bringing the law into disrepute.

346. Is this court then bound by established law to reach so unsatisfactory a conclusion as the majority of the court suggest: tortious liability but for nominal damages only? To my mind it is not. Assuming that a power to detain exists, that any preconditions to its exercise have been satisfied and any limitations upon its scope observed, I know of no case which holds the detainee to have been falsely imprisoned merely because, in the course of exercising the power, the decision-maker committed some public law breach of duty. On the contrary, and to my mind hardly surprisingly, the courts have consistently shied away from such a conclusion as is amply and consistently demonstrated by the series of Court of Appeal judgments in this very line of cases. Such was the decision of the Court of Appeal (Laws, Keene and Longmore LJJ) in *SK (Zimbabwe)*, the Court of Appeal (Lord Neuberger of Abbotsbury MR, Carnwath and Stanley Burnton LJJ) in the cases from which the present appeals are brought, and the Court of Appeal (Maurice Kay, Longmore and Black LJJ) more recently still in *Anam v Secretary of State for the Home Department* [2010] EWCA Civ 1140. In *Anam*, indeed, Black LJ in giving the leading judgment characterised the appellant's argument thus at para 17:

“At its most radical, the submission advanced by [counsel] is that a failure by the Secretary of State to apply his published policy in making a decision to detain necessarily renders that decision a nullity and the resulting detention unlawful.”

Have all these Lords Justices, many of them distinguished public law jurists, lost sight of the clear and basic principles of public law which, it is said, necessarily compel such a ‘radical’ conclusion?

347. So far from the authorities supporting such a surprising conclusion they can and should, I suggest, be analysed rather to the following effect.

(1) False imprisonment is the inescapable result of detention absent any power to detain *R v Governor of Brockhill Prison (No 2) Ex p Evans* [2001] 2 AC 19 is itself a good illustration of this basic proposition: the appellant having been kept in prison beyond the date when her custodial sentence, properly calculated, expired, there could hardly have been a clearer case of false imprisonment. Such would also be the position were someone arrested for a non-arrestable offence. Analysed in the way I analysed the power of detention under Schedule 2 to the Immigration Act 1971 (directly analogous to the Schedule 3 power under consideration in these appeals) in *R (Khadir) v Secretary of State for the Home Department* [2006] 1 AC 207, these are cases not about the *exercise* of the power, but rather about its *existence*.

(2) The tort of false imprisonment is committed too if someone is detained in breach of a condition precedent to the existence of the detention power. *Christie v Leachinsky* [1947] AC 573 illustrates the common law's imposition of such a condition precedent: a right of arrest only arises when the citizen is told why he is being arrested. *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662 illustrates the imposition of such a precondition by statute (in that case the requirement for review as a precondition of continued detention beyond six hours). *R v Secretary of State for the Home Department Ex p Khawaja* [1984] AC 74 provides another such illustration, the House of Lords there deciding that the power to detain and remove an immigrant as an illegal entrant under Schedule 2 to the 1971 Act was dependent upon establishing such illegality as a precedent fact.

(3) Detention beyond the scope of a detaining power similarly constitutes false imprisonment. For example, the limitations imposed by the courts following Woolf J's decision in *R v Governor of Durham Prison Ex p Hardial Singh* [1984] 1 WLR 704 (the *Hardial Singh* principles) undoubtedly operate to constrain the power of detention under paragraph 2 of Schedule 3 and it has long been recognised that detention in breach of the *Hardial Singh* principles gives rise to tortious liability. (Categories 2 and 3, I recognise, may not always be easily distinguishable. It could, for example, be said that the first *Hardial Singh* principle constitutes a precondition for the exercise of the detention power. It has seemed to me nonetheless worth attempting the distinction.)

(4) I would accept too that in certain circumstances a power of detention may be narrowed by a published policy as to how it will be exercised. The Court of Appeal's decision in *R (Nadarajah) v Secretary of State for the Home Department* [2004] INLR 139 is, I think, an illustration of that in the present context. The Secretary of State had in that case adopted a published policy which in substance

narrowed the grounds on which the detaining power (in that case under schedule 2 to the 1971 Act) would be exercisable (the stated policy there being to release anyone whose removal was not imminent). Certainly it is on that basis alone that I would regard *Nadarajah* as correctly decided. And it must, of course, be recognised that, as with any other statement of policy (a policy being, by definition, no more than an advance indication of how it is proposed to exercise the particular discretionary power in question) it is always open to the holder of the power to change that policy – see, for example, in relation to the Immigration Rules themselves, *MO (Nigeria) v Secretary of State for the Home Department* [2009] 1 WLR 1230.

348. Every false imprisonment case on which the appellant relies can, in my opinion, be seen to fall within one or other of the above four categories. Besides those already mentioned, two cases in particular call for brief special mention.

349. *Kuchenmeister v Home Office* [1958] 1 QB 496 concerned a German national who landed at Heathrow en route to Dublin. The immigration officers, instead of refusing him leave to land (as they had been instructed to do), detained him at the airport until it was too late for him to catch the Dublin flight. Holding him to have been wrongfully imprisoned, Barry J said this (p 512):

“His liberty was restricted to a greater degree than the immigration authorities were entitled to restrict it under [the particular power they sought to rely upon]. The fact that they might have restricted his mobility by employing the powers conferred upon them by other articles of the Order seems to me to be immaterial. It is no answer, when a man says ‘I have been unlawfully arrested without a warrant,’ to say ‘Well, had I (the person making the arrest) taken the trouble to go and ask for a warrant, I would undoubtedly have got it.’ That would be no answer to a claim for unlawful arrest. Similarly here, although the [immigration officers] could have detained the plaintiff by refusing him leave to land, that does not entitle them to detain him on the grounds on which they did.”

The case was to my mind correctly decided and can be seen to fall squarely under the first of the above four categories: the immigration officers simply had no power to restrict the plaintiff’s movements in the way they did.

350. *Langley v Liverpool City Council* [2006] 1 WLR 375 concerned a child in obvious need of protection. Two relevant powers existed, respectively under sections 44 and 46 of the Children Act 1989. Section 44 provides for the grant of an emergency protection order (EPO) authorising the council to remove a child

into the care of foster carers; section 46 gives the police power to take a child into police protection. The police officer there having removed the child in purported exercise of his power under section 46, the Court of Appeal held that he had been wrong to do so and accordingly that the child had been falsely imprisoned. Dyson LJ in giving the leading judgment said that “the statutory scheme clearly accords primacy to section 44 [which] is sanctioned by the court and . . . involves a more elaborate, sophisticated and complete process than removal under section 46” (para 38); that “section 46 should be invoked only where it is not practicable to execute an EPO” (para 40); and that in the result, albeit the officer “had jurisdiction to remove [the child] pursuant to section 46”, he could not lawfully invoke that power unless there were “compelling reasons for exercising this power when, to his knowledge, an EPO was in force which authorised the council to remove [the child] into the care of foster carers” (paras 44 and 46). Again, I have no difficulty in accepting the correctness of this decision: just as the *Hardial Singh* line of cases imposed restrictions upon the power of detention under the 1971 Act, so the court in *Langley* thought it right to place a limitation upon the scope of the section 46 power. The case falls neatly into category 3 (or perhaps into category 2, on the basis that the impracticality of executing a concurrent EPO was held to be a precondition to the lawful exercise of the section 46 power).

351. In what circumstances, then, does the breach of a public law duty in the exercise of a power to detain result in the detainee being falsely imprisoned? I have already indicated, at paragraph 347(4) above, one such circumstance, namely when the Secretary of State by his published policy indicates that he will not exercise his power to its fullest extent but rather will confine its exercise within certain limits (for example, as in *Nadarajah*, by releasing anyone whose removal is not imminent). Such a published policy, unless and until it is changed, as a matter of public law requires the decision-maker to decide cases (subject always to reasoned exceptions) in accordance with it.

352. It is my clear present view (subject to any further argument on the point) that *SK (Zimbabwe)* provides a good illustration of circumstances where, the breach of a public law duty notwithstanding, the detainee should *not* be regarded as falsely imprisoned. The Secretary of State there breached what was his undoubted public law duty to review all detention cases monthly in accordance with his published policy on procedure. As it seems to me, however, it is one thing to breach a policy under which a detainee is entitled to be released; quite another to breach a policy under which he is entitled merely to be reviewed for release. Whereas the former will result in false imprisonment, the latter will not. Obviously, if the detainee on review would have been entitled to be released under the *Hardial Singh* principles (or, if more favourable, the published policy statements) then he has a claim for false imprisonment. But the claim in those circumstances arises from his continued detention beyond the date of such entitlement, not from the failure to review his case.

353. What, however, is the position in a case like the present when the Secretary of State's breach of public law duty consists of applying, in place of his published policy, an unpublished policy less favourable to those subject to the detaining power? On the appellant's case, of course, that automatically results in the false imprisonment of every single detainee whose continued detention has been considered under the wrong policy, irrespective of whether or not they would have had the least prospect of release whatever policy had been applied. Applying the wrong policy, the argument runs, means that the Secretary of State failed to have regard to a material consideration, instead had regard to an immaterial consideration, and therefore reached his decision in an unlawful manner. This renders it a nullity with the result that there was no lawful authority for the ensuing detention.

354. The closest this thesis comes to finding high-level support in the authorities is in a much quoted dictum of Lord Diplock in *Holgate-Mohammed v Duke* [1984] 1 AC 437. Following Mrs Holgate-Mohammed's arrest on suspicion of theft and her detention for six hours at a police station for questioning, she was found at first instance to have been wrongfully arrested and was awarded £1,000. This was on the basis that the arresting officer, in deciding that there would be a better prospect of her confessing if she were arrested and detained rather than merely interviewed under caution, wrongfully exercised his power of arrest. Upholding the Court of Appeal's decision to allow the Chief Constable's appeal, the House of Lords held that the better prospect of the plaintiff confessing her guilt if arrested and questioned at a police station was in fact a relevant matter so that the arrest was not after all unlawful. In the course of the only reasoned speech, Lord Diplock (at p443) observed that, the condition precedent to the officer's powers of arrest and detention having been fulfilled by his having reasonable cause to suspect the plaintiff to be guilty of an arrestable offence, "this left him with an executive discretion whether to arrest her or not." It is the next passage in the speech that is so strongly relied upon by the appellants:

"Since this is an executive discretion expressly conferred by statute upon a public officer, the constable making the arrest, the lawfulness of the way in which he has exercised it in a particular case cannot be questioned in any court of law except upon those principles laid down by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, that have become too familiar to call for repetitious citation. The *Wednesbury* principles, as they are usually referred to, are applicable to determining the lawfulness of the exercise of the statutory discretion of a constable under section 2(4) of the Criminal Law Act 1967, not only in proceedings for judicial review but also for the purpose of founding a cause of action at common law for damages for that

species of trespass to the person known as false imprisonment, for which the action in the instant case is brought.”

Lord Diplock then noted that amongst the *Wednesbury* principles was that whoever exercises the discretion must (in Lord Greene’s words) “exclude from his consideration matters which are irrelevant to what he has to consider”.

355. It is, to my mind, critical to a proper understanding of Lord Diplock’s speech to recognise that the relevant matter in question there, the matter which the judge at first instance held the officer to have wrongly taken into consideration, was a consideration clearly decisive of the way he had exercised his discretion. The whole reason for the officer exercising his power to arrest and detain the plaintiff was so that she would then be more likely to confess. If that had been an unlawful consideration, nothing could be clearer than that without it the officer would not have exercised the power at all. In short, on the facts of the case, the power would have been exercised for an improper reason and the resultant detention necessarily unlawful.

356. Certainly it would in my opinion be quite wrong to regard the case as authority for any wider proposition, least of all a thesis so absolute and unsatisfactory as that contended for here. There had been no argument on the point: the Chief Constable was not even called upon. Small wonder that in the quarter century following, despite the hugely increased scope of public law challenges, not a single case appears to have held an arrested detainee falsely imprisoned on *Wednesbury* grounds save where the arresting officer acted either in bad faith or for an improper purpose.

357. Perhaps the way to put the point is this. Classically most public law challenges go to the decision-making process rather than to the substance of the decision taken. The substantive decision is for the public body and not for the court to take and generally a successful challenge requires that the impugned decision be taken afresh. Obviously, if the substantive decision reached is outside the powers conferred upon the public body purporting to make it (*ultra vires* in the traditional, literal sense), then it must be nullified. So too if it is irrational in the public law (*Wednesbury*) sense – i.e. outside the range of permissible decisions which the public body is empowered to make. But if, as here, the challenge is to the process whereby decisions to continue a detainee’s detention were taken – or, indeed, as in *SK (Zimbabwe)*, if what is challenged is a failure to take decisions (as often as promised by the policy) as to whether a detainee’s detention should continue – then the appropriate remedy is to require the decision-maker to act lawfully: to re-decide decisions that resulted from a flawed decision-making process or, as in *SK (Zimbabwe)*, to take decisions that earlier the decision-maker had omitted to take. It simply does not follow from a flawed decision-making

process that the detainee's continued detention immediately thereupon becomes unlawful so as to make him a victim of false imprisonment until a fresh decision comes later to be lawfully taken – so that, for example, a detainee whose detention is reviewed every second month instead of monthly as the published policy dictates, alternates yo-yo like between lawful detention and false imprisonment.

358. Nor does it seem to me that the absolutist approach to the consequences of public law error espoused here by the majority of the Court has received universal endorsement over recent years. The decision of the House of Lords in *Boddington v British Transport Police* [1999] 2 AC 143 is often cited as a modern example of the *Anisminic* principle being applied in the ordinary course of proceedings (there in the context of a criminal trial). But there are important dicta in the judgments which expressly leave open the question whether legal consequences may nonetheless follow from unlawful action. Consider this passage from the speech of Lord Slynn of Hadley, an acknowledged master in the field of public law:

“In our jurisdiction the effect of invalidity may not be relied on if limitation periods have expired or if the court in its discretion refuses relief, albeit considering that the Act is invalid. These situations are of course different from those where a court has pronounced subordinate legislation or an administrative act to be unlawful or where the presumption in favour of their legality has been overruled by a court of competent jurisdiction. But even in these cases I consider that the question whether the acts or byelaws are to be treated as having at no time had any effect in law is not one which has been fully explored and is not one on which it is necessary to rule in this appeal and I prefer to express no view upon it. The cases referred to in *Wade & Forsyth, Administrative Law*, 7th ed. (1997), pp.323-324, 342-344 lead the authors to the view that nullity is relative rather than an absolute concept (p.343) and that ‘void’ is ‘meaningless in any absolute sense. Its meaning is relative.’ This may all be rather imprecise but the law in this area has developed in a pragmatic way on a case by case basis.” (p.165 C-F)

(*Wade & Forsyth*, now in its tenth edition (2010), continues to recognise the relativity of the concept of nullity in this context.)

All I am saying is that if the law is to continue to develop in this area in a pragmatic way on a case by case basis, then in this particular case it should expressly recognise that not every decision to detain affected by a public law breach necessarily carries in its wake an unanswerable claim for false imprisonment.

359. That said, I readily acknowledge that the power of executive detention is one to be exercised with the greatest care and sensitivity and that it is of the first importance that those who exercise it should be ever-mindful not merely of the legal limits of the power but also of such public law duties as surround its proper exercise. Where, as here, a wrong and less favourable policy has been applied in deciding whether a person should be, or continue to be, detained, I accept that it must be for the Secretary of State as decision-maker to establish that this breach of his or her public law duty did not in fact prejudice the detainee. In short, it is for the Secretary of State in these circumstances, in order to avoid liability for the tort of false imprisonment, to establish that the detainee would have been detained in any event – even, that is, had the lawful published policy been followed. Assuming, however, that the inevitability of detention in any event *can* be established, it seems to me nothing short of absurd to hold the tort of false imprisonment nevertheless made out. After all, had a detainee in such circumstances sought to challenge his continued detention by judicial review (or habeas corpus), the court would have been likely to grant declaratory relief only, declining in its discretion to order the detainee’s release. Assuming, indeed, that the Secretary of State’s lawful policy in effect dictates the detainee’s detention, why, one wonders, would a decision to release him not itself be in breach of the Secretary of State’s public law duty?


360. Given, as the Court of Appeal held, and as I understand each member of this court to accept, that there was no realistic prospect whatever of these appellants having been released even had the Secretary of State applied his more favourable published policy, it follows that for my part, whilst, of course, deeply regretting the public law breaches of which the Secretary of State was here guilty, I would dismiss the appeals.

361. The bulk of this judgment was written upon my understanding that the essential choice facing the court was between (a) no false imprisonment and (b) false imprisonment but nominal damages only. It now appears that some members of the court favour a third outcome: (c) false imprisonment with damages of perhaps £500 - £1,000 by way of a “vindictory” or “conventional” award. Describe such an award how one will, to my mind it cannot sensibly be justified here. Is the court really to award substantial damages to those conceded to have been rightly detained? I have made clear my difficulties with a nominal award of damages. A substantial award would appear to me more objectionable still. Lord Hope (at para 177 of his judgment) refers to *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 – a constitutional challenge based upon “some quite appalling misbehaviour by a police officer” (Lord Nicholls at para 2) – and calls here for “some recognition of the gravity of the breach of the fundamental right which resulted in false imprisonment.” Properly critical though our judgments may be of the conduct of Home Office officials in these and similar cases, I find it quite impossible to recognise in them any breach (grave or

otherwise) of the detainees' fundamental rights. The detainees, I can only repeat, were rightly detained and it would have been wrong to release them.

362. Save insofar as this judgment indicates the area of my disagreement with Lord Dyson's judgment, I wish to say that I am in respectful agreement with it and feel unable to add anything of value on the various other issues arising for decision.

ANNEX A14

Gericht:	BVerfG 1. Senat 1. Kammer
Entscheidungsdatum:	29.07.1998
Rechtskraft:	ja
Aktenzeichen:	1 BvR 1143/90
ECLI:	ECLI:DE:BVerfG:1998:rk19980729.1bvr114390
Dokumenttyp:	Kammerbeschluss
Quelle:	
Normen:	Art 14 Abs 1 S 1 GG, Art 14 Abs 1 S 2 GG, Art 14 Abs 2 GG, Art 20 Abs 2 GG, Art 20 Abs 3 GG ... mehr
Zitiervorschlag:	BVerfG, Kammerbeschluss vom 29. Juli 1998 - 1 BvR 1143/90 -, juris

(Nichtannahmebeschluss: Keine Verletzung von GG Art 14 Abs 1 S 1 durch den Ausschluss des urheberrechtlichen Schutzes für als technische Baubestimmungen bauaufsichtlich eingeführte und in amtlichen Bekanntmachungen in Bezug genommene DIN-Normen)

Orientierungssatz

1. Die Vorschrift in UrhG § 5 stellt eine verfassungsmäßige Bestimmung von Inhalt und Schranken des Eigentums iSv GG Art 14 Abs 1 S 2 dar (wird ausgeführt).
2. Zur Frage, wann die Auslegung des einfachen Rechts und seine Anwendung auf den einzelnen Fall durch die dafür allgemein zuständigen Gerichte die Schwelle eines Verstoßes gegen Verfassungsrecht, den das BVerfG zu korrigieren hat, erreicht, vgl BVerfG, 1985-01-08, 1 BvR 501/83, BVerfGE 68, 361 <372>.
3. Zu den sich aus GG Art 14 Abs 1 S 1 iVm Art 20 Abs 2, 3 ergebenden Grenzen richterlicher Entscheidungsbefugnis vgl BVerfG, 1990-04-03, 1 BvR 1186/89, BVerfGE 82, 6 <11f>.
4. An die Gemeinwohlbelange müssen hohe Anforderungen gestellt werden, wenn über das Verfügungsrecht hinaus auch das Verwertungsrecht des Urhebers eingeschränkt werden und die Benutzung ohne Vergütungsanspruch zugelassen werden soll (vgl BVerfG, 1988-10-11, 1 BvL 80/86, BVerfGE 79, 29 <41>).

Der Verlust des urheberrechtlichen Schutzes durch den Abdruck des Werkes eines privaten Urhebers als Teil einer amtlichen Verlautbarung ist mit GG Art 14 Abs 1 S 1 jedenfalls vereinbar, solange für den Abdruck die Zustimmung des privaten Urhebers verlangt wird (vgl BVerfG, aaO).

5. Hier:

5a. Die Auslegung des UrhG § 5 Abs 1 durch den BGH, die private technische Regelwerke (hier: DIN-Normen) als amtliche Werke behandelt, die keinen urheberrechtlichen Schutz genießen, wenn sie durch Verwaltungsvorschrift als Technische Baubestimmungen eingeführt werden und der Urheber dem Abdruck der Normblätter in amtlichen Verlautbarungen zur Ein-

führung als Technische Baubestimmungen zugestimmt hat, ist mit GG Art 14 Abs 1 S 1 vereinbar.

5b. Auch die Ansicht des BGH, dieser Ausschluss des urheberrechtlichen Schutzes könne auch bei Werken privater Urheber eintreten, selbst wenn sie nicht in Rechts- oder Verwaltungsvorschriften inkorporiert sind, sondern das verlautbarende Amt sich auf eine Bezugnahme (Verweisung) beschränkt, sofern konkrete Umstände die Zurechnung zu dem Amt rechtfertigten, ist verfassungsrechtlich nicht zu beanstanden.

Fundstellen

ZUM 1998, 926-930 (red. Leitsatz und Gründe)
NJW 1999, 414-416 (red. Leitsatz und Gründe)
GRUR 1999, 226-230 (red. Leitsatz und Gründe)
AfP 1999, 54-57 (red. Leitsatz und Gründe)
LM UrhG § 5 Nr 7a (5/1999) (Leitsatz und Gründe)
RzU BVfG Nr 37 (red. Leitsatz und Gründe)
Verfahrensgang

vorgehend BGH 1. Zivilsenat, 26. April 1990, I ZR 79/88, Urteil
Diese Entscheidung wird zitiert

Literaturnachweise

Gerhard Schrickler, EWiR 1998, 997-998 (Anmerkung)
Karl-Heinz Ladeur, RzU BVfG Nr 37 (Anmerkung)

Kommentare

Fromm/Nordemann, Urheberrecht

- Prof. Dr. Axel Nordemann/Prof. Dr. Jan Bernd Nordemann, LL.M./Prof. Dr. Christian Czychowski u.a., § 101 Anspruch auf Auskunft; IV. Sog. Drittauskunft (Abs. 2); d) Speicherbefug
- Prof. Dr. Axel Nordemann/Prof. Dr. Jan Bernd Nordemann, LL.M./Prof. Dr. Christian Czychowski u.a., § 43 Urheber in Arbeits- oder Dienstverhältnissen; II. Tatbestand;
- Prof. Dr. Axel Nordemann/Prof. Dr. Jan Bernd Nordemann, LL.M./Prof. Dr. Christian Czychowski u.a., § 43 Urheber in Arbeits- oder Dienstverhältnissen; II. Tatbestand; 2. Verpflich
- Prof. Dr. Axel Nordemann/Prof. Dr. Jan Bernd Nordemann, LL.M./Prof. Dr. Christian Czychowski u.a., § 5 Amtliche Werke; I. Allgemeines; 1. Systematik, Sinn und Zweck
- Prof. Dr. Axel Nordemann/Prof. Dr. Jan Bernd Nordemann, LL.M./Prof. Dr. Christian Czychowski u.a., § 5 Amtliche Werke; II. Tatbestand; 3. Rückausnahme für private Normwerke (Abs ... mehr

Sonstiges

Wenzel/Burkhardt, Urherberecht für die Praxis

- 2. Kapitel Das Werk als Gegenstand des Urheberschutzes; V. Amtliche Werke (§ 5)

Diese Entscheidung zitiert

Rechtsprechung

Vergleiche BVerfG 1. Senat, 3. April 1990, 1 BvR 1186/89
Vergleiche BVerfG 1. Senat, 11. Oktober 1988, 1 BvR 743/86, ...
Vergleiche BVerfG 1. Senat, 8. Januar 1985, 1 BvR 792/83, ...

Gründe

- 1 Die Verfassungsbeschwerde betrifft die Frage, ob die Auslegung von § 5 Urheberrechtsgesetz (UrhG) durch den Bundesgerichtshof mit Art. 14 Abs. 1 Satz 1 GG vereinbar ist, die private technische Regelwerke (hier: DIN-Normen) als amtliche Werke behandelt, die keinen urheberrechtlichen Schutz genießen, wenn sie durch Verwaltungsvorschrift als Technische Baubestimmungen eingeführt werden.

I.
- 2 1. Die Urheber von Werken der Literatur, Wissenschaft und Kunst genießen für ihre Werke Schutz nach Maßgabe des Urheberrechtsgesetzes vom 9. September 1965 (BGBl I S. 1273). Die geschützten Werke sind im zweiten Abschnitt des ersten Teils (§§ 2 ff. UrhG) bestimmt. Dabei versagt § 5 den urheberrechtlichen Schutz für amtliche Werke. Die Vorschrift hat folgenden Wortlaut:

§ 5

3 Amtliche Werke

4 (1) Gesetze, Verordnungen, amtliche Erlasse und Bekanntmachungen sowie Entscheidungen und amtlich verfaßte Leitsätze zu Entscheidungen genießen keinen urheberrechtlichen Schutz.

5 (2) Das gleiche gilt für andere amtliche Werke, die im amtlichen Interesse zur allgemeinen Kenntnisnahme veröffentlicht worden sind, mit der Einschränkung, daß die Bestimmungen über Änderungsverbot und Quellenangabe in § 62 Abs. 1 bis 3 und § 63 Abs. 1 und 2 entsprechend anzuwenden sind.

6 Diese Regelung gilt seit Erlass des Urheberrechtsgesetzes unverändert. Sie knüpft, wie die Gesetzesbegründung erläutert, an die vorher geltenden Ausnahmenvorschriften in §§ 16 und 26 des Gesetzes betreffend das Urheberrecht an Werken der Literatur und der Tonkunst (LUG) vom 19. Juni 1901 (RGBl S. 227) in der Fassung der Gesetze vom 22. Mai 1910 (RGBl S. 793) und vom 13. Dezember 1934 (RGBl II S. 1395) an, die ihre Rechtfertigung darin fanden, daß das öffentliche Interesse die möglichst weite Verbreitung solcher Werke erfordere und daß die kraft Amtes zur Schaffung solcher Werke berufenen Verfasser entweder überhaupt kein Interesse an der Verwertung ihrer Leistungen hätten oder ihre Interessen denen der Allgemeinheit nachordnen müßten (s. BTDrucks IV/270, S. 39). § 5 Abs. 1 UrhG zähle diejenigen amtlichen Werke auf, die ohne weitere Voraussetzung vom Urheberrechtsschutz ausgenommen seien; die Aufzählung folge im wesentlichen der Regelung in § 16 LUG und erwähne zusätzlich die amtlich verfaßten Leitsätze zu Entscheidungen. § 5 Abs. 2 UrhG fordere für andere amtliche Werke als Voraussetzung der Freistellung vom Urheberrechtsschutz, daß das Werk im amtlichen Interesse zur allgemeinen Kenntnisnahme veröffentlicht sein müsse (a.a.O.).
- 7 2. Der Beschwerdeführer, das DIN Deutsches Institut für Normung e.V. (im folgenden: DIN), ist ein eingetragener Verein, der von mehr als 6.000 Unternehmen und juristischen Personen der Wirtschaft als Mitgliedern getragen wird. Vereinszweck ist es, durch Gemeinschaftsarbeit der interessierten Kreise zum Nutzen der Allgemeinheit Normen oder andere Arbeitsergebnisse, die der Rationalisierung, der Qualitätssicherung, der Sicherheit und der Verständigung in Wirtschaft, Technik, Wissenschaft, Verwaltung und Öffentlichkeit dienen, aufzustellen, sie zu veröffentlichen und ihre Anwendung zu fördern (§ 1 Abs. 2 der Satzung). Die Normen werden in Arbeitsausschüssen (1989 ca. 3.700) von

ehrenamtlich tätigen Fachleuten der interessierten Kreise (1989 ca. 40.000) erarbeitet, vom DIN als DIN-Normen herausgegeben und von einer Tochtergesellschaft, einem Verlag in Berlin, veröffentlicht und vertrieben. Die Überschüsse des Verlages sowie die Entgelte für die Einräumung von Nutzungsrechten zur Vervielfältigung und Verbreitung von DIN-Normen werden zur Finanzierung der Normungsarbeit des DIN verwendet. Sie steuerten 1989 64 v.H. der Gesamteinnahmen bei, während Mitgliedsbeiträge und Beiträge der öffentlichen Hand jeweils 17 v.H. erbrachten.

- 8 Im Ausgangsverfahren hatte die Beklagte, eine andere Verlagsgesellschaft, zunächst mit Zustimmung des Beschwerdeführers DIN-Normen in eigenen Veröffentlichungen abgedruckt, sich dann aber geweigert, Nutzungsentgelte für die DIN-Normen zu zahlen, die von den Ländern bauaufsichtlich als Technische Baubestimmungen eingeführt worden seien. Die Klage des Beschwerdeführers, mit der er zunächst einen Teilbetrag von 50.000 DM geltend machte, wurde vom Kammergericht abgewiesen. Auch die Revision blieb ohne Erfolg.
- 9 Der Bundesgerichtshof stützte sein Urteil darauf, daß die DIN-Normen nach § 5 Abs. 1 UrhG vom Urheberrechtsschutz ausgeschlossen seien. Zwar seien die DIN-Normen selbst keine Gesetze, Rechtsverordnungen, amtliche Erlasse oder Bekanntmachungen im Sinne dieser Vorschrift. Denn für die Annahme einer Rechtsnorm fehle es an der notwendigen Allgemeinverbindlichkeit, für die eines amtlichen Erlasses oder einer Bekanntmachung an dem Erfordernis der Herkunft aus einem Amt. Sie seien grundsätzlich als private Normwerke zu beurteilen. Doch könne auch die Bezugnahme (Verweisung) auf private Werke in amtlichen Verlautbarungen zum Ausschluß des Urheberrechtsschutzes nach § 5 Abs. 1 UrhG führen.
- 10 Dabei könne dahinstehen, ob dies auch ohne jedes Zutun ihres Urhebers allein durch einen Akt eines Amtes geschehen könne. Denn im Streitfall habe der Beschwerdeführer seine Zustimmung zum Abdruck gegeben. Er habe sich durch Verträge mit den einzelnen Bundesländern verpflichtet, gegen Zahlung eines Entgelts Normen für den Bereich der Bauaufsicht zur Einführung als Technische Baubestimmungen auszuarbeiten und die Normen so zu erstellen, daß sie das Land ohne wesentliche Änderungen zur Einführung als Technische Baubestimmungen übernehmen könne; zugleich habe er dem Land den kostenlosen Abdruck der Normblätter in amtlichen Verlautbarungen zur Einführung als Technische Baubestimmungen gestattet.
- 11 Diese Zustimmung alleine führe allerdings noch nicht zur Freistellung einer in eine amtliche Verlautbarung einbezogenen DIN-Norm vom Urheberrechtsschutz und damit zu einem Nachdruckrecht für Dritte. Es müßten vielmehr konkrete Umstände hinzutreten, nach denen es gerechtfertigt sei, die in Bezug genommenen DIN-Normen dem darauf verweisenden Amt zuzurechnen. Das sei namentlich dann der Fall, wenn sich das Amt in seiner Verlautbarung die jeweilige DIN-Norm in irgendeiner Weise inhaltlich zu eigen mache, so daß die in Bezug genommene Norm zur eigenen Willensäußerung der Behörde werde und damit zum Inhalt der hoheitlichen Erklärung gehöre. Die amtliche Verlautbarung dürfe sich überdies nicht auf eine interne Bindungswirkung, d.h. auf eine bloße Hinweiskraft gegenüber nachgeordneten Behörden, beschränken, sondern sie müsse auch eine gewisse Außenwirkung haben.
- 12 Diese Voraussetzungen seien zu bejahen. Die bauaufsichtlich eingeführten DIN-Normen seien der Verwaltung als eigene hoheitliche Erklärung zuzurechnen. Die Behörden benutzten diese Normen, um Anforderungen festzulegen, die sie andernfalls selbst aufstel-

len könnten oder sogar müßten. Dies ergebe sich aus den Bauordnungen der einzelnen Länder (§ 3 BauO NW, § 3 BauO Hamburg, Art. 3 BayBO). Die Einführung der DIN-Normen als Technische Baubestimmungen diene danach der Konkretisierung der in den Landesbauordnungen übereinstimmend enthaltenen Generalklausel der allgemein anerkannten Regeln der Technik (der Baukunst) und damit der Erleichterung des verwaltungsrechtlichen Baugenehmigungsverfahrens. Ihre Bedeutung beschränke sich dabei nicht auf eine interne Bindungswirkung gegenüber nachgeordneten Behörden, sondern es trete auch eine Selbstbindung im Außenverhältnis ein. Aus der in den Bauordnungen enthaltenen Regelung, daß als allgemein anerkannte Regeln der Technik auch die eingeführten Technischen Baubestimmungen gälten, folge für den Bauwilligen, der sein Bauvorhaben entsprechend den eingeführten DIN-Normen ausführen wolle, jedenfalls unter bauaufsichtlichen Gesichtspunkten ein Anspruch auf Baugenehmigung. Daß die DIN-Normen nicht den Charakter zwingender Normen hätten, sei für die urheberrechtliche Beurteilung unbeachtlich. Nach § 5 Abs. 1 UrhG führten nicht nur solche Normen zur Freistellung vom Urheberrechtsschutz, sondern auch Verwaltungsvorschriften, da diese zumindest für die Anwendung und Auslegung des geltenden Rechts von besonderer Bedeutung sein könnten. Maßgebend sei allein, ob die DIN-Normen Bestandteil der sie einführenden amtlichen Verlautbarungen geworden und daher der Verwaltung als eigene Willensäußerungen zuzurechnen seien. Das folge aus der dargelegten Bindungswirkung im Außenverhältnis. Dadurch erlangten die bauaufsichtlich eingeführten DIN-Normen jedenfalls im Verhältnis zu den Bauwilligen, die sich an die DIN-Normen hielten, eine rechtssatzähnliche Bedeutung.

- 13 Der Ansicht, die Einführung von DIN-Normen sei dem Amt nur dann als eigene Erklärung zuzurechnen, wenn die technischen Normen in den Wortlaut der amtlichen Verlautbarung selbst aufgenommen seien und auf sie nicht nur durch Hinweis auf einen Abdruck im Anhang oder auf eine andere Fundstelle verwiesen werde, werde dem Umstand nicht gerecht, daß es für die urheberrechtliche Beurteilung unerheblich sei, ob die Verweisung auf technische Normen in Verwaltungsvorschriften verfassungs- und verwaltungsrechtlich zulässig sei. Im übrigen sei es auch bei Gesetzen und Verordnungen nicht unüblich, auf privat geschaffene überbetriebliche Normen zu verweisen (vgl. z.B. § 35 h StVZO, § 7 BImSchG). Wie die dort in Bezug genommenen technischen Normen einen die Verweisungsnorm ergänzenden Rechtscharakter hätten und damit nach § 5 Abs. 1 UrhG den Urheberrechtsschutz verlieren könnten, so könnten auch Verweisungen auf DIN-Normen in amtlichen Verlautbarungen, sofern sie im Blick auf die Konkretisierung baurechtlicher Generalklauseln einen rechtssatzähnlichen Charakter hätten, eine normergänzende Bedeutung erlangen, die im Interesse der Zugänglichkeit für eine breite Öffentlichkeit einen völligen Ausschluß vom Urheberrecht nach § 5 Abs. 1 UrhG rechtfertige. Überdies sei die Art und Weise der äußeren Einbeziehung der DIN-Normen in eine amtliche Verlautbarung letztlich nur eine Frage verwaltungstechnischer Zweckmäßigkeit. Daß die DIN-Normen in den ministeriellen Erlassen oder Bekanntmachungen teilweise abgeändert oder ergänzt worden seien, stehe der Annahme rechtssatzähnlicher Bedeutung nicht entgegen. Vielmehr stelle dies ein zusätzliches Indiz für die Verantwortlichkeit des Amtes für den Inhalt der DIN-Normen in seiner unveränderten oder abgeänderten Fassung dar.
- 14 3. Mit der Verfassungsbeschwerde wird eine Verletzung von Art. 14 GG durch das Urteil des Bundesgerichtshofs gerügt. Der Bundesgerichtshof verkenne die wertsetzende Bedeutung des Grundrechts aus Art. 14 Abs. 1 Satz 1 GG. § 5 Abs. 1 UrhG sei eine Ausnahmenvorschrift für amtliche Werke, weil deren Verfasser dafür keinen Grundrechtsschutz genossen. Sie sei eng auszulegen und einer erweiternden Interpretation oder einer ana-

logen Anwendung nicht zugänglich. Durch die Anwendung von § 5 Abs. 1 UrhG werde der verfassungsrechtliche Schutz privater Werke (in der Hand des Beschwerdeführers) zu nichte gemacht. Das habe gravierende wirtschaftliche Folgen für den Beschwerdeführer, der sich bei der Finanzierung der Normungsarbeit zu über 60 v.H. auf die Verkaufserlöse der DIN-Normen stütze. Die Rechtsfolge, die der Bundesgerichtshof an die bauaufsichtliche Einführung der DIN-Normen knüpfe, hätten weder der Beschwerdeführer noch die beteiligten Bundesländer erkannt oder gewollt, als sie die in dem angegriffenen Urteil erwähnten Verträge miteinander abschlossen. Diese Verträge müßten, falls das Urteil des Bundesgerichtshofs Bestand haben sollte, geändert und notfalls vom Beschwerdeführer gekündigt werden, um den urheberrechtlichen Schutz der DIN-Normen zu erhalten und nicht durch bauaufsichtliche Einführung in Verlust geraten zu lassen.

- 15 Der Bundesgerichtshof widerspreche im übrigen mit der Annahme der Rechtssatzähnlichkeit seiner eigenen Rechtsprechung, die genau diese Qualität bei der Frage der haftungsrechtlichen Entlastung verneine (vgl. BGH, NJW 1984, S. 801 f.). Die Entziehung des Urheberrechtsschutzes habe im übrigen auch deshalb weitreichende Konsequenzen, weil sie einen freien, auch fehlerhaften Nachdruck mit unübersehbaren Folgen erlaube.
- 16 Die Auslegung des Bundesgerichtshofs greife außerdem in die Verwertungsbefugnis des privaten Urhebers ein, deren Beschränkung aber nach der verfassungsgerichtlichen Rechtsprechung nur durch ein gesteigertes öffentliches Interesse gerechtfertigt werden könne, und entziehe sie entschädigungslos. Die Anwendung von § 5 Abs. 1 UrhG auf DIN-Normen, auf die in einer amtlichen Verlautbarung verwiesen werde, sei nach dem Zweck der Vorschrift, eine möglichst weite Verbreitung solcher Werke zu gewährleisten, nicht erforderlich, weil die vom Beschwerdeführer veranlaßte Vielfältigung und Verbreitung die allgemeine Kenntnisnahme der DIN-Normen ermögliche. Die Auslegung führe damit zu einer unverhältnismäßigen Belastung des privaten Urhebers.
- 17 4. Im Jahr 1997 haben alle 16 Länder und das DIN einen einheitlichen Vertrag geschlossen, der an die Stelle der zwischen den einzelnen Ländern vor 1990 abgeschlossenen Verträge mit dem DIN getreten ist. Darin sind die Abdruckrechte nun spezifiziert worden (§ 1 Abs. 10 des Vertrages).
- 18 Das DIN gestattet den Ländern den kostenlosen Abdruck der Normen in amtlichen Verlautbarungen zur Einführung als Technische Baubestimmungen; diese müssen allerdings auf der Titelseite den Hinweis erhalten, daß die Verwendung des Satzbildes der Norm auf dem Vertrag der Länder mit dem DIN und der Zustimmung des Tochter-Verlages des DIN beruhe und eine Verwendung des Satzbildes durch andere nicht gestattet sei.
- 19 Anstelle eines Abdrucks kann hinsichtlich des Inhalts auch auf die Fundstelle verwiesen werden. Das Deutsche Institut für Bautechnik ist überdies berechtigt, Normen gemäß den § 20 Abs. 2 Muster-Bauordnung entsprechenden Vorschriften der Länder im Einvernehmen mit dem Land in der Bauregelliste A bekannt zu machen. Ungeachtet unterschiedlicher Rechtsauffassungen zur Frage, ob demgemäß bekanntgemachte Normen als Technische Baubestimmungen urheberrechtlichen Schutz genießen, seien sich die vertragsschließenden Parteien einig, daß etwaige urheberrechtliche Ansprüche des DIN gegenüber einem Land mit dem vom Land gemäß § 2 des Vertrags gezahlten Entgelt abgegolten seien.

II.

- 20 Die Verfassungsbeschwerde ist nicht zur Entscheidung anzunehmen, weil die Annahmeporaussetzungen des § 93 a Abs. 2 BVerfGG in der Fassung der Bekanntmachung vom 11. August 1993 (BGBl I S. 1473) nicht vorliegen. Diese sind gemäß Art. 8 des Fünften Gesetzes zur Änderung des Gesetzes über das Bundesverfassungsgericht vom 2. August 1993 (BGBl I S. 1442) auch auf vorher anhängig gewordene Verfahren anzuwenden.
- 21 1. Der Verfassungsbeschwerde kommt grundsätzliche verfassungsrechtliche Bedeutung nicht zu (§ 93 a Abs. 2 Buchstabe a BVerfGG). Die verfassungsrechtlichen Fragen, auf die es für die Entscheidung über die Verfassungsbeschwerde ankommt, sind in der Rechtsprechung des Bundesverfassungsgerichts geklärt (vgl. zu diesem Kriterium BVerfGE 90, 22 <24 f.>). Im einzelnen wird auf die nachstehend jeweils aufgeführten Rechtsprechungsnachweise verwiesen.
- 22 2. Die Annahme der Verfassungsbeschwerde ist auch nicht zur Durchsetzung der Eigentumsgarantie angezeigt (§ 93 a Abs. 2 Buchstabe b BVerfGG), weil die Verfassungsbeschwerde keine hinreichende Aussicht auf Erfolg hat (vgl. BVerfGE 90, 22 <25 f.>).
- 23 a) Die Vorschrift in § 5 UrhG stellt eine verfassungsmäßige Bestimmung von Inhalt und Schranken des Eigentums im Sinne des Art. 14 Abs. 1 Satz 2 GG dar.
- 24 Zu den konstituierenden Merkmalen des Urheberrechts als Eigentum im Sinne der Verfassung gehört die grundsätzliche Zuordnung des vermögenswerten Ergebnisses der schöpferischen Leistung an den Urheber im Wege privatrechtlicher Normierung und seine Freiheit, in eigener Verantwortung darüber zu verfügen. Das bedeutet nicht, daß damit jede nur denkbare Verwertungsmöglichkeit verfassungsrechtlich gesichert ist. Im einzelnen ist es Sache des Gesetzgebers, im Rahmen der inhaltlichen Ausprägung des Urheberrechts nach Art. 14 Abs. 1 Satz 2 GG sachgerechte Maßstäbe festzulegen, die eine der Natur und der sozialen Bedeutung des Rechts entsprechende Nutzung und angemessene Verwertung sicherstellen (vgl. BVerfGE 31, 229 <240 f.>; 49, 382 <400>; 79, 29 <40 f.>). Der Gesetzgeber hat einerseits zu berücksichtigen, daß das Eigentum privatnützig auszugestalten ist und seine Nutzung dem Eigentümer finanziell eine eigenverantwortliche Lebensgestaltung ermöglichen soll. Richtschnur der inhaltlichen Ausgestaltung ist andererseits das Wohl der Allgemeinheit (Art. 14 Abs. 2 GG). Unbedingten Vorrang vor den Interessen der Gemeinschaft kann das Individualinteresse des Urhebers nicht beanspruchen. Das Gemeinwohl ist allerdings nicht nur Grund, sondern auch Grenze für die dem Eigentümer aufzuerlegenden Beschränkungen. Diese dürfen nicht weitergehen, als es das Allgemeinwohl gebietet. Beide Belange hat der Gesetzgeber in Anwendung des Verhältnismäßigkeitsgrundsatzes sowie unter Beachtung des Gleichheitsgebotes in ein ausgewogenes Verhältnis zu bringen (vgl. BVerfGE 79, 29 <40 f.> m.w.N.).
- 25 Diesen Anforderungen wird die Regelung in § 5 UrhG gerecht. Die Verfasser amtlicher Werke stehen regelmäßig in einem öffentlichen Dienstverhältnis und wären schon deshalb verpflichtet, die Ergebnisse ihrer Arbeit - durch Übertragung eines ausschließlichen Nutzungsrechts - dem Dienstherrn zur Verfügung zu stellen (§ 43 UrhG; s. Rojahn, in: Schrickler, Urheberrecht, 1987, § 43 Rn. 39 und 45). Die Annahme des Gesetzgebers ist daher nicht zu beanstanden, daß die kraft ihres Amtes zur Schaffung solcher Werke berufenen Verfasser entweder überhaupt kein Interesse an der Verwertung hätten oder ihre Interessen hinter denen der Allgemeinheit zurücktreten müßten (s. BTDrucks IV/270, S. 39).

- 26 Die Regelung verfolgt ein Gemeinwohlziel von hohem Rang. Werke, die im amtlichen Interesse zur allgemeinen Kenntnisnahme veröffentlicht werden, sollen keinen Urheberrechtsschutz genießen, damit eine möglichst weite Verbreitung gesichert ist (§ 5 Abs. 2 UrhG; s. a. BTDrucks IV/270, S. 39). Welche Bedeutung die Publizität amtlicher Verlautbarungen hat, zeigt bereits das verfassungsrechtliche Erfordernis der Verkündung von Gesetzen und Verordnungen (Art. 82 Abs. 1 GG). Das Rechtsstaatsprinzip gebietet allgemein, daß förmlich gesetzte Rechtsnormen verkündet werden. Damit sollen sie der Öffentlichkeit in einer Weise zugänglich gemacht werden, daß die Betroffenen sich verläßlich Kenntnis von ihrem Inhalt verschaffen können. Diese Möglichkeit darf auch nicht in unzumutbarer Weise erschwert sein (vgl. BVerfGE 65, 283 <291>). Auch für Verwaltungsvorschriften, die ein Gesetz in für die Verwaltung verbindlicher Form mit Bindungswirkung für den Bürger ergänzen, hat das Bundesverfassungsgericht die Publikation gefordert, damit gewährleistet ist, daß die getroffene Regelung jedem, den es angeht, bekannt werden kann (vgl. BVerfGE 40, 237 <252 f., 255>).
- 27 b) Die Verfassungsbeschwerde wendet sich gegen die Auslegung des § 5 Abs. 1 UrhG durch den Bundesgerichtshof, der Ausschluß des urheberrechtlichen Schutzes könne auch bei Werken privater Urheber eintreten, selbst wenn sie nicht in Rechts- oder Verwaltungsvorschriften inkorporiert seien, sondern das verlautbarende Amt sich auf eine Bezugnahme (Verweisung) beschränke, sofern konkrete Umstände die Zurechnung zu dem Amt rechtfertigten. Die Verfassungsbeschwerde hat keine Aussicht auf Erfolg. Der Beschwerdeführer wird durch die angegriffene Entscheidung nicht in seinem Grundrecht aus Art. 14 Abs. 1 Satz 1 GG verletzt.
- 28 aa) Die Auslegung des einfachen Rechts und seine Anwendung auf den einzelnen Fall sind Sache der dafür allgemein zuständigen Gerichte und der verfassungsgerichtlichen Nachprüfung grundsätzlich entzogen (vgl. BVerfGE 18, 85 <92>). Die Schwelle eines Verstoßes gegen Verfassungsrecht, den das Bundesverfassungsgericht zu korrigieren hat, ist erst erreicht, wenn die Auslegung der Zivilgerichte Fehler erkennen läßt, die auf einer grundsätzlich unrichtigen Anschauung von der Bedeutung der Eigentumsgarantie beruhen und auch in ihrer materiellen Bedeutung für den konkreten Rechtsfall von einigem Gewicht sind (vgl. BVerfGE 68, 361 <372>).
- 29 bb) Nach diesem Maßstab verletzt das angegriffene Urteil des Bundesgerichtshofs den Beschwerdeführer nicht in seinem Grundrecht aus Art. 14 Abs. 1 Satz 1 GG, wenn es den Ausschluß des urheberrechtlichen Schutzes für private Werke bejaht, die mit Zustimmung des Urhebers in amtlichen Verlautbarungen Verwendung finden.
- 30 Die Rechtsprechung des Bundesgerichtshofs ist vor dem Hintergrund der vom Gesetzgeber zugrundegelegten Bewertung der Interessen der Verfasser amtlicher Werke zu würdigen. Sowohl die Verpflichtung aus dem öffentlichen Dienstverhältnis wie das fehlende Eigeninteresse an einer Verwertung kann bei einem privaten Urheber nicht unterstellt werden. Das größere Gewicht der Individualinteressen bei Werken privater Verfasser kann auch nicht ohne weiteres im Blick auf die hohe Bedeutung der Publizität amtlicher Werke durch Veröffentlichung und Verbreitung übergangen werden.
- 31 Der Beschwerdeführer verweist in diesem Zusammenhang nicht zu Unrecht auf die gestuften verfassungsrechtlichen Anforderungen an Eingriffe in das Verfügungs- und in das Verwertungsrecht, wie sie in der Rechtsprechung des Bundesverfassungsgerichts entwickelt worden sind. Das Verfügungsrecht als Ausschließlichkeitsrecht stellt für den Urheber

ber das Mittel dar, um mit dem Interessenten vor der Nutzung eine Vergütung auszuhandeln zu können. Eine Beschränkung dieses Rechts - etwa durch einen Kontrahierungszwang nach Maßgabe des § 61 UrhG oder eine gesetzliche Lizenz aufgrund von §§ 46, 49 Abs. 1 und § 52 UrhG - führt zu einer wesentlichen Beeinträchtigung des wirtschaftlichen Wertes der geschützten Leistung, wenn die Möglichkeit der freien Honorarvereinbarung nicht durch einen gesetzlichen Vergütungsanspruch ersetzt wird. Dementsprechend hohe Anforderungen müssen an die Gemeinwohlbelange gestellt werden, wenn über das Verfügungsrecht hinaus auch das Verwertungsrecht eingeschränkt werden und die Benutzung ohne Vergütungsanspruch zugelassen werden soll (vgl. BVerfGE 31, 229 <243>; 49, 382 <400>; 79, 29 <41>).

- 32 Durch den Abdruck des Werkes eines privaten Urhebers als Teil einer amtlichen Verlautbarung gehen dem Urheber unter den vom Bundesgerichtshof angeführten Voraussetzungen nicht nur das Verfügungs- und Verwertungsrecht hinsichtlich einzelner Nutzungen verloren; vielmehr genießt das Werk insgesamt gemäß § 5 Abs. 1 UrhG keinen urheberrechtlichen Schutz mehr. Dies ist mit Art. 14 Abs. 1 Satz 1 GG jedenfalls vereinbar, solange für den Abdruck die Zustimmung des privaten Urhebers verlangt wird. Denn damit wird die Entscheidung in seine Hand gelegt und ihm die Möglichkeit gegeben, eine angemessene Vergütung auszuhandeln (vgl. BVerfGE 79, 29 <41>).
- 33 In diesem Fall treffen auch die vom Gesetzgeber der Regelung in § 5 UrhG zugrunde gelegten Annahmen weiter zu. Denn die Interessen des Urhebers, der vertraglich das Recht zum Abdruck seines Werkes in einer amtlichen Verlautbarung einräumt, was nach der Auslegung des Bundesgerichtshofs die Rechtsfolge des § 5 Abs. 1 UrhG auslösen kann, sind denen des Urhebers im öffentlichen Dienstverhältnis durchaus gleichzuachten. Daß konsensuales Handeln zu einem Rechtsverlust führen kann, ist dem Urheberrecht nicht fremd, wie die Erschöpfung des Verbreitungsrechts nach mit Zustimmung erfolgter Veräußerung gemäß § 17 Abs. 2 UrhG zeigt.
- 34 Ob der Gesetzgeber darüber hinaus dem Urheber auch bei einem Abdruck ohne oder gegen seinen Willen den Verlust des urheberrechtlichen Schutzes zumuten könnte und in diesem Fall der Verweis auf Schadensersatz- oder Bereicherungsansprüche ausreichte oder ob nicht ein Anspruch auf angemessene Vergütung vorzusehen wäre wie in Fällen der Zwangslizenz, kann offenbleiben. Der Bundesgerichtshof hat sich mit der seine Entscheidung tragenden Begründung, die von der Zustimmung des Beschwerdeführers zum Abdruck der Normblätter in amtlichen Verlautbarungen zur Einführung als Technische Baubestimmungen ausgeht, jedenfalls in dem Rahmen gehalten, den Art. 14 Abs. 1 Satz 2 GG dem Gesetzgeber zieht.
- 35 cc) Die Verfassungsbeschwerde ist auch insoweit unbegründet, als sie sich gegen die weitere Begründung des Bundesgerichtshofs richtet, die Freistellungswirkung des § 5 Abs. 1 UrhG könne auch bei einer Bezugnahme (Verweisung) auf private technische Regelwerke eintreten, wenn konkrete Umstände eine Zurechnung zu dem verweisenden Amt erlaubten.
- 36 aaa) Die Verfassungsbeschwerde greift diese Auslegung zunächst wegen Verstoßes gegen das Verhältnismäßigkeitsprinzip an. Die Gemeinfreiheit sei bei bloßer Bezugnahme nicht erforderlich, um die vom Gesetzgeber angestrebte weite Verbreitung der DIN-Normen zu erreichen.

- 37 Es ist nicht von der Hand zu weisen, daß der Verweis auf die Fundstelle in Veröffentlichungen des Beschwerdeführers zeigt, daß auch die die DIN-Normen einführenden Behörden von einer ausreichenden Verbreitung durch den Beschwerdeführer ausgehen (vgl. BGH, GRUR 1984, S. 117 <119>). Die Erforderlichkeit kann deshalb nicht auf das Ziel einer weiten, sondern nur auf das einer von Urheberrechten ungehinderten Verbreitung gestützt werden.
- 38 Das ist in der Tat auch das Ziel der gesetzlichen Regelung. Die Gemeinfreiheit soll die allgemeine Kenntnisnahme der amtlichen Werke ermöglichen (§ 5 Abs. 2 UrhG). Diese kann auch durch überhöhte Preise erschwert werden. Der Ausschluß des urheberrechtlichen Schutzes soll verhindern, daß das Verbotsrecht des Urhebers als Druckmittel in Verhandlungen mit an der Nutzung des Werkes Interessierten eingesetzt werden kann. Die Möglichkeit des freien Nachdrucks soll dämpfend auf die Preise wirken.
- 39 Den Vorhaltungen in der Literatur, die eine überzogene Preisgestaltung bei privatverbandlich gesetzten Normen kritisieren (s. Reh binder, FuR 1983, S. 573 <574>; Lamb, Kooperative Gesetzeskonkretisierung, 1995, S. 91), muß nicht weiter nachgegangen werden. Der Beschwerdeführer trägt selbst vor, daß die Verwertung der DIN-Normen mehr als zwei Drittel seiner gesamten Einnahmen erbringe. Diese Finanzierungsfunktion läßt es nicht zu, die Preisgestaltung allein an dem Ziel, allgemeine Kenntnisnahme durch möglichst günstige Preise zu ermöglichen, auszurichten.
- 40 bbb) Auch die Überlegungen, mit denen der Bundesgerichtshof die Zurechnung der in Bezug genommenen privaten technischen Regelwerke begründet, sind verfassungsrechtlich nicht zu beanstanden. Die Auslegung von § 5 Abs. 1 UrhG überschreitet nicht die Grenzen richterlicher Entscheidungsbefugnis, die sich aus Art. 14 Abs. 1 Satz 1 GG in Verbindung mit Art. 20 Abs. 2 und 3 GG ergeben (vgl. BVerfGE 82, 6 <11 f.>; Beschluß des Ersten Senats des Bundesverfassungsgerichts vom 12. November 1997, NJW 1998, S. 519 <519 f.>). Die Rüge einer unzulässigen Ausweitung des § 5 Abs. 1 UrhG berücksichtigt nicht, daß die Auslegung nach Wortlaut, Entstehungsgeschichte und Normzweck jedenfalls vertretbar ist.
- 41 Der Wortlaut der Norm zeigt, daß es für die Anwendung von § 5 Abs. 1 UrhG auf die Frage der Normativität oder Rechtssatzähnlichkeit nicht ankommt. § 5 Abs. 1 UrhG nennt selbst neben Gesetzen und Verordnungen als Rechtsnormen im Sinne der klassischen Rechtsquellenlehre Verwaltungsvorschriften und (Verwaltungs- wie Gerichts-)Entscheidungen als amtliche Werke. Publizität soll damit nicht nur für die Rechtsnormen selbst, sondern auch für deren Auslegung und Anwendung durch Verwaltung und Gerichte gewährleistet sein. Ziel der Regelungen zur Gemeinfreiheit von amtlichen Werken war es seit jeher, Publizität für alle Äußerungen der Staatsgewalt zu schaffen. Der dem Gesetz unterworfenen Bürger soll sich über Vorschriften aller Art, Entscheidungen und über sonst rechtserhebliche Unterlagen und Äußerungen in gerichtlichen und behördlichen Verfahren frei unterrichten können (s. Katzenberger, GRUR 1972, S. 686 <691 f.> m.w.N. zur Rechtsentwicklung seit dem LUG 1870).
- 42 Auch bei teleologischer Auslegung ist die Auffassung des Bundesgerichtshofs jedenfalls vertretbar, § 5 Abs. 1 UrhG sei auf amtlich eingeführte technische Bauvorschriften anzuwenden. Die Bauordnungen haben die im Gewerberecht entwickelte Regelungstechnik übernommen, die Sicherheitsanforderungen in einer Generalklausel zu beschreiben und zur Ausfüllung auf die allgemein anerkannten Regeln der Technik zu verweisen (vgl.

BVerfGE 49, 89 <135 f.>). Um für die Rechtspraxis Klarheit über die jeweils anzuwendenden technischen Regeln zu schaffen und gleichzeitig eine Korrektur mit der Generalklausel nicht zu vereinbarender Entwicklungen in der technischen Normung zu ermöglichen (s. Böckenförde, in: Böckenförde/Temme/Heintz, Landesbauordnung Nordrhein-Westfalen, 9. Aufl., 1998, § 3 Rn. 50), sehen alle Bauordnungen die Einführung Technischer Baubestimmungen durch Bekanntmachung vor und lassen dabei auch den Verweis auf die jeweilige Fundstelle genügen. Die amtlich eingeführten Technischen Baubestimmungen wirken mindestens als Beweislastregel zugunsten des sich auf sie berufenden Bürgers (vgl. Marburger, Die Regeln der Technik im Recht, 1979, S. 396 ff.). Diese Rechtswirkung setzt die Publizität der Technischen Baubestimmungen voraus, was nach dem Normzweck die Anwendung des § 5 Abs. 1 UrhG rechtfertigt.

- 43 Die Auslegung des Bundesgerichtshofs ist auch nicht deshalb verfassungsrechtlich zu beanstanden, weil sie dem Beschwerdeführer die Verwertungsbefugnisse an DIN-Normen entschädigungslos entzöge. Die im technischen Sicherheits-, Bauordnungs- und Umweltrecht praktizierte Regelungstechnik, durch amtliche Einführung unter bloßem Verweis auf die Fundstelle klarzustellen, welche technischen Regeln die jeweilige Generalklausel ausfüllen, setzt notwendig bereits existente, d.h. veröffentlichte (§ 6 UrhG), urheberrechtlich geschützte Werke (Regeln der Technik) voraus. Während im Regelfall die Erstveröffentlichung amtlicher Werke durch die öffentliche Hand vorgenommen wird (§ 5 Abs. 2 UrhG), so daß von vorneherein keine Urheberrechte entstehen, bewirkt der Verweis auf von privater Seite veröffentlichte technische Regeln der Sache nach den Untergang bereits entstandener Urheberrechte. Diese Rechtsfolge gebietet jedoch von Verfassung wegen keine andere Auslegung des § 5 Abs. 1 UrhG, solange der private Urheber dem Abdruck seiner Werke zur amtlichen Einführung zustimmt (s.o. II.2.b)bb).
- 44 Der Bundesgerichtshof hat im übrigen im angegriffenen Urteil weder eine ständige Rechtsprechung aufgegeben noch sonst eine überraschende Wende vollzogen, wie der Beschwerdeführer vorträgt. Die Entscheidung fügt sich vielmehr in die Entwicklung der Rechtsprechung seit 1972 (vgl. BGH, GRUR 1972, S. 713 <714>; 1982, S. 37 <40>; 1987, S. 166 <167>) ein und hatte sich insbesondere bereits im Urteil zur VOB/C (vgl. BGH, GRUR 1984, S. 117 <118 f.>) angekündigt; das war auch in der Literatur bemerkt worden (s. Lukes, NJW 1984, S. 1595 <1597>).
- 45 Diese Entscheidung ist unanfechtbar.

ANNEX A15

92000E1841**WRITTEN QUESTION E-1841/00 by Klaus-Heiner Lehne (PPE-DE) to the Commission.
Copyright protection of Community legal texts in the CELEX data bank.**

Official Journal 089 E , 20/03/2001 P. 0095 - 0096

WRITTEN QUESTION E-1841/00

by Klaus-Heiner Lehne (PPE-DE) to the Commission

(9 June 2000)

Subject: Copyright protection of Community legal texts in the CELEX data bank

1. Is it true that the Commission considers Community legal texts in the CELEX data bank to be covered by copyright?
2. If so, what does the Commission consider is the basis for this copyright protection?
3. Is the Commission relying in this connection on Directive 96/9/EC?
4. If so, on what basis does the Commission argue that the Directive should have direct effect in this case even though it has not been transposed by a national law on the copyright protection of legal texts?
5. Does the Commission consider it acceptable for legal texts, which are produced by the Community legislature and should be generally available for public access and use, to be covered by copyright?
6. What is the Commission's view of the current legal disputes in Germany, for example, between the various licensees?

Answer given by Mr Bolkestein on behalf of the Commission

(28 July 2000)

1. The question whether official texts of a legislative, administrative and legal nature⁽¹⁾ are subject to copyright protection has been dealt with differently by legislators in the Member States. In Germany for example, the legislator has clearly opted not protect official texts⁽²⁾. At Community level, while there is no specific legal provision which applies, the Commission is of the view that legal and quasi-legal texts emanating from the Community institutions are not subject to copyright, regardless of their format and the medium in which they are available.

However, legal texts available in their basic form should be distinguished from any format which incorporates added value, whether in the form of legal analysis, annotation, indexation, structure or specific processing within the context of a database such as CELEX. Therefore, it is less the basic legal texts in themselves which may be subject to copyright protection than the specific selection, structure, or arrangement of the texts within the CELEX database which may constitute an intellectual creation. In addition, Directive 96/9/EC of the Parliament and the Council of 11 March 1996 on the legal protection of databases⁽³⁾ (the Database Directive) which harmonised the law pertaining to copyright in databases in the Community, also provides for a sui generis form of protection for non-creative databases under certain conditions.

2. In addition to the Database Directive, various international treaties signed by the Community and its Member States confer copyright protection on compilations of data constituting intellectual creations and this applies without prejudice to any copyright subsisting in the data itself. In this regard, attention is drawn to Article 5 of the World intellectual property organisation (WIPO) Copyright Treaty and Article 10 of the agreement on trade related aspects of intellectual property rights.

3. The Honourable Member is referred to the answers given above.

4. Member States are required to comply with their Community obligations by ensuring that their law fulfils the objectives of the Database Directive. It must be kept in mind that the objective of the Directive is to harmonise protection of databases by conferring copyright protection on certain databases and a sui generis right on non-creative databases. This protection applies irrespective of the eligibility of the contents of that database for protection by copyright or by other rights. Where Member States failed to transpose the Database Directive by the date of implementation or where they do so incorrectly, the question may arise as to whether the particular measure, in this case the Database Directive, is capable of having direct effect, if it confers rights on individuals. That is ultimately a question for the Court of justice. It is for the Commission to consider whether any failure by the Member State involved gives rise to infringement proceedings.

5. As stated above, legal texts emanating from the Community institutions are not protected by copyright in the Commission's view. The question of whether copyright or sui generis right subsists in the CELEX database is not contrary to the public availability of Community legal information, as the basic material or

texts contained therein are widely available, on paper as well as in electronic format, at affordable prices and in certain cases free of charge within the context of the EUR-Lex system. Prior permission is not required to reproduce documents from EUR-Lex and reproduction is subject only to acknowledgement of the source.

6. The Commission has been informed of the litigation between two German licensees of the CELEX database, Otto Schmidt Verlag and SEIDL Datenbank Service. To the Commission's knowledge, this is the only current legal dispute underway between CELEX licensees. This dispute is based on the interpretation of German law and is therefore a matter for the German courts.

(1) Cf. Article 2(4) of the Berne Convention (Paris Act of 24 July 1971 as amended on 28 September 1979), confirmed by the relevant provisions of the World intellectual property organisation (WIPO) Copyright Treaty (adopted by the Diplomatic Conference on 20 December 1996).

(2) Cf. Chapter II, 5.-(1) of Part I of Gesetz über Urheberrecht und verwandte Schutzrechte.

(3) OJ L 77, 27.3.1996.

ANNEX A16

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ANNEX A17



THE SUPREME COURT

RECORD NO. 384/2011

O'Donnell J.
MacMenamin J.
Dunne J.

BETWEEN/

JAMES ELLIOTT CONSTRUCTION LIMITED

Plaintiff/ Respondent

-and-

IRISH ASPHALT LIMITED

Defendant/ Appellant

Ruling of the Court delivered on the 2nd day of December, 2014

Introduction

1. The Ballymun Central Youth Facility project was part of an imaginative urban regeneration scheme (by Ballymun Regeneration Limited) in an area where bad housing, social deprivation, and youth unemployment were historically prevalent. After practical completion of the facility in 2005, cracks began to appear in the ground floor and walls. These started as hairline fractures, but expanded and this put the building at risk. As the High Court Judge put it in a detailed judgment, the facility was "ruined". The construction company which had built the building, James Elliott Construction Limited ("Elliott Construction"), the respondent herein, accepted that it was liable for the work done and the materials used and carried out remediation in 2009 at a direct cost of €1.55 million to it. Many more millions have been spent since on investigations of the building and on the costs in the High Court and on appeal. The building is now, and as a result of the expensive remediation carried out by Elliott Construction, free of defect.

2. Elliott Construction subsequently initiated proceedings against the defendant/appellant, Irish Asphalt Limited ("Irish Asphalt"), claiming that the infill (Clause 804 infill) provided by it, and placed underneath the floor in the building had caused "pyrite heave" which was the cause of the damage to the building. It was submitted that the Clause 804 infill provided to it contained framboidal pyrite, which is now known to expand with moisture. If used as infill below solid flooring, the effect of even relatively small amounts of movement can be dramatic and drastic. Irish Asphalt supplied this infill from its own quarry for what, in the context of this case, was the small sum of €25,000 plus VAT. Irish Asphalt, in turn, argued in the High Court that the allegation of pyrite heave was an unproven theory and several alternative arguments were submitted to the Court. On the 25th May 2011 the High Court found that the damage to the building had been caused by pyrite heave and thus found against Irish Asphalt. Irish Asphalt has appealed that decision.

3. In this appeal, Irish Asphalt no longer contests that pyrite heave caused the damage to the building as found by the High Court. Accordingly, much of what was in contention in the High Court is no longer directly relevant in this appeal and it is not necessary to consider the very complex issues of science and fact which are set out in the comprehensive High Court Judgment in any extensive detail. However, it is necessary to outline these matters briefly to facilitate a full understanding of this appeal. The matter to be decided in this appeal is essentially, which company is responsible in law for the costs of the remediation carried out by Elliott Construction. Is it to be Elliott Construction, which purchased the Clause 804 infill, or is to be Irish Asphalt, which provided the product?

4. This judgment will consider:

- a. The findings in the High Court;
- b. The issue of implied terms under the Sale of Goods and Supply of Services Act 1980 ("the 1980 Act");
- c. Whether the contract in question contains a limitation of liability clause; and
- d. Issues which arise under European Union law.

In order to understand the findings of the High Court it is first necessary to give a brief description of Clause 804 and of pyrite heave.

Clause 804

5. Clause 804 is a type of crushed rock which is commonly referred to as an "aggregate". This aggregate is made up of stones which range in size from stones that would "fit in the palm of a man's hand" as described in the High Court Judgment (para. 3), to tiny fragments. Clause 804 is called "hardcore infill" and it was originally specified for the support of roads (and takes its name from the standard specifications for road building) because it is hardwearing, of high quality and durable. These qualities meant that it was also used as high quality infill in building projects. It was used in this instance as sub-floor infill and under exterior paving around the building and in its central, open courtyard. The trial judge found that it was recognised as a high quality product, also frequently used as floor support in buildings when required because of its high levels of stability, inertness, and durability.

Pyrite Heave

6. Pyrite heave is a problem identified in the last thirty years. It causes building foundations to expand and rise. Pyrite heave has been a problem in several other countries such as Canada. A useful description of the process of pyrite heave was given by a Canadian body, *Le Comité technique québécois d'étude des problèmes de gonflement associés à la pyrite* and quoted at para. 7 of the High Court Judgment:

"Pyrite (FeS₂) is the main iron sulphide responsible for swelling and is also one of the most abundant minerals on the planet. Pyrite is found in several different types of rock, in fairly low percentages (< 1%).

Pyrite exists in different forms, namely massive (chemically stable) and "framboidal" (chemically unstable). The framboidal form is characterized by an agglomeration of very small cubic crystals (not visible to the naked eye) with a very large specific surface. In some conditions, this form of pyrite can oxidize in the presence of water and react with other minerals present in the same rock to form gypsum. Gypsum, when it forms, occupies a much greater volume than pyrite, causing swelling of the granular backfill. The swelling produces cracking and causes concrete floor slabs to heave. In some cases, especially in garages, the foundation walls may also crack and be displaced outwards.

The chemical solutions formed during pyrite oxidation can be absorbed by the concrete, causing the concrete floor slab to sulfate and heave. The swelling thus has two constituent elements, namely swelling of the aggregate and intrinsic swelling of the concrete slab.

This chemical reaction is generally slow, and it takes between 10 and 15 years after the building is constructed before it is visible to the occupants. Slab displacement levels vary, but can be as high as 5 mm per year.

...

Most aggregates used as underfloor backfill contain pyrite and other sulphurs, but a very large percentage of buildings will never exhibit symptoms of pyrite-related problems. This is because pyrite found in hard rock with low clay mineral contents does not oxidize and the materials remain stable".

7. At para. 4 of this judgment, the High Court Judge gave a clear description of the manner in which this phenomenon was alleged to have operated in the context of this case:

"This mineral [pyrite], it is claimed, reacted with the water, producing sulphuric acid and this, in turn, reacted with calcite formations within the crushed stone, causing crystals of gypsum to form, thus opening laminations within the stone, causing fissures, opening existing fissures further and adhering around the stones. This is argued to have caused the floors and brick-paved courtyard to be heaved upwards; making the opening of some doors impossible, buckling and cracking the walls severely and rendering the ground floor of the building effectively useless."

Obviously, as in this case, years can elapse before the problem manifests itself, especially if the tests carried out on the building are themselves insufficient, or the testing techniques are inadequate to detect and address the problem. In order to remedy this, a new standard was set in 2007 (EN13242:2002+A1:2007). This Standard introduced additional tests to address the problem of pyrite. It is not disputed in this case that the product supplied in 2004 would not have been compliant with this later, 2007, Standard.

The High Court Proceedings

8. The trial in the High Court lasted for 56 days and resulted in a judgment running to some 114 pages in length. The time at hearing was spent dealing, almost exclusively, with expert evidence on causation. In seeking to avoid liability, Irish Asphalt sought at one stage to blame both Elliott Construction and the engineers, Moylan Consulting. It also contended that the foundations had not risen, but rather that the building had sunk. It disputed pyrite heave had taken place, thereby, putting causation in issue. Much time and expertise was devoted to the science underlying the phenomenon of pyrite heave with national and international experts called on each side. At para. 10 of his judgment, the trial judge stated (a point which was reiterated at several points in this judgment) that:

"The most striking feature of this case was the inability of the experts as to engineering, architecture, geology and petrography on each side to agree on anything of importance to the case."

The Ballymun Building Contract

9. The contract between Elliott Construction and Ballymun Regeneration for the construction of the building, to which Irish Asphalt was, of course, not a party, was contained in several documents. The High Court Judge noted that these documents were "in some potentially important respects, potentially a source of confusion" (para. 25). A series of specifications made up this documentation such as the engineering specification and the general specification of the architect. These specifications included drawings and Patrick Elliott, the principle in Elliott Construction, and Mr Martin Hannay, the foreman, laid emphasis in their evidence in the High Court on the primacy of these drawings but also emphasised the importance given to the instructions of the engineer, and occasionally the architect, on site. These instructions were sometimes noted by Mr Hannay on the contract documents but sometimes the oral directions were not recorded. Irish Asphalt argued that this was a breach of contract because according to the engineering specification, if any discrepancies were found between the documents, the contractors were supposed to inform the architect and a more formal process should have ensued. The trial judge found that Mr Elliott and Mr Hannay were correct in their approach to the primacy of the drawings over the written contract clauses and that they had consulted the engineers and architects on site as appropriate.

Specification of Clause 804

10. The engineering specification also contains several references to the best type of material and equipment being used in the works. It is specified that the sub-base material "shall comply with clause 804 granular material type B of the specification for road works issued by the Department of the Environment". The relevant drawing states in relation to the internal floors that they will consist of "a 150mm pc concrete slab with a 1.42 layer of mesh on dpm [damp proof material] insulation and radon barrier to architects detail on 225 mm of well-compacted hardcore clause 804 to D.O.E. [Department of Enterprise] specification." The trial judge accepted that this provision was the most important provision and overrode all other provisions. The judge found that the Clause 804 infill was a known standard within the building industry and one on which "Elliott Construction was entitled to rely in ordering, paying for and in accepting deliveries" (para. 40). The provision of Clause 804 was thus a term of the contract between Elliott Construction and Irish Asphalt. The evidence of Dr Michael Maher, consultant engineer with Golder Associates Canada, on what this meant was accepted. Dr Maher was retained by Elliott Construction as an expert witness. He is an expert in geotechnical engineering and construction methods and former President of the Canadian Council of Independent Laboratories. Dr Maher testified in 2010, having been involved in investigating pyrite issues since 2007. He stated that Clause 804 is manufactured to have particular characteristics and that builders purchasing it have an entitlement to rely on that understanding. The judge found as a fact at para. 40 of his judgment that:

"Clause 804 is, in fact, a material superior to what is usually needed for construction infill and underfloor support. It is manufactured and sold on the basis that it is a high quality product. The fundamental requirement for Clause 804 as a construction infill is that it should do the job that it is intended to be used for. This characteristic can be broken into: firstly, that the material must be inert and not subject to chemical change; secondly, that the material is durable and should not break down due to temperature within the expected limits of the relevant site and

moisture within the expected limits of the relevant climate; thirdly it must be strong enough for its purpose; and, fourthly, when used for roads, the material should not wear, breakdown or polish so that any surface designed to have a particular level of friction becomes polished and slippery”.

The trial judge identified the central issue as being whether, in the event that pyrite heave was proven to have ruined the building, the Clause 804 hardcore infill was supplied in breach of contract.

The European and Irish Standard

11. Clause 804 is an aggregate for which a European Standard exists. This is EN13242:2002, “Aggregates for unbound and hydraulically bound materials for use in civil engineering work and road construction”, which was adopted by the European standardisation body, *Le Comité Européen de Normalisation* (“CEN”), in December 2002. CEN is a private body established under Belgian law. Its members are the national standardisation bodies of European countries, including but not limited to the standardisation bodies of the Member States of the EU. The rules of membership of CEN require the national bodies to adopt European standards once adopted by CEN. The Irish standardisation body is the National Standards Authority of Ireland (“NSAI”) established pursuant to the National Standards Authority Act 2006. The NSAI adopted and issued an Irish standard in terms identical to EN13242:2002, in January 2003. That standard is I.S. EN13242:2002. A standard adopted by the NSAI does not take effect as law or have legal force of its own effect. It may however be incorporated into specifications and contracts by parties.

12. Standards are referred to in the law of the EU in two ways relevant to the present proceedings. Under Council Directive 89/106/EEC (21st December 1988) on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (“the Construction Products Directive”), the European Commission may issue a mandate to CEN to produce a standard in a particular area. Furthermore, Directive 98/34/EC of the European Parliament and the Council (22nd June 1998) laying down a procedure for the provision of information in the field of technical standards and regulations (“the Technical Standards Directive”), as amended by Directive 98/48/EC of the European Parliament and of the Council (20th July 1998) amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, imposes certain obligations on Member States in respect of notification of national standards, and observing a standstill period when a European standard is being adopted. The impact of these Directives will be considered later in this judgment. For present purposes it is sufficient to observe that Elliot Construction claimed, and the High Court agreed, that the terms of standard I.S. EN13242:2002 were incorporated into the contract between the parties hereto by the reference to Clause 804, and that accordingly, the product supplied had to conform to that standard.

Breach of the Standard

13. The trial judge found (on the basis of evidence that Irish Asphalt now contends on appeal was inadmissible) that there was a comprehensive failure to meet the standards prescribed for aggregates and therefore Clause 804. The trial judge also found that the terms of merchantability and fitness for purpose implied by the 1980 Act meant that Clause 804 was understood and expected to be of sufficient inertness, strength and durability so as not to expand or move or heave, or cause damage to any building. The deficiencies in the Clause 804 supplied were analysed under a number of headings. To be fit for purpose and of merchantable quality, the material had to be inert and not subject to chemical changes. Second, the material had to be durable, and not break down due to temperature within the expected limits of the relevant site, and moisture within the expected limits of the relevant climate. Third, the product had to be strong enough for its purpose. Fourth, when used for roads, the material should not be susceptible to wear, breakdown or polish so that any surface designed to have a particular level of friction should not become polished or slippery. The judge held that as a matter of national law, these matters were part of the contract by virtue of the implied terms as to fitness for purpose and merchantability.

14. The European Standard adopted in Ireland contains or refers to a number of tests to which aggregate of this nature should be subjected. Much of the findings both of alleged breach of the Standard, and the more general findings of breach of the implied terms of merchantability and fitness for purpose, were based on the evidence given in relation to these tests. It is worth noting at the outset that the trial judge strongly preferred Elliott Construction’s expert evidence as to causation. He concluded at para. 267:

“Given the absence of any other cause, apart from pyrite heave, which could result in the floors moving upwards, the monitoring results are, coupled with this evidence enough to prove the plaintiff’s case.”

The Test Results

15. The findings of the High Court on the tests can be briefly summarised. The Court found that that the material taken from the Ballymun building and tested in 2009 failed to meet the standard in respect of the Los Angeles abrasion test (para. 157 of the High Court Judgment), the magnesium sulphate soundness test (para. 158) the liquid limits test (para. 159) and the water absorption test (para. 160). The judge also quoted the written opinion of Mr Lloyd Twomey, whose evidence he accepted, at para. 162:

“The overwhelming majority of the material tested for this report is [on aggregate from Bay Lane quarry removed from the building]. All of the Bay Lane aggregate tested fails at least two of the Clause 804 requirements, while of the remaining tests, between 47 and 97% of the Bay Lane sample tested failed the requirements for Clause 804 material. These tests, which indicate the overall quality of the aggregate in terms of grading, clay content, plasticity, strength, a resistance to wear, ability to absorb water and ability to resist chemical weathering, show that the material may be classified as a poor quality aggregate. In summary:

- 97% of Bay Lane aggregate tested is outside the Clause 804 grading curve typically at the ‘fines’ end indicating an excess of fines.
- 100% of Bay Lane aggregate tested is in excess of the specified liquid limit of 21 ranging up to 41%, and in some cases having a plastic limit measured up to 28% (Clause 804 should be non-plastic). This suggests that the fines present are behaving in plastic manner and suggests that the source material is of poor quality, such as a mud stone. A material with excessive plastic clay materials will have low strength, will be sensitive to moisture and will reduce the cohesion and shear strength of the aggregate.
- 87% of the Bay Lane aggregate tested had LA abrasion test values in excess of the specified limit of 30. This suggests that the material is weak, has low abrasion resistance and is more prone to degradation, relative to Clause 804 aggregate.
- 100% of the Bay Lane samples has 10% fines value below the SR21 equivalent requirement of 130 kN with the maximum value achieved of 65kN. This suggests that the material is weak and is prone to physical breakdown, in comparison to the Clause 804 aggregate.

- 47% of the Bay Lane aggregate tested for flakiness index, had values in excess of the specified limit of 35. This suggests that the aggregate has a platy habit (i.e. flat and thin) indicative of a laminated or closely bedded source material. Flaky aggregate physically has lower strength than blocky aggregate and typically does not compact into as dense a matrix as blocky aggregate will.
- 100% of the Bay Lane aggregate tested for magnesium sulphate soundness test has values in excess of the specified limit of 25%, with the maximum value measured of 76%. This test simulates the ability of an aggregate to resist weathering. This test is also related to the water absorption test, where an aggregate with high water absorption value tends to have a low soundness.
- 93% of the Bay Lane aggregate tested for water absorption had valued in excess of the specified value of 2% indicating that air and moisture can penetrate into the aggregate. Strong aggregate tends to have low water absorption values below 1%.

While the above tests are relevant to the performance of the material as an aggregate, they are also relevant to the ability of the material to weather and to resist expansive forces. The material is shown to allow moisture and air to penetrate into the body of the aggregate. This means that moisture can attack any minerals contained within the aggregate, such as pyrite and cause it to break down.

The material is shown to be flaky, indicative of a laminated/closely bedded fine-grained structure within aggregate. This means that the aggregate is likely to have anisotropic strength and potential weaker those within the fragments.

The material is shown to have poor strength and durability, which means that one expansive forces begin to exert on the material and once weathering begins, the material is more likely to break down.

The material is shown to have a low soundness and resistance to weathering processes, which means it is susceptible to breaking down and is unlikely to be able to resist expansive forces.

All the above indicates that the material supplied to the Ballymun Youth Centre from Bay Lane quarry was of poor quality, could not be classified as Clause 804 is susceptible to break down by pyrite oxidation and is unlikely to be unable to resist expansive forces within the aggregate'."

16. It was concluded that:

"The foregoing analysis on tests of water absorption, Los Angeles abrasion, liquid limits and magnesium sulphate soundness renders the plaintiff's case of pyrite heave more likely. It supports the physical findings in relation to the building that pyrite heave took place. Therefore, the finding that the foundations are stable, together with the analysis of what the tests on the infill under the building demonstrate and the state of the building itself, establishes a probability of pyrite heave." (para. 165)

Later, the judge observed at para. 241 of the judgment:

"I regard it as central to the contracts between Elliott Construction and Irish Asphalt, that the material to be supplied carried the characteristics of Clause 804 hardcore infill as had been established through use by numerous builders over the years since 1972. It would be completely contrary to the purpose for which that material was required for it to swell up when used as infill under buildings and ruin floors and buckle walls."

17. It is necessary here to deal briefly with a further issue in respect of the Standard which occupied a significant part of the argument in the High Court, but which can be dealt with briefly here, although it will be necessary to return to it later in more detail. Elliot Construction also argued that the Clause 804 was required to have a sulphur level of less than 1%. This is potentially an important category since it was found that the material tested had a sulphur content of 1.41% (para. 125). Sulphur content is an indicator of the presence of pyrite which was found to amount to 1.5% by volume and 2.7% by weight in the Clause 804 put under the building (para. 111). The High Court found that European Standard EN 13242:2002 (and the Irish standard in identical terms) contained three possible categories of requirement for total sulphur (para. 115) and that a guidance note on the use of EN13242:2002 issued by the NSAI in 2004, S.R. 21:2004, constituted the relevant guidance and set a standard of 1%. This was hotly contested by Irish Asphalt which argued that there was no standard fixed for sulphur content. This is not relevant here however (although it becomes relevant later) since first, the High Court held that a finding of breach of the sulphur limit on its own, while establishing breach of contract, would not in itself require the remedial works carried out (since if excess sulphur alone was detected the appropriate action would be to monitor the building rather than carry out extensive remediation) and second, because the High Court made comprehensive findings of breach of the standard on other grounds which, subject to the legal arguments discussed later, would be sufficient to sustain the finding of breach of contract by reference to the Standard. As stated above the judge concluded at para. 161:

"Thus on the water absorption test, the liquid limits test, the magnesium sulphate soundness test and the Los Angeles abrasion test, the material removed from the building in Ballymun clearly fails the Clause 804 standard. This establishes a breach of contract."

18. It appears that this amounts to a finding that the material breached the Standard as of the date of testing and, as a matter of probability, at the date of supply. At para. 148 the judge observed:

"On the entire of the evidence, however, I cannot see that rock is likely to change in nature so fundamentally as the differential between the test results from 2004, the apparently routine quarry tests, to 2009, the tests on the infill from under the building, suggest, simply because it has been consolidated and left under a floor slab for five years. Rather, I am satisfied, on the basis of the evidence of Dr. Maher, for the plaintiff, that the difference in these tests cannot be accounted for in consequence of the treatment of the Clause 804 infill at the time of construction or its presence under the building for a period of nearly five years prior to being removed and tested. The test results from 2003 and 2004 are not consistent with the material seen and tested by Golder and Arup [on behalf of Elliot Construction]. If the material was of good quality it would not change."

19. The judge also addressed the argument that the test results had not been conducted in precise accordance with the testing

protocols referred to in EN13242:2002. He rejected that argument at para. 164:

"Many test results were challenged by an allegation of deviation from a standardised procedure. It was argued, in addition, that no standard testing protocols were available in respect of stone infill that had been dug out from under a building after several years supporting a floor slab. The precise methodology of the test can vary. What is important to the Court is the nature of the information it provides. Using a different test to that specified in the standard may, in some instances, indicate that a fail is a breach of contract. Using the correct test is a more direct methodology. I appreciate that the Clause 804 tests are applicable to stone tested directly from a quarry as in 2004. Tests on underfloor infill that has gone wrong are not given by an Irish or European standard. What, however, a reasonable person wants to know in a case like this is what has gone wrong. What the tests do is to provide a route towards a reasoned analysis. What is important to the Court is that information is supplied that can lead to a conclusion based on probability."

Terms Implied under the Sale of Goods and Supply of Services Act 1980

20. The High Court Judge held that the contract between Elliot Construction and Irish Asphalt contained terms of merchantability and fitness for purpose implied by ss. 14(2) and 14(4) of the Sale of Goods Act 1893 ("the 1893 Act") as inserted by s. 10 of the 1980 Act. These terms, he considered, required that the Clause 804 supplied should be inert, strong and durable (para. 41). It was found that these terms had been breached, relying on the evidence already set out in respect of the findings of breach of the Standard. However the judge also made findings of breach on the basis of evidence of other tests, including swelling tests (paras. 166-176), minute scrutiny (paras. 177-209), monitoring results (paras. 216-227), and statistical analysis (paras. 228-232). Irish Asphalt challenged the expertise of the evidence of the experts who gave evidence on behalf of Elliot Construction, particularly on the issue of minute scrutiny, but as is apparent the findings of the High Court rest on a number of independent grounds and accordingly this Court does not consider it necessary to address this further.

21. The judge considered results from tests done on the samples of rock at the Bay Lane Quarry, Irish Asphalt's quarry, between 2003 and 2005, and on infill material removed from the Ballymun building when the problems manifested themselves. He observed that it emerged eventually at the hearing that Irish Asphalt had itself done its own tests on the material removed from under the building in 2009, although, as already observed, its case is that the only admissible tests were those carried out in accordance with specified protocols at the point of supply, and at the time the aggregate was taken from the quarry. The 2009 evidence was at least in certain respects even more damning of the product. The evidence which is described hereafter and which formed the basis of the trial judge's conclusions as to the quality of the product, is normally admissible as a matter of Irish law as to compliance with implied terms.

22. At the conclusion of his judgment the trial judge stated at para. 268:

"Any one of the following pieces of evidences would have entitled the plaintiff to succeed: the monitoring results showing the floor slab rising while the foundations remain essentially static; the crystal heave evidence; the swelling tests; the state of the building showing heave coupled with failure of the infill material on crucial tests; or the chemical test results on the infill coupled with the necessity to remove it because of danger to concrete elements. Because of the state of the evidence, I have no option but to find in favour of the plaintiff on four of these five elements. Had there been only one finding for the plaintiff, I would still be obliged to find in favour of the plaintiff because a probability is thereby established. I have analysed the evidence separately in each of those blocs in order to come to that conclusion. I have based no conclusion, on this separate re-analysis of the evidence, on the bulk chemistry tests. I therefore hold for the plaintiff on the basis that the foundations are sufficient and stable coupled with the nature of the material under the floors; coupled with the monitoring results; coupled with the swell tests; coupled with the crystal heave evidence. Each of these is separate. Cumulatively, I also hold for the plaintiff in respect of any combination of these findings coupled with the foundation stability finding."

The judge rejected any accusation of bias against Irish Asphalt's experts. He considered they had carried out their testing in a fair and appropriate manner.

The Appeal

23. Irish Asphalt has put forward a number of interrelated arguments on appeal. Whilst accepting that its contract contained the terms implied by the 1980 Act, it is denied that the facts found amount to a breach of either of the implied terms of merchantability and fitness for purpose. Furthermore, it is contended that under the provisions of the contract, any liability for breach is limited by Clause 8 of its terms and conditions of sale which purported to limit liability for defective goods to the cost of their replacement. In respect of the findings of breach of the standard, and accordingly a failure to supply Clause 804 in accordance with the contract, Irish Asphalt contends that such breach was not established in the only manner in which such an issue could be determined and that accordingly the only admissible evidence heard in the High Court was of compliance with the standard. Finally, it is argued that it was not open to the High Court to make any finding of a breach of the terms implied by the 1980 Act and in particular to make a finding that there was a breach of implied terms as to inertness, durability and strength, because to do so was to create a new domestic law standard which was, it is argued, impermissible as a matter of the law of the European Union.

24. Irish Asphalt sought to rebut a wide range of findings of fact made by the trial judge, which were clearly supported by weighty evidence. This attempted challenge to the High Court Judge's findings of fact was at variance with the jurisprudence of this Court regarding findings of fact supported by evidence and inferences based thereon, and as identified in *Hay v. O'Grady* [1992] 1 I.R. 210 and *Northern Bank Finance Corporation Ltd v. Charlton & Ors* [1979] I.R. 149. There is no doubt that there was evidence before the High Court Judge which allowed him to reach his conclusions. Arising from this, Irish Asphalt effectively abandoned its appeal insofar as it related to the issue of alternative causation, but maintained that, notwithstanding the findings of fact made, particularly the finding that the damage to the building was caused by pyritic heave, it was not liable to Elliott Construction as a matter of law both domestic and EU.

25. Irish Asphalt makes two closely related points which it is necessary to identify and analyse separately. First, it says that the evidence of the 2009 testing of the materials taken from the Civic Centre is simply *nihil ad rem*. It does not and cannot prove breach of the Standard. It says that in certain respects the tests were not carried out in accordance with the protocols identified in the Standard, and more importantly, were not carried out in the time indicated, namely at the time of delivery. In essence, it is contended that the Standards (and therefore the contract inasmuch as it required delivery of Clause 804 conforming to those Standards), required that the material meet the relevant tests as of the date of delivery. Indeed, inasmuch as the standardisation of national standards is required as part of a single market, in order to facilitate the putting on the market of products from different Member States, it might be said that the obvious point at which compliance with the Standard has to be demonstrated is precisely when the product is being placed upon the market. There was no serious contest but that Irish Asphalt's data showed that tests had been carried out on samples of the quarry material throughout the relevant period, all of which (subject to the sulphur issue discussed

above, and where Irish Asphalt had not tested for sulphur) showed compliance with the Standards, at those times. Accordingly Irish Asphalt contended that, at a minimum, resolution of this issue required a resolution of an issue of European law, namely whether compliance (or breach) of the Standards could only be established as of the point of delivery and by use of the testing protocols referred to in the Standard. Perhaps put another way, the argument was that if the Standards required that the product meet the relevant Standards at the point of delivery and then only, then to demand that they meet the tests some five or more years later, would be to impose a new standard, incompatible, with the existing European and national standard and thus, it was said, contrary to European law.

26. The second argument made by Irish Asphalt in relation to this evidence was inasmuch as it related to the separate national law question of whether there was a breach of implied term as to merchantable quality and fitness for purpose. In this respect it accepted, at least tacitly, that such evidence was admissible as evidence of breach of the implied terms as indeed it was. However, it was contended firstly that there had been no breach of either implied terms as a matter of national law, or, and secondly, that if there was, such a conclusion was not permissible as a matter of EU law, or, and again at the very least, that this raised an issue which it was necessary to refer for the consideration of the Court of Justice of the European Union ("CJEU"). It is accordingly necessary to consider the domestic law issues which arise since, if Irish Asphalt is correct in these respects, the consequential issues of European law which they contend arise, are certainly reduced if not removed.

Merchantability and Fitness for Purpose

27. As already observed, the trial judge concluded that, on the facts found, there had been a breach of the conditions as to merchantability and fitness for purpose implied by s. 14 of the 1893 Act as inserted by s. 10 of the 1980 Act. Irish Asphalt's appeal on this aspect raises narrow but important issues of law. Accepting as it must, for the purpose of this aspect of the appeal, the facts as found by the trial judge, Irish Asphalt argues nevertheless that there was no breach of the implied condition of merchantability under s. 14(2), and that the implied condition of fitness for purpose under s. 14(4) did not arise. As already mentioned these arguments did not loom large in the High Court where detailed and complex issues of fact and science dominated. However, these matters have been the subject of careful and focussed submissions in this Court.

Merchantability

28. There is no dispute that as this was a sale in the course of business, there was implied into the contract a condition that the goods supplied would be of merchantable quality, pursuant to s. 14(2) of the 1893 Act (as substituted by s. 10 of the 1980 Act). Section 14(3) of the same Act (again as substituted by the 1980 Act) provides a statutory definition of the concept of merchantable quality. It provides:

"Goods are of merchantable quality if they are as fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances, and any reference in this Act to unmerchantable goods shall be construed accordingly."

29. In simple terms, Irish Asphalt accepts, as it must on the findings of the trial judge and subject to the issues raised by the other grounds of appeal, that the Clause 804 supplied by them was unfit for the purpose of being used as hardcore under the cement floors of the Ballymun building. However, it argues that this does not amount to a breach of the implied condition of merchantability because the Clause 804 was fit for the purpose of being used as hardcore under car parks or non-load bearing areas around the building, where indeed it was used in the course of this development. It is contended that the fact that the product could be used for this separate purpose means that the product was merchantable within the meaning of the 1893 Act.

30. Decisions of the courts of other common law jurisdictions are of persuasive authority. The argument that a product is merchantable if it is shown to be fit for one purpose for which it is used is almost entirely dependent upon the decision of the Court of Appeal of England and Wales in *Aswan Engineering Establishment Co. v. Lupdine Ltd & Anor* [1987] 1 W.L.R. 1 ("*Aswan*"), and in particular, the careful analysis of Lloyd L.J. in that case. To understand the legal issue it is necessary to trace the statutory development of s. 14 of the 1893 Act, both in the UK and in Ireland. It is indeed a further complication of this argument that as a result of the statutory changes *Aswan* is now only of historical interest in the law of the UK and has not been further discussed or analysed in that jurisdiction, but, it is argued, correctly represents the law in Ireland.

31. The concept of statutory implied terms can be traced to the 1893 Act. Section 14 of that Act originally contained versions of the two warranties of merchantable quality and fitness for purpose which are at issue in this case, albeit in different format, and in a different order. Section 14 of the 1893 Act as originally enacted provides: -

"Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

32. It is notable that the 1893 Act did not originally provide any definition of merchantability. Merchantable quality is, as the Sales Law Review Group chaired by Professor Robert Clark observed in its 2011 *Report on the Legislation Governing the Sale of Goods and Supply of Services*, an archaic term (p. 157). It is redolent of an earlier age where merchants traded commodities both for use and for resale. As the English and Scottish Law Commissions noted in 1987 in their *Report on the Sale and Supply of Goods* (Law Com No. 160 and Scot. Law Com. No. 104);

"the word 'merchantable' was derived from Victorian cases where (putting the matter at its simplest) the question was, 'were the goods were of such a quality that one merchant buying them from another, would have regarded them as suitable?'" (para. 3.7)

But the archaic and somewhat mysterious nature of the concept of merchantability also allowed the term to be deployed with some

flexibility in assessing whether goods supplied were of adequate or sufficient quality so that a purchaser could not reject them. There was perhaps a tension between different conceptions of "sufficient quality" which was obscured by use of the term "merchantable". Thus for example, in *Bristol Tramways Carriage Co. Ltd v. Fiat Motors Ltd* [1910] 2 K.B. 831, Farwell L.J. stated that the term meant that the article is of "such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it" (p. 841). On the other hand in *Taylor v. Combined Buyers Ltd* [1924] N.Z.L.R. 627, Salmond J. criticised the approach and stated that:

"The term 'merchantable' does not mean of good, fair or average quality. Goods may be of inferior or even bad quality but could yet fulfil the legal requirement of merchantable quality. For goods may be in the market in any grade good, bad or indifferent, and yet all equally merchantable.... If the buyer wishes to guard himself in this respect he must expressly bargain for the particular grade or standard that he requires." (para. 645)

33. This difference of approach reflects perhaps a difference of perspective: from the purchaser's point of view, 'acceptability' is the key feature whereas a vendor will look to saleability. The development of the law has seen a gradual movement from reflecting the seller's viewpoint to a position more sensitive to that of the purchaser, especially when a consumer. It can be seen that the 1893 Act is framed in terms of a general rule against any condition or warranty as to fitness to which the terms implied are an exception, whereas today it is probably more realistic to see s. 14 as imposing minimum criteria which in consumer cases cannot be excluded. An influential approach was that of Dixon J. in the High Court of Australia in *Australian Knitting Mills Ltd v. Grant* (1933) 50 C.L.R. 387 at p. 418, where he suggested that:

"The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price...and without special terms."

34. This test was referred to with approval by the House of Lords in *Henry Kendall & Sons v. William Lillico & Sons Ltd* [1969] 2 A.C. 31. However, relatively few cases have required this degree of analysis of the term 'merchantable'. For the most part, the term has been sufficiently flexible and sufficiently understood to provide an acceptable vehicle for decisions in individual cases. It is only in particularly difficult and strict cases (and the appellant contends that this is such a case), that the test became difficult.

35. The case of *Henry Kendall & Sons v. William Lillico & Sons Ltd* is in fact an example of a case which was difficult in this way. In this case, the plaintiff game farmers bought compounded meal from the defendant for feeding to pheasants and partridges and their chicks which they reared for stock and sale. As a result of feeding them this meal, many of the chicks died, or were stunted and unfit for breeding purposes. It was found by the trial judge that this was caused by the presence in the compounded meal of a proportion of Brazilian ground nut extraction which contained a toxic substance known as aflatoxin. The ground nut extraction had been bought from two third parties, which in turn had bought it from fourth parties who had imported it from Brazil. The case was further complicated by the fact that there were different terms and conditions between the relevant parties.

36. The plaintiff recovered damages from the defendant for an admitted breach of the implied terms under both ss. 14(1) and (2) of the 1893 Act, as it then stood. The defendant who produced the feed, in turn, sought an indemnity and damages for breach of contract from the third parties who had supplied the groundnut ingredient, alleging breaches of the same implied terms. The defendant succeeded at first instance and on appeal. In the appeal, the House of Lords held that there was a breach of the implied condition as to fitness for purpose, but it was held by a majority (Lord Pearce dissenting and Lord Wilberforce expressing no opinion) that as the judge had properly directed himself on the meaning of merchantable quality, and on his findings the ground nut extraction was not of unmerchantable quality, there was no breach of the term implied by s. 14(2) of the 1893 Act.

37. The aspect of the case dealing with merchantable quality turned on evidence that ground nut extractions were sold for inclusion in feed stuffs to cattle even when contamination of this nature was detected. On these findings, Lord Reid set out the general principle of sales by description:

"...[I]t is a condition (unless excluded by the contract) that the goods must be of merchantable quality. Merchantable can only mean commercially saleable. If the description is a familiar one it may be that in practice only one quality of goods answers that description - then that quality and only that quality is merchantable quality. Where it may be that various qualities of goods are commonly sold under that description - then it is not disputed that the lowest quality commonly so sold is what is meant by merchantable quality: it is commercially saleable under that description." (p. 75)

38. On the basis of what Lord Reid described as the somewhat surprising finding that some buyers were ready to buy such ground nut extraction under that description and to pay the ordinary market price for it, the contaminated ground nut extractions were merchantable under the general description of ground nut extractions. At p. 77 of the report, he stated the principle:

"...[I]f the description was so general that goods sold under it are normally used for several purposes, then goods are merchantable under that description if they are fit for any one of these purposes: if the buyer wanted the goods for one of those several purposes for which the goods delivered did not happen to be suitable, though they were suitable for other purposes for which goods bought under that description are normally bought, then he cannot complain. He ought either to have taken the necessary steps to bring subsection (1) [the warranty of fitness for a particular purpose] into operation or to have insisted that a more specific description must be inserted in the contract."

Lord Pearce dissented on this point and Lord Wilberforce expressed no opinion.

39. In 1973, the law in the UK underwent a significant change. Section 3 of the Supply of Goods (Implied Terms) Act 1973 ("the 1973 Act") amended s. 14 of the 1893 Act as follows:

"(1) Except as provided by this section, and section 15 of this Act and subject to the provisions of any other enactment, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract or sale.

(2) Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition: -

(a) as regards defects specifically drawn to the buyer's attention before the contract is made; or

(b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

(3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment."

40. Furthermore, the interpretation provision of the 1973 Act (s. 7(2)) amended s. 62(1) of the 1893 Act to include a statutory definition of merchantable quality as follows:

"(1A) Goods of any kind are of merchantable quality within the meaning of this Act if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances; and any reference in this Act to unmerchantable goods shall be construed accordingly."

41. It will be noted that the 1973 Act contains terms very similar to the provisions introduced into Irish law by the 1980 Act. There are a number of significant distinctions between the provisions introduced by the 1973 Act in the UK and the 1980 Act in Ireland, and their common 1893 predecessor. First, the warranty of merchantable quality is no longer limited to sales by description. The warranty now applies to any sale in the course of business. Second, the statutory definition of merchantable quality makes it clear that there is an overlap between the warranty of merchantable quality and that of fitness for purpose since it defines merchantable quality in part by reference to the question whether the goods are "as fit for the purpose or purposes for which goods of that kind are commonly bought". Third, that definition makes specific reference to price which, it will be recalled, was referred to by Dixon J. in *Australian Knitting Mills Ltd v. Grant*. Fourth, and significantly for the present purposes, the definition refers to fitness for the "purpose or purposes" for which the goods of that kind are commonly bought. The 1973 UK Act also made a number of other important changes, not least the introduction of the concept of consumer sales from which it was not permissible to exclude the terms implied' which were later adopted in the Irish legislation.

42. To complete the development of the statutory provisions, it is necessary to observe that the Sale of Goods Act 1979 ("the 1979 Act") in the UK reorganised the terms of s. 14, making some minor amendments, and bringing the definition of merchantable quality into s. 14 at subs. (6). It is to this Act that the later UK cases refer, although of course the main substantive changes were made in the UK in the 1973 Act. In 1980, the Oireachtas updated the 1893 Act in Irish law so that the statute law in Ireland was broadly similar to that in the UK at that time, as seen above. More specifically, the definition of merchantable quality was brought within s. 14 and placed at subs. (3), and the concept of durability was included in the definition of merchantability. However, nothing turns on that term in these proceedings. Thus, when seeking to understand the argument made on the basis of the decision in *Aswan*, an important starting point is that the statutory provisions in issue in these proceedings are essentially identical to those contained in the 1979 Act which was the applicable law in the UK at that time.

43. Section 1 of the Sale of Goods and Supply Act 1994 ("the 1994 Act") in the UK effected a further significant change in replacing the concept of merchantable quality with an implied warranty of "satisfactory quality" which itself was defined as meeting a standard "that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances". That Act also took the opportunity of amending s. 14 of the 1979 Act to include the concept of durability in the definition of satisfactory quality, but for present purposes it is also significant because it expressly defined the quality of goods as including "fitness for all the purposes for which goods of the kind in question are commonly supplied" (s. 1(2B)(a)). Finally, the Report of the Sales Law Review Group in 2011 on legislation governing the supply of goods and the supply of services, recommended the introduction of a concept of satisfactory quality in place of the warranty of merchantable quality (p. 17). From this recital, it can be concluded that inasmuch as this case involves an interpretation of the statutory definition of merchantability in the 1980 Act, the terms in which that definition is couched are effectively identical to the statutory definition of merchantability in the law of the UK between 1973 and 1994. Thus, any decision of the UK courts from that period which considers the statutory definition may be of assistance when considering the Irish legislation.

44. The facts of the *Aswan* case were quite extreme. The plaintiff, a construction company conducting business in Kuwait, bought from the first defendant (Lupdine) a consignment of waterproofing compound in plastic pails for shipment to Kuwait. The pails had been supplied to the defendant in turn by the second defendant, Thurgar Bolle Ltd. Before the hearing, Lupdine went into liquidation and the issue became the liability, if any, of the second named defendant either in tort to the plaintiff or in contract to the first defendant. One of the issues which arose was the extent to which it could be said that the plastic pails failed the implied condition of merchantable quality, and whether the implied condition as to fitness for purpose arose.

45. The pails of waterproofing compound were shipped stacked 5-6 pails high in a container. When the container arrived at Kuwait it stood on the quayside in the sunshine. The temperature rose to 70° centigrade (150° Fahrenheit). Unsurprisingly, the pails collapsed and the water-proofing compound was lost. Importantly, the evidence was that the pails, stacked in the configuration in which they were, could still have resisted temperatures up to 52° centigrade (122° Fahrenheit) and would even survive the 70° centigrade heat if they had not have been stacked on top of each other. There was also evidence that the pails had been used for export to other parts of the world without mishap.

46. The central issue was Lupdine's claim to be indemnified by Thurgar Bolle and that issue turned principally on the question of whether there had been a breach of the implied term as to merchantability. The claim failed both at first instance and in the Court of Appeal. At first instance, Neil J. found simply that the pails were of merchantable quality, observing that they had very nearly survived the extreme conditions created by intense heat of an enclosed container in the Gulf. The analysis in the Court of Appeal was however much more detailed. It appears to have been argued that the introduction of the word "purpose or purposes", and in particular, the use of the plural in the 1973 Act (and re-enacted in the 1979 Act) meant that the pails were required to be fit for all the purposes for which they were sold. It was thus argued that, since they failed in Kuwait, they were not fit for at least one of the purposes for which they were sold and were not merchantable. On behalf of the supplier of the pail, Thurgar Bolle, it was argued that the statutory definition then contained in s. 14(6) of the 1979 Act made little if any change to the existing law, and the fact that the pails were manifestly generally fit for the purposes for which they were sold meant that they were of merchantable quality.

47. Lloyd L.J. conducted a careful and impressive analysis of the law of merchantability prior to the enactment of the 1973 Act. He concluded that the definition of merchantability did not alter the law as laid down in *Henry Kendall & Sons v. William Lillico & Sons Ltd* (also reported as *Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association*) [1969] 2 A.C. 31 ("*Hardwick Game Farm*"). While accepting that the contrary argument was attractive, he concluded that the true position was that the statutory

enactment of the definition of merchantability was as accurate a reproduction of the test advanced by Lord Reid in the *Hardwick Game Farm* case as it was possible to compress in to a single sentence. It was however necessary to explain why the plural "purposes" had been used in the statute. Lloyd L.J. took the view that this could be traced to the fact that, as pointed out in the *Hardwick Game Farm* case, goods of any one kind may be sold under more than one description corresponding to different qualities. He explained the significance he attributed to this in the following important passage:

"To take the facts of the present case, heavy duty pails are no doubt higher quality than ordinary pails, and for that reason no doubt command a higher price. Pails which are suitable for the lower quality purpose may not be suitable for the higher quality purpose. It would obviously be wrong that pails sold under a description appropriate to the higher quality should be held to be merchantable because they are fit for a purpose for which pails are sold under the description appropriate to the lower quality. Since the definition presupposes that goods of any one kind may be sold under more than one description, it follows that the definition had, of necessity, to refer to more than one purpose. In my opinion, this is the true and sufficient explanation for the reference to "purposes" in the plural. The reference to the purpose in the singular was required in order to cover one-purpose goods, such as the pants in *Grant v. Australian Knitting Mills Ltd.*, 50 C.L.R. 387. It would be wrong to infer from the use of the phrase "purpose or purposes" that Parliament intended any such far-reaching change in the law as that for which Mr. Aikens contends." (p. 13)

48. The analysis in *Aswan* was central to the argument made by Irish Asphalt in this case and we were invited to adopt the analysis in *Aswan* as a correct statement of Irish law. It was argued that Clause 804 was sold for a number of purposes, initially for the purposes of road construction, but also for hard core under floors, as here, and as general hard core for car parks and open areas which were not load-bearing. Those areas had not been remediated by Elliott Construction when it removed the Clause 804 material from the youth facility and replaced it. Accordingly, it could be inferred, it was argued, that the product could be satisfactorily used at least for that purpose. On that basis, it was fit for at least one of the purposes for which it was commonly sold and had indeed been sold for that purpose in this case. On the analysis in *Hardwick Game Farm*, it was of merchantable quality. *Aswan* was at least persuasive authority that the changes effected in the UK in 1973, and introduced in Ireland, did not as a matter of law affect the conclusion in the *Hardwick Game Farm* case, and thus, the Court should hold that the Clause 804 material was of merchantable quality.

49. It was frankly acknowledged that the subsequent development of the law in the UK and elsewhere, until the amendment of the statutory definition in 1994, was less clear-cut. In *Rogers v. Parish (Scarborough) Ltd.* [1987] Q.B. 933 ("*Rogers v. Parish*"), a differently constituted Court of Appeal had to confront a similar argument in the context of a consumer contract, in that case the purchase of a Range Rover motor vehicle. The plaintiffs purchased a Range Rover which was sold as new but proved to be defective and another Range Rover was substituted for it. On delivery, however, the engine, gear box and bodywork of the replacement were substantially defective, and oil seals at vital junctions were unsound, causing significant quantities of oil to escape. There were a number of unsuccessful attempts made by the garage to rectify the defects. At the end of a six month period, the engine was still misfiring, excessive noise was being emitted from the gear box, substantial defects remained in the body work, and the plaintiffs rejected the vehicle. The plaintiffs then brought an action for a declaration that there had been a breach of the implied condition as to merchantable quality, and that they had been entitled to repudiate the contract. The judge at first instance found that since none of the defects had rendered the vehicle unroadworthy, unstable or unfit, it was reasonably fit for its purpose which was that of driving, and it was accordingly of merchantable quality.

50. Perhaps unsurprisingly, the decision was overturned on appeal. It is one of the additional difficulties of this line of authority that *Aswan* was not among the authorities cited to the Court of Appeal, possibly because it had only recently been decided, and may have not have been reported at that time. However, the arguments for the unsuccessful defendant in *Rogers v. Parish* were almost precisely those which had succeeded in *Aswan*. At p. 937, counsel is recorded as relying on the decision of the House of Lords in the *Hardwick Game Farm* case for the proposition that the vehicle, being commercially saleable and useable for a secondary purpose, albeit at a lower price than the plaintiffs had paid, was not therefore unmerchantable, and the plaintiffs were entitled to no more than the difference between the price they paid and the value at which the vehicles were commercially saleable. It was also argued that the 1973 Act, while inserting a statutory definition of merchantability, did no more than codify the law as the House of Lords had stated it in *Hardwick Game Farm*, relying in that regard on the observations of Lord Denning in *Cehave N.V. v. Bremer Handelsgesellschaft M.B.H. The Hansa Nord* [1976] Q.B. 44 at p. 62, a decision also referred to and relied on in *Aswan*.

51. The Court of Appeal (Mustill and Woolf L.J.J. and Sir Edward Eveleigh) unanimously rejected this argument. In particular, the court disapproved of the suggestion that the 1973 Act should be interpreted in the light of decisions under the 1893 Act. Mustill L.J. said at pp. 942 - 943:

"In the course of argument before us our attention was drawn to various expressions of opinion in cases decided before the enactment of the 1973 legislation as to the precise significance of the term "merchantable quality." In my judgment this is not a practice to be encouraged. The Act of 1973 was an amending Act and it cannot be assumed that the new definition was included simply because the draftsman saw a convenient opportunity to reproduce in more felicitous and economical terms the gist of the speeches and judgments previously delivered. The language of section 14(6) is clear and free from technicality, and it should be sufficient in the great majority of cases to enable the fact-finding judge to arrive at a decision without exploring the intricacies of the prior law. In my judgment the present case is not one of those exceptional cases where it may be necessary to have recourse to the former decisions in order to give the full meaning to the words of the subsection."

52. The Court then addressed the argument that since the vehicle was capable of starting and being driven safely from one point to the next on public roads, and whatever other service the car was supposed to be able to negotiate, it must necessarily be merchantable. Mustill L.J. firmly rejected that contention:

"I can only say that this proposition appears to have no relation to the broad test propounded by section 14(6) [the definition of merchantability] even if, in certain particular circumstances, the correct inference would be that no more could be expected of the goods sold." (p. 944)

53. He then pointed out that the purpose for which goods of that kind, i.e. a new motor vehicle, were bought included not just travelling from one place to another, but doing so with the appropriate degree of comfort, ease of handling, reliability and indeed pride in the vehicle's outward and interior appearance. Accordingly, he had no difficulty in concluding that the Range Rover was not as fit for the purposes the buyer could reasonably expect. Woolf L.J. was also of the same opinion as to the inappropriateness of having recourse to authorities which were dealing with the different provisions of s. 14 of the 1893 Act.

54. As it happens, the Australian Trade Practices Act 1974 also incorporated amendments to the implied terms of merchantability and

fitness for purpose, which are essentially similar to those which were introduced by the Act in UK in 1973. In *Cavalier Marketing (Australia) Pty Ltd v. Rasell & Anor* (1990) 96 A.L.R. 375 ("*Cavalier Marketing*"), the Supreme Court of Queensland, which was referred to both decisions and firmly preferred the approach in *Rogers v. Parish* to *Aswan*. In *Cavalier Marketing*, the goods supplied were a carpet, which on installation showed evidence of reverse piling which affected its colour and shading. It was argued that the carpet was fit for the purpose of floor covering in terms of physical quality and manufacture, which was the purpose for which a carpet was commonly bought. Thus it was said to be merchantable notwithstanding the reverse piling. One member of the court, Cooper J., addressed the divergence in the authorities and indeed in the academic commentary on the new provisions. Page 400 of his judgment contains three passages which encapsulate his approach to the section:

"I am not persuaded that the approach of Lloyd LJ in *Aswan Engineering* is a correct approach to statutory interpretation. The words of the statute ought to be given their ordinary meaning. The statutory definition so construed is capable of operating without absurdity or ambiguity, no occasion to refer to the previous common law as an aid to construction arises ...

...I agree with the observations of Mustill and Woolf LJ in *Rogers*. It is unnecessary and undesirable to look to the common law definition of merchantability for the purpose of construing section 66(2) and section 74(g)(1) and (3) of the Act. The common law tests relates to saleability of goods. They are tests of merchants and are more appropriate to commercial sales. The provisions of s.66(2) and s.74(d)(3) are quite different and focus on the reasonable objective expectations of a consumer as defined. They are not concerned with the goods purchased for resale, although indirectly a consumer may purchase goods with the ultimate view of resale e.g. a family motor vehicle. Further the legislation ought to be interpreted against the background of its remedial character giving consumers rights and protection which previously were not available. The definitions in s.66(2) and s.74(d)(3) are comprehensible and flexible and ought to be directly applied, in accordance with their terms, to the many and varied facts and situations which they may apply. ...

Goods may have more than one normal purpose ... In my view as a matter of construction and as a matter of legislative intent, the section requires that all normal purposes for which goods are commonly bought be brought into consideration. Fitness is tested against each of these purposes and none are to be excluded. The decision is otherwise if the terms of the contract as supplied between the direct supplier to the consumer (including any description applied to the goods by that supplier) or alternatively any description applied by the corporation (i.e. manufacturer/importer/distributor) the goods requires that a particular normal purpose be excluded. Such a construction is reasonable in both the interests of the consumer and the corporation. First, it addresses and responds to the reasonable expectations of the consumer at the time of acquisition of goods that they will be fit for all their normal purposes, subject to the terms of the contract of supply to which the consumer has agreed. Secondly it addresses the reasonable expectations of the corporation as to the purpose or purposes to which the goods will be put. Thus the corporation may by the description, if any, it attaches to the goods, the price it receives and any other relevant circumstances place goods in circulation in such a manner that the corporation may delineate the relevant purpose or purposes itself."

55. The final case in the sequence is *Rotherham Metropolitan Borough Council v. Frank Haslam Milan & Co. Ltd & Anor* [1996] C.L.C. 1378 ("*Rotherham*"). Although decided in 1996, the case concerned works done between March and July 1979. Therefore, it was decided by reference to the provisions of the 1979 Act. The facts of the case bear a superficial resemblance to the facts of the present case.

56. The defendant contractor was employed by the plaintiff Borough Council as contractor for the erection of a new five storey office building to be used as civic offices. Phase one involved site preparations and foundation work. The bill of quantities referred to granular hard core which was to be graded or uncrushed gravel stone or rock, filled crushed concrete, or slag. It was accepted that the granular fill material supplied included steel slag, and that in fact such steel slag, in confined conditions, was subject to expansion, and did expand so as to cause cracking to the reinforced concrete slabs and damage to the building.

57. The claim in the *Rotherham* case was by the client against the builder. In other words, it was the equivalent of a claim made by Ballymun against the Elliott Construction in these proceedings. As such, it was not a claim for sale of defective goods, but rather provision of services alleged to be defective by the supply of the product. It was however, accepted that the same principle applied in such a case as in a claim for breach of the terms implied on a sale of goods. The plaintiff Borough Council succeeded at first instance in establishing both a breach of the implied term as to fitness for purpose and the merchantability. In the Court of Appeal, the decision was reversed. The principal focus of the case was the implied term of fitness for purpose. The Court accepted that the specific purpose for which the product was used was made known to the contractor since the specifications made it clear that it would be used in a confined space as foundation material. However, the Court concluded that the circumstances showed that the plaintiff had not relied on the contractor's skill and judgment, principally because the material was specified by the plaintiff's architect. The case was treated as one in which the question to be resolved was who should bear the risk of the damage to the building caused by the fill used around the foundations, the professional persons who specified the material or the contractors who supplied it? The Court appears to have been influenced by the fact that there was some developing knowledge about the capacity of steel slag to expand, and that the architects and engineers specifying it were in a better position to know that than contractor who bought material for suppliers to fill a contractual specification. In the circumstances of the case, the Court held that the plaintiff had not relied on the skill and care of the contractor. It will be necessary to return to this analysis when considering the claim under s. 14(4).

58. However the decision also dealt with the claim that there was a breach of the implied term as to merchantability which it was accepted formed part of the contract between the plaintiff Borough Council and the defendant contractor. That was dealt with as subsidiary to the main argument on fitness for purpose and appears to have been influenced by the conclusion to which the Court came on that point. Unfortunately, although the Court was referred to the *Hardwick Game Farm* case and *Aswan*, there was no reference to *Rogers v. Parish* or to *Cavalier Marketing*.

59. The central factual feature of this case was the agreement between the experts that, "[s]teel slag is currently being used in a number of applications in the construction industry. The material is saleable and can be used in appropriate unconfined applications and in bituminous macadam." (p. 1389). Indeed, it was observed that it was used for those very purposes on the contract. The Court accordingly concluded that it was commercially saleable, and, therefore, of merchantable quality. The Court adopted the analysis of Lloyd L.J. in *Aswan* as to the coincidence between the pre-1973 law and the statutory definition contained in the 1973 Act.

60. Irish Asphalt has understandably placed heavy reliance on the decision in *Rotherham*, not least because of its factual similarity to the present case. While acknowledging the different strand of judicial opinion illustrated by *Rogers v. Parish* and *Cavalier Marketing*, it was nevertheless submitted that the analysis proffered by Lloyd L.J. in *Aswan* was the correct one in relation to the statutory

definition of merchantability contained in the 1973 Act as reproduced almost identically in the 1980 Act.

61. There are good reasons why an Irish court should analyse with particular care decisions in other common law jurisdictions in respect of the provisions of the 1893 Act and its statutory successors. First, where the provisions are identical, the analysis of another court will often be helpful. Second, all other things being equal, it is normally desirable that significant differences of interpretation of the same provisions between courts in different jurisdictions should be avoided. Particularly in the field of international commercial transactions, there is a significant benefit in the same well understood code applying in different jurisdictions. Where, outside the field of consumer contracts, the parties can negotiate their own terms, all that such parties require is knowledge of the default position. In the light of that knowledge, they can decide whether they wish that position to be adjusted in the contract between them. In such circumstances, certainty is often more important than the most intellectually satisfying analysis. Furthermore, where an interpretation of the statutory provision has been settled on in one jurisdiction, and another jurisdiction subsequently adopts the same statutory language, it may be permissible, subject to the strictures contained in *Inspector of Taxes v. Kiernan* [1981] I.R. 117, to deduce that the legislature has adopted that language in the knowledge of the interpretation applied to it. In certain circumstances, the fact that a court in one jurisdiction offered an authoritative interpretation of a statutory provision might itself be a powerful argument in favour of the adoption of that same interpretation of what might otherwise appear to be an ambiguous statutory provision.

62. However, these factors have little weight in this case. First, *Aswan* post-dated the provisions of the 1980 Act. Second, neither *Aswan* nor *Rotherham* can be regarded as entirely authoritative even in terms of the jurisprudence of the UK because of the existence of the decision in *Rogers v. Parish*, and the fact that *Rotherham* was decided without reference to that case. Perhaps even more importantly, the decision in *Cavalier Marketing* shows that the *Aswan* interpretation has not been accepted in another common law jurisdiction. Finally, and in any event, the fact that the statutory definitions have now diverged since 1994 removes the possibility of cross-jurisdictional uniformity of interpretation. Accordingly, it is necessary to address this case on its merits.

63. It is no discourtesy to the lucid submissions of counsel for Irish Asphalt to say that we have come to the clear conclusion that its arguments cannot be accepted. Indeed, the clarity of the argument has greatly facilitated the Court's analysis. Nevertheless the Court has come to the conclusion that there was in this case a breach of the implied term as to merchantable quality.

64. At a fundamental level, the Court considers that the evidence does not provide a sufficient basis in fact to allow an argument based on *Aswan* to be advanced. It should be said that, notwithstanding the amount of judicial and academic ink spilt over the issue, the problem identified in cases such as the *Hardwick Game Farm* and *Aswan* is not a common place one. It requires evidence of something which must normally be unusual, or in the words of Lord Reid, surprising. It is a necessary precondition of the legal argument that it be established as a matter of fact that, although a product contains an element rendering it defective for one purpose for which it is commonly bought or sold, it can nevertheless be sold and used for another purpose for which it is commonly sold, and then at a price at least equivalent to the price paid for the product which proved defective for the purpose for which it was bought. Furthermore, adopting the approach of Dixon J. at first instance in the *Australian Knitting Mills Ltd v. Grant* case, it would be necessary to show that a buyer with knowledge of the defect or characteristic, would nevertheless purchase it, at a roughly equivalent price. It is understandable that such evidence would, in the normal case, be surprising. The reference to price in the statutory formula is important. Where a product has a number of possible uses, the fact that a product has more than one application or use, by increasing demand, will normally have an impact upon price. If it transpires that a product can only be safely used for one of its possible purposes, it is normally to be expected that that will depress the price in a functioning market. It is not readily to be assumed that a purchaser with knowledge of the characteristic of the product would nevertheless purchase it for another purpose at the same or similar price. In the *Hardwick Game Farm* case, such evidence, albeit surprising, was available. Similarly, in the *Rotherham* case, the agreed evidence of the experts was taken as establishing that fact. But that is evidence which requires to be given and tested, and should not be readily assumed.

65. In this case, in the Court's view, the evidence falls far short of what is required to establish a sound basis for the *Aswan* argument. It is important that evidence was not directed towards this point. Instead, the argument was based on a careful analysis of the evidence in general, from which it was said it was possible to deduce that Clause 804 had been used uniformly as hardcore throughout the site, both in respect of load bearing areas under the building and outside the footprint of the building. It was established that the remediation work had removed Clause 804 used under the building, and some, but not all, of that used outside the footprint of the building. From this, it was said it should be deduced that the Clause 804 not removed was satisfactory, and, accordingly, it was argued that this should be accepted as evidence that the product was fit for one purpose and, therefore, applying the *Aswan* analysis, was of merchantable quality. Notably, although Clause 804 was initially identified as hardcore for use in road building, it was not suggested, either in argument or evidence, that Clause 804 containing pyrite was suitable for this purpose.

66. The Court is satisfied that this falls decisively short of the level of evidence which it would be necessary to establish to allow the *Aswan* argument to be made. The evidence that Clause 804 was not removed from car park areas does not demonstrate that a purchaser with knowledge of the defect would nevertheless pay a similar price for such material for use even under a car park and in open space areas. The absence of such evidence is particularly telling in this case. The defendant, as owner of a quarry with substantial quantities of stone affected by framboidal pyrite, would be in a strong position to provide evidence of sales of the product, if such evidence were available.

67. Since, however, the High Court addressed the substance of this issue, and since questions of the interpretation of s. 14 of the 1893 Act (as amended) rarely reach this Court, it is desirable to address the substantive legal issue. On the assumption, therefore, that it was demonstrated that there was a use for which the Clause 804 was saleable to a purchaser aware of the pyrite content and its propensity to swell and heave, then we are of the view that that fact alone would not be sufficient to render the product supplied to the respondent merchantable within the meaning of s. 14 as substituted.

68. First, the *Aswan* decision is complicated by the fact that the result seems plainly correct. The pails were very robust and almost withstood extraordinary heat to which they were subjected, and would indeed have withstood even that heat if not packed on top of each other in a manner which increased the pressure on the pails. But we doubt, with respect, that it could properly be said that there were two separate purposes involved here, or indeed, that the purpose of the storage of waterproofing compound in Kuwait could be said to be a separate and distinct purpose from that for which the pails were commonly sold. It seems more natural to consider that the purpose for which the pails were sold, whatever the location, was a single one: the storage of waterproofing compound or perhaps more generally, other bulk liquids for transport and storage. That was the purpose for which the pails were commonly used and sold, and taken as a whole, the pails were as fit for that purpose as it was reasonable to expect. This was indeed, it appears, the basis upon which the judge at first instance had rejected the plaintiff's claim. We consider that this is a more plausible and practical approach to this case. Indeed, the fact that it is possible to characterise the same product as either having different purposes or a single purpose expressed at a more general level of abstraction, suggests that there are significant limits to the applicability and utility of this line of argument.

69. Second, we consider in any event that the approach to statutory interpretation in *Roger v. Parish* and *Cavalier Marketing*, is preferable to that in *Aswan*. The normal purpose of statutory amendment is to change the existing law. It may on occasion be useful to address the prior law if only to illustrate the area of change, but it would be unusual to approach a statutory provision on the basis that it did no more than restate the existing law. Indeed, if the definition of merchantable quality was intended to simply express in a slightly more compressed form what had already been said by Lord Reid in the *Hardwick Game Farm* case, it is difficult to see what would be achieved by attempting to put in statutory form what had already been laid down by the highest court in that jurisdiction.

70. Third, the purpose of the 1973 Act and the 1980 Act was to effect significant changes in the law generally, and in particular to shift the balance of the law somewhat in favour of the purchaser, and indeed to establish the concept of consumer sales in which it would not be possible to exclude the implied terms. It might be said that the changes to the concept of merchantability were quite marginal, but these cases, as the difference of judicial opinion shows, were at the margins, and it is not inconceivable that small changes of definition might alter the outcome of such cases.

71. Fourth, taken on its face, the terms of s. 14(3) are clear, easy to apply, and by no means absurd. There is no reason to advance or accept a more sophisticated meaning. The words "purpose or purposes" when applied in their ordinary sense are both capable of application and produce a sensible result. On the other hand, it is, and with respect, not easy to interpret the words as expressing Lord Reid's definition in a more compressed form. It is necessary to hypothesise the purpose for which goods are most "commonly bought" for which they are nevertheless, unfit. If this is indeed the case, it is difficult to see why there should be any reluctance to find such goods to be not of merchantable quality. The emphasis on description, while understandable in the context of the 1893 Act where the applied term as to merchantability only arose on sales of description, is less appropriate in the context of the modern legislation

72. Furthermore, the example proffered in *Aswan* of the circumstance of sale of the same goods by different descriptions, and, therefore, justifying their reference in the plural to "purposes" is not, in our view, persuasive. It was said that heavy duty pails were of higher quality than ordinary pails and for that reason might command a higher price. Pails which are suitable for the lower quality purpose may not be suitable for the higher quality purpose. It would however be obviously wrong that pails sold under the description appropriate to the higher quality should be held to be merchantable because they are fit for a purpose for which pails are sold under the description appropriate to the lower quality. In such a circumstance, it would seem more natural to conclude by reference to the statutory definition, that the more expensive heavy duty pails were not of merchantable quality because they were not fit for the purpose (singular) for which they were sold, having regard to the description applied to them and the price. In any event, this complex interpretation seems an unlikely one to ascribe to a drafter who has used plain and simple language.

73. Finally, and from a broader perspective, it was argued that the interpretation adopted in *Rogers v. Parish* and *Cavalier Marketing*, and in the High Court in this case, shifts the dividing line between the merchantability term and the fitness for purpose term, to the point where the fitness for purpose term is virtually obliterated. However, the history of the development of the formulation and interpretation of the terms traced so carefully in *Aswan* and elsewhere, is of the gradual elevation of the merchantability term, which means, almost inevitably, that the fitness for purpose term has less work to do. This, in itself, is not a reason to reject the interpretation of the High Court. Furthermore, it is perhaps inaccurate to speak of a 'dividing line' between the terms. Both terms now address fitness for purpose, and there is an unavoidable, and intended, overlap between them. Indeed, the fitness for purpose term is capable of covering all the ground dealt with by the merchantability term and more. While the fitness for purpose term applies most naturally in the area of special or unusual purposes, it is in principle capable of applying to any purchase. For example, even if the implied term as to merchantability arises, if the purchaser makes known to the seller the purpose for which the goods are bought, then, even if that is the sole purpose for which such goods may be sought, the purchaser can succeed under the implied term as to fitness for purpose as well as the implied term as to merchantability. It is thus perhaps more accurate to say that the end result of the interpretation adopted in the High Court is that the area which is covered for the fitness for purpose term alone, is reduced to special or uncommon purposes but we see no reason why that should lead to a different interpretation of the term 'merchantable'. A narrow reading of the merchantability term is often justified by the argument that, if the purchaser wishes greater protection, he or she can always invoke the fitness for purpose term by making known the purpose for which the product is sought, and relying on the seller's skill. This is so, but is hardly a compelling reason to adopt a narrower interpretation. There also must be limits to this type of argument since it assumes, touchingly but unrealistically, that parties negotiating sales are avid consumers of the decisions on the Sale of Goods Act and its various amendments. But even if this approach is taken, it still seems more sensible to adopt the *Rogers v. Parish* approach. A seller may be more knowledgeable about the purposes to which the product is put than the purchaser. A purchaser may not know that there are multiple uses for the product. He or she may consider that the use for which they are buying the product is the obvious and only use for the product. But, on the *Aswan* reasoning, the product, though unfit for that purpose (being perhaps the overwhelmingly obvious purpose for the product), can nevertheless be merchantable, if it is suitable for some purpose of which the buyer may be entirely unaware. In such circumstances, the purchaser may not even know of these matters, or their legal consequences, and thus may be unaware of the importance, and indeed necessity, of seeking to bring into play the warranty of fitness for the particular purpose for which he or she has brought the product.

74. Finally, at the level of principle, an interpretation of the provision which imposes the risk (at least initially) upon the seller rather than the purchaser, is sensible and logical. Sellers are normally much more aware of the use to which their products can be put than individual buyers. Increased use will increase demand, and, therefore, the price for the goods, even when used for the original purpose. It is perhaps noteworthy that one of the innovations in the 1980 provisions is the reference to the price at which the product was sold being a component of merchantability. For these reasons, we have come to the conclusion that Irish Asphalt's contention must fail, and that the High Court was right to hold that the Clause 804 as applied here was not of merchantable quality.

Fitness for Purpose

75. The trial judge also found that Irish Asphalt was in breach of the condition implied pursuant to s. 14(4) of the 1893 (as substituted by s. 10 of the 1980 Act). It may be helpful to set that section out in full:

"Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment."

76. It is of course apparent that this is closely related to the implied condition as to merchantable quality, since both address both the question of fitness for purpose, and the purpose for which goods are commonly bought or supplied. As already observed, there is on any interpretation, a significant degree of overlap between the two provisions. It is however important to distinguish between them. There are some distinct features of s. 14(4). First, whereas the condition as to merchantable quality arises once there is a sale of goods in the course of business, the term implied under s. 14(4) does not arise until the buyer does something. He or she must

expressly or by implication make known to the seller any particular purpose for which the goods are being bought. A second distinctive feature of s. 14(4) is the concept of reliance. The section presumes reliance on the seller's skill and judgment. This is shown by the fact that the implied condition does not arise if reliance is negated in fact, or if reliance would be unreasonable. By contrast, the implied condition under s. 14(2) arises whether or not there is reliance, and is not negated by proof of its absence. Finally, the question of the seller's skill and judgment only arises in the context of s. 14(4). Again by contrast, the condition of merchantability under s. 14(2) arises on sale, and cannot be negated by proof that the seller has used the utmost skill and judgment to ensure that the product is of merchantable quality. That is also the case under s. 14(4), but the reference to skill and judgment suggests perhaps, that the implied condition would normally be thought to arise in circumstances where the question is the selection and appropriateness of goods for the particular task rather than the inherent, and perhaps latent, defect in the goods. The implied condition is broad enough to cover the latter situation but it is not perhaps its primary focus.

77. The evidence and decision in this matter are contained in paras. 246 and 247 of the judgment of the High Court. The relevant evidence was the cross-examination of Patrick Elliott, the principal of the plaintiff firm, Elliott Construction. Mr Elliott accepted that he did not supply any copies of the Ballymun Regeneration contract to Irish Asphalt from which it follows, none of the drawings would have been supplied to that company. This is to be expected. Elliott Construction merely ordered from a supplier, in this case Irish Asphalt, a product which had been specified by the professional advisers to Ballymun. Mr Elliott agreed that he did not ask anyone from Irish Asphalt to come and look at the site, but pointed out that that firm visited the site regularly with their deliveries. Elliott Construction did not tell Irish Asphalt specifically that it was going to use the Clause 804 under the building. Mr Elliott considered however that that was implied because "why else would we have been buying the Clause 804 off them, it's a structural infill material...". He said:

"They [Irish Asphalt] knew we were a general building contractor and not engaged in civil engineering and road building works and works of that nature. They knew that we were primarily into, you know, building factories and buildings like the Youth Centre and such around Dublin...".

The trial judge accepted the evidence of Mr Elliott who he considered to be honest. He concluded that the material was not reasonably fit for a purpose which had been made known to the seller.

78. It is clear that this was a subsidiary issue in the trial. Furthermore, in circumstances where this Court has upheld the finding of a breach of the condition as to merchantability, it becomes less important to determine whether or not there was a breach of s. 14(4). However, in view of the conclusion of the High Court Judge, the view we have taken of it, and the importance of clarity in this area, it is necessary to consider the matter.

79. While s. 14(4) might apply most classically in the case of a purchaser asking a vendor's advice as to whether a particular product is suitable for some particular purpose, it is not necessary that anything so formal or pedantic should take place. In many cases, it would be apparent that the particular purpose has been made known by implication, and it is the circumstances, rather than any express evidence, which may show that the buyer does, or does not, rely on the seller's skill and judgment. Furthermore, while there are a number of different components to the section, it is important to keep in mind that it is a single provision, and that, in most cases, the relevant evidence will be short, and will satisfy all the components of the section, both positive and negative.

80. One distinctive feature of the section, and in contra distinction to s. 14(2), is that, as already observed, it is triggered by the purchaser doing something. This is of some importance because it is the making known of the purpose which gives rise to the circumstances which may demonstrate that the buyer does not rely, or that it is unreasonable to rely, on the seller's skill and judgment. Therefore, it is not enough that the evidence shows that the seller knows the purpose for which the product is used. There must, at some basic and even rudimentary level, be some circumstances from which it is fair to say that the buyer made that purpose known to the seller. In our view, the evidence goes so far as to demonstrate that the seller probably knew that one of the purposes for which the Clause 804 was ordered by Elliott Construction was to be used under the building at foundation level, but there is no evidence from which it can be said that it was made known to the seller *by the buyer* as envisaged by s. 14(4). By the same token, and in this respect, applying similar analysis to that in the *Rotherham* case, we conclude that the circumstances in this regard show that Elliott Construction did not rely on Irish Asphalt's skill or judgment. Elliott Construction did not itself exercise any thought as to the appropriateness of this Clause 804 for the contract. It was specified, by the employer, on the advice of its professional advisors, and Elliott Construction was required to obtain it. There was no room in that transaction for reliance by Elliott Construction on Irish Asphalt's knowledge, skill or judgment, as if Elliott Construction relied on anyone's skill or judgment, it was by implication that of the persons specifying the Clause 804 for this purpose, although it might be more realistic to say that, in that regard, Elliott Construction was simply complying with its contractual obligations. Accordingly, we conclude that no implied condition arose under s. 14(4) of the 1893 Act, as substituted by s. 10 of the 1980 Act. Since, however, we have also concluded that there was a breach of the implied condition as to merchantability, this conclusion on s. 14(4) does not affect the outcome of the case.

Incorporation of Terms and Conditions

81. The next issue that arises for consideration is the question as to whether or not Irish Asphalt's terms and conditions of sale were incorporated into the contract or contracts between it and Elliott Construction. This issue was considered by the learned trial judge at paras. 248 to 257 of his judgment under the heading "Notice". The trial judge rejected the argument that the terms and conditions of sale were notified by Irish Asphalt to Elliott Construction. The learned trial judge came to the conclusion that the same were not so notified, and Irish Asphalt has appealed from the findings of the trial judge in that regard.

82. Irish Asphalt sought to rely on the terms and conditions by reason of the provisions of Clause 8 thereof which have the effect of limiting its liability in the event of goods being defective. Clause 8 is in the following terms:

"In the event of goods being delivered which are defective, the company's liability shall be limited to the cost of their replacement. In no circumstances shall the company be liable for any of their loss arising directly or indirectly from the supply of defective materials."

There may be some debate as to the precise meaning of the phrase "the cost of their replacement" in Clause 8, but there is no doubt that the effect of the clause sought to be relied on by Irish Asphalt is to significantly limit its liability to a party to whom it has supplied goods arising out of any defect in those goods. It is also helpful to refer to a clause which appeared on delivery dockets furnished by Irish Asphalt, which contain the following words:

"This material is sold subject to the terms and conditions available on request. White to accounts – pink to customer – blue to haulier – yellow to file."

83. The Court was referred to a considerable number of academic works and to a large volume of case law on the subject of

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incorporation of terms and conditions, particularly those containing exemption clauses, in the course of the hearing. The observation contained in Clark, *Contract Law in Ireland* (Dublin; Round Hall; 2013; 7th ed.) at p. 221 seems apposite:

"The Irish judges, like their English brethren, have struggled with the problem of incorporation because the tests advanced have varied from time to time."

84. Terms and conditions can be incorporated into a contract in a number of ways . Irish Asphalt has relied on the following in arguing that the terms and conditions were incorporated into the contract:

- (1) Incorporation by signature;
- (2) Actual notice of the terms and conditions by reference to three credit notes;
- (3) Reasonable notice by reference to delivery dockets both during the course of the Ballymun Regeneration Project and in the course of earlier projects;
- (4) Incorporation by means of a course of dealing;
- (5) Incorporation by reference.

Contractual Documents

85. An important part of Irish Asphalt's argument on the issue of incorporation concerned the status of the delivery dockets, and how they should be viewed in the context of the contracts as a whole. It was submitted on behalf of Irish Asphalt that each individual delivery was a separate contract. Counsel for Irish Asphalt submitted that the delivery dockets were contractual documents, and that the signing of those dockets by Mr Hannay, the site foreman of Elliott Construction, created, or alternatively, evidenced, the contracts. Thus, counsel submitted that on each occasion, an individual contract for the sale of Clause 804 took place, and that the contract must have included the terms and conditions relied on because of the proviso as to terms and conditions contained in the delivery dockets signed by Mr Hannay.

86. The delivery dockets were described as contractual documents by Elliott Construction in its replies to particulars, wherein it was stated: "The contractual documentation consists of delivery dockets and invoices". The characterisation of the delivery dockets in the replies to particulars as contractual documents does not of itself answer the question as to whether or not the delivery dockets are contractual documents, or, more importantly, whether the terms and conditions of Irish Asphalt were incorporated into the contract either by signature or by reference.

87. Counsel on behalf of Elliott Construction, contended that, insofar as the terms of the contract were concerned, they were negotiated prior to the involvement of Mr Hannay. While it was accepted that there were individual contracts created on each occasion that the foreman on site ordered a specific load, the foreman did not have any involvement in the negotiation of price, or in relation to the acceptance or otherwise of any terms and conditions. The pre-existing terms as to price were those agreed between the principals of the respective parties. In his submissions, counsel for Elliott Construction made reference to the High Court decision (Finlay Geoghegan J.) in the case of *Noreside Construction Limited v. Irish Asphalt* [2011] IEHC 364 ("*Noreside*") which is under appeal to this Court. While not relying on the judgment in that case on the subject of contractual documents by way of precedent, counsel for Elliott Construction relied on the analysis contained in that judgment as to the role of the delivery dockets:

"In my judgment on the facts herein, the delivery dockets had a contractual purpose in the sense of being a document used in the execution of the contract which came into existence on 26th March, 2003. They did not have contractual effect in the sense of making or varying a contract. Having regard to the system operated by both parties for the performance of the supply contract agreed on 26th March, 2003, neither a reasonable man nor any haulier or site operative signing a delivery docket on behalf of the plaintiff would have understood that his signing of the delivery docket potentially varied the terms of the contract already agreed according to which the aggregate was being supplied by the defendant to the plaintiff." (para. 38)

88. Counsel for Elliott Construction pointed out that the delivery notes were for the most part signed by Mr Hannay who was the site foreman, but were not always signed by someone at his level. It was also stated that Mr Hannay had no authorisation to do anything in relation to the delivery notes, other than to confirm the amount shown on the delivery docket was the amount that was in fact delivered, thus confirming that Elliott Construction had received that amount of product.

89. The Court is of the view that there was an overarching contract between the parties or a "master contract" for the supply of goods for the Ballymun project which identified, *inter alia*, the goods required, the price for the goods, and the credit terms applicable to the sale of those goods. After that, a series of separate contracts were made for the sale and supply of Clause 804 during the course of the Ballymun Regeneration Project. It is in that context that the Court will consider the nature of the delivery dockets.

90. Counsel for Irish Asphalt relied on a number of authorities in support of its arguments including the decision in the case of *Spurling Limited v. Bradshaw* [1956] 1 W.L.R. 461 ("*Spurling*") in which the United Kingdom Court of Appeal considered the status of a "landing account". The defendant in that case had dealings with the plaintiff warehousemen, and delivered to them a number of barrels of orange juice for storage. A few days later, the defendant received a "landing account" which, on its face, referred to conditions printed in small type on the back. Those conditions included an exemption clause. The barrels, when collected, were found to be empty, or in such damaged condition as to be useless. The warehousemen sued for charges due for storage and the defendant counterclaimed for damages for breach of an implied term of the contract of bailment to take reasonable care of the barrels. Denning L.J. (at p. 467) commented:

"It is to be noticed that the landing account on its face told Mr. Bradshaw that the goods would be insured if he gave instructions; otherwise they were not insured. The invoice, on its face, told him they were warehoused 'at owner's risk'. The printed conditions, when read subject to the proviso which I have mentioned, added little or nothing to those explicit statements taken together.

Next it was said that the landing account and invoice were issued after the goods had been received and could not, therefore, be part of the contract of bailment: but Mr. Bradshaw admitted that he had received many landing accounts before. True he had not troubled to read them. On receiving this landing account, he took no objection to it, left the goods there, and went on paying the warehouse rent for months afterwards. It seems to me that by the course of business and conduct of the parties, these conditions were part of the contract."

91. In the circumstances, the warehousemen were able to rely on the exempting conditions and were able to recover their charges whilst the defendant's counterclaim was dismissed. Counsel for Elliott Construction, in his submissions, noted that the landing account had been received by the plaintiff on many occasions in the course of his dealings with the defendant, and for that reason, it had the effect of putting the plaintiff on notice of the contractual terms which it contained.

92. It is clear that the Court of Appeal in that case was not concerned with the fact that the landing account was issued after the goods had been received. As the landing account and invoice with the terms and conditions containing the exemption clause had been provided to the defendant on many previous occasions, the Court concluded that, by the course of business and conduct between the parties, the terms were incorporated into the contract.

93. The case of *British Road Services Ltd v. Arthur v. Crutchley & Co. Ltd (No.1)* [1968] 1 All E.R. 811 ("*British Road Services Ltd v. Arthur*"), involved a delivery note issued in the course of a contract of bailment. Under a long established course of business between the plaintiff carriers and the defendants, delivery notes for goods transported by the plaintiffs and delivered at the defendants' warehouse in the course of trans-shipment at Liverpool would be handed back to the plaintiffs' lorry drivers, on the defendants receiving the goods, stamped "Received on AVC [that is the defendants'] Conditions". The conditions included a term limiting liability to £800 per ton. A lorry load of whisky was delivered by the plaintiffs to the defendants' warehouse. During the night the warehouse was broken into, and the whisky was stolen. On appeal, it was found that the defendants' conditions of carriage were incorporated into their contract with the plaintiffs, and, accordingly, the liability of the defendants was limited to £800 per ton. At pp. 816-817 of his judgment Lord Pearson commented:

"Now I come to the terms of the contract between the plaintiffs and the defendants. It was not proved that the plaintiffs' conditions of sub-contracting were ever sent to the defendants, and the defendants in evidence denied that they were sub-contractors to the plaintiffs. The plaintiffs' form of delivery note contained the words:

'All goods are carried on the [plaintiffs'] conditions of carriage, copies of which can be obtained upon application to any office of the [plaintiffs].'

Under the long-established course of business between the parties, however, the plaintiffs' driver brought his delivery note into the defendants' office at the Cotton Street warehouse and asked in effect if he could bring his load into the warehouse. If there was room in the warehouse, the permission would be given, and the delivery note would be rubber-stamped by the defendants with the words 'Received under AVC conditions', followed by the date and the address of the warehouse. The delivery note, thus converted into a receipt note, would be handed back to the plaintiffs' driver and he would bring his load into the warehouse as instructed by the warehouse foreman. If this had only happened once, there would have been a doubt whether the plaintiffs' driver was their agent to accept the defendants' special contractual terms. This, however, happened frequently and regularly over many years at this and other warehouses of the defendants. Also the defendants' invoices contained the words: 'All goods are handled subject to conditions of carriage copies of which can be obtained on application'. It may perhaps be material to add that the defendants' conditions of carriage were not peculiar to them, but were the conditions of carriage of Road Haulage Association, Ltd. At any rate, I agree with the decision of the judge that the plaintiffs' conditions were not, and the defendants' conditions were, incorporated into the contract between these parties. The effect was that, while the nature of the defendants' liability as bailees to the plaintiffs was unaffected, the liability was limited in amount to £800 per ton, which, when credit is given for sixty bottles of whisky recovered after the theft, produces a total in this case of £6,135."

94. What is of interest in that case is that the defendants' terms and conditions were found to have been incorporated into the contract between the parties but the plaintiffs' terms and conditions, to which reference was made on the printed delivery note, were not incorporated into the contract. As stated in Lord Pearson's opinion, the reason why the plaintiffs' terms and conditions were not incorporated into the contract was because "It was not proved that the plaintiffs' conditions of subcontracting were ever sent to the defendants and it was denied by the defendants that they were subcontractors to the plaintiffs". By contrast, the defendants' terms and conditions were not peculiar to them, but were the conditions of carriage of the Road Haulage Association Limited, and were incorporated into the contract by reference to the rubberstamping of the words "Received under AVC Conditions" on the delivery note.

95. Another case relied on by Irish Asphalt in relation to the nature of contractual documents is the case of *Thompson v. T. Lohan (Plant Hire Limited) Ltd & Anor* [1987] 1 W.L.R. 649 ("*Thompson v. T. Lohan*"), a case in which at issue was a letter and a time sheet. This was a judgment of the Court of Appeal of England and Wales. The letter in question concerned the hire of an excavator and contained the following:

"All plant hired out under the terms and conditions of the Contractors' Plant Association conditions of hire a copy of which will be forwarded on request." (p. 651)

The letter was read by a Mr Pinder on behalf of a third party and it was accepted that the initial agreement in that case was made between Mr Danby on behalf of the defendant and Mr Pinder on behalf of the third party. It was noted by Fox L.J. in his judgment (at p. 651):

"As to the position of the two individuals principally concerned, Mr. Pinder was the quarry manager of the third party, and Mr. Danby was a director of Lohan. Mr. Pinder had previously hired from Lohan and knew that Lohan traded on the C.P.A. model terms — and the judge so found."

Fox L.J. went on to say (at p. 653):

"The first question which I deal with, although in fact it came later in the third party's submissions, is: what was the contract? Was it the bare contract to supply plant at a price, or was the plant so supplied on the C.P.A. conditions? I have no doubt that it was the latter. First, Mr. Danby's letter of 8 September made it quite clear that the hiring was to be on the C.P.A. terms; the letter says so. Secondly, the third party raised no objection to that; indeed, it is clear that is what they expected. Thirdly, it was absolutely common form in the industry. Fourthly, I should refer to some passages in Mr. Pinder's cross-examination. [His Lordship referred to passages in which Mr. Pinder said that, although he had never read the C.P.A. conditions, he knew of their existence, that the letter from the first defendants stated that the plant was hired subject to those conditions and that it was the practice and custom in the industry to hire plant subject to the conditions. His Lordship continued:] Fifthly, the form of time sheet has a note at the bottom of the sheet which says:

'All hours shown on this time sheet certified correct, an invoice charged on these hours will be accepted. C.P.A. conditions of hire to apply.'

That is signed by the operator and also on behalf of the hirer. Mr. Pinder in fact signed that time sheet and some six others which we have in the appeal bundle. Again, there is plain reference to the C.P.A. terms. In my opinion the only conclusion to be reached from those facts and evidence is that the parties entered into the contract upon C.P.A. terms. At what precise point of time the contract was concluded I need not consider. There is no doubt there was a contract and, on the evidence, in my view it was beyond doubt that such contract was on C.P.A. terms."

96. Counsel for Elliott Construction argued that it was clear from the decision in that case that the incorporation of the terms and conditions occurred independently of time sheets, and suggested that the case was not authority for the proposition that a post-contractual document could have the effect of incorporating new terms and conditions into a contract.

97. That case supports the proposition that terms and conditions can be incorporated by reference to specific terms and conditions in common use in that industry. Significantly, the letter of the 8th September contained the clause set out above stating the terms of the hire in question and the time sheet was relevant because it also made reference to the C.P.A. terms.

98. The English High Court decision in the case of *Photolibary Group Ltd v. Burda Senator Verlag GmbH* [2008] 2 All E.R. (Comm) 881 ("*Burda*") is also of interest. It concerned the role of delivery notes. The claimants in the case supplied photographs in the form of transparencies for the consideration of the defendants for publication in their magazines. The defendants would pass on their requests to one of their number who would in turn pass on the request to photograph providers. A number of photographs would be selected and sent to the defendant publishers. They would be considered, some would be published, some not. Those not used would be returned after consideration, some quickly, some not. When the transparencies were sent to the defendants, they were accompanied by a delivery note. On its face and back, it set out terms of business. They were standard terms of the British Association of Picture Libraries and Agencies. A substantial parcel of transparencies was sent out accompanied by the delivery note. While a number of transparencies were being returned, they were lost in transit between Germany and London. The terms and conditions included a term requiring the party who requested them to pay a holding fee while the transparencies were retained and also provided for payment of compensation for loss. In the course of his judgment, Jack J. said:

"65. Mr Ayres put great emphasis on the fact that Burda Media did not sign the delivery notes, which, he submitted, showed that the terms of the notes were not accepted. If the notes had been returned signed, that would have made the defendants' position as to incorporation really unarguable. But the converse does not follow. The signature which was requested, where it was, was to acknowledge safe receipt. If the terms were not acceptable, Burda Media was asked to return the transparencies. That, of course, was never done.

. . .

68. It follows also that I reject the submission that the deliveries of transparencies are to be considered as bare bailments with no terms apart from a term as to the return of the transparencies with an obligation to take due care of them in the meanwhile. While it is now clear that contract is not a pre-requisite to bailment — I refer to Chitty on Contracts (29th Edition, 2004) Volume II, page 176 (paragraph 33-002) — in my view, in commercial situations such as the present where goods are passed by way of business from one party to another, it will be very unusual that there will be no contract between those parties."

Jack J. also noted (at para. 63):

"In my judgment the most straightforward analysis of the contractual situation is that a delivery of transparencies accompanied by a delivery note is to be treated as an offer, which was accepted by the acceptance of the transparencies and their onward transmission to Germany. In each case a contract was made in that way. It incorporated the terms of the delivery notes. That is the appropriate objective interpretation of the parties' conduct, whatever the actual intention of the defendants. However, I should say that I do not think that the evidence established any positive intention on the part of the defendants not to deal on the basis of the delivery notes. The evidence was actually to the contrary. For they knew what the terms were. They never rejected them, or said they would not be bound by them. In the early days the claimants' delivery notes were sent to Germany and loss fees were noted on Burda Media's delivery notes. I find that they negotiated loss fees on the basis that the claimants were entitled to the amounts stated in their delivery notes but could be persuaded to accept less because they wanted their businesses with the defendants to prosper. That was the appreciation on both sides. In the case of the sixth claimant, Marianne Majerus, there was an express acceptance of her terms at her meeting with Carmen Durrant in January 2004. Mr Crichton can also rely on the terms of his letter of 9 December 1996.

64. The alternative analysis that the faxed requests for transparencies to be submitted were offers to submit them on the usual terms, that is, the terms of the delivery notes, which offers were accepted by the submission of transparencies accompanied by the notes, seems to be equally viable. Likewise the case can be put on the basis of an established course of dealing on the terms of the delivery notes: compare the *Circle Freight* case."

99. Counsel for Elliott Construction made the comment that that decision had no application to post-contractual delivery dockets. It is correct to say that the delivery notes accompanied by the transparencies were viewed as an offer by the Court in that case and, thus, could not be described as post contractual documents; but, nevertheless, the case is of assistance, particularly having regard to the course of dealing between the parties. It is important to bear in mind that in *Burda*, the delivery note contained the following provision:

"1. Any client who has not previously dealt with us on the terms and conditions set out overleaf and who does not wish to accept such terms must return all the images immediately...The client will be deemed to have accepted our terms if all the Images are not returned within 5 days of their receipt."

Thus, it was an option for the defendants, on receipt of the transparencies, accompanied by the delivery notes setting out the terms and conditions of the contract, to be entered into, to reject the terms and conditions and to return the goods if not acceptable. It was also clear that the defendants were aware of the terms and conditions which were set out in the delivery notes.

100. Reference was also made to the decision of the Scottish Court of Session - Inner House in the case of *Continental Tyre & Rubber Co. Ltd v. Trunk Trailer Co. Ltd* [1985] S.C. 163 ("*Continental Tyre & Rubber Co. Ltd*"). That case concerned the sale and delivery of tyres, and a claim in respect of sums due in respect of the sale of the tyres. A number of tyres had been ordered by a purchase order in a standard form; on delivery, the pursuer's driver tendered a delivery note in standard form and this was signed by

a junior employee of the defenders. An invoice was sent about ten days later. The tyres were alleged to have been rejected by customers of the defenders as not being of merchantable quality. The pursuers in that case, on the assumption that the warranty as to merchantable quality had been breached, pleaded that their liability was excluded by a reference to their standard conditions of sale on the delivery note. It was contended that this note was a counter offer accepted by the defenders. They also relied on the argument that a recent and consistent course of dealing meant that the terms of the delivery note had been incorporated into the contract. It was held in that case that the contract was concluded as soon as the first batch of tyres had been delivered and the delivery note was merely a receipt indicating quantity and description of the tyres. It did not amount to a contract note or a record of the terms on which supply was made. Also, it was pointed out that there were no averments that a signature was required before delivery. It was further held that the incorporation of the contractual term by a course of dealing depended on whether the pursuers were reasonably entitled to conclude that the defenders accepted the tyres subject to their conditions, and particularly on whether sufficient notice had been given; the delivery note was not contractual and the defenders had continued to send purchase orders bearing that their own conditions were to prevail.

101. Lord Brand, the Lord President, in the course of his judgment (at p. 168) commented:

"What has been called the 'delivery note' does not so describe itself. It is not and does not bear to be a contract note or 'sold' note of the kind considered in *Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association* [1966] 1 W.L.R. 287. . . which purported to record the terms of the parties' agreement, and which was tendered before performance. It is not and does not bear to be, either, an acknowledgement of order form, of the kind considered in *Grayston Plant Ltd. v. Plean Precast Ltd.* 1976 S.C. 206, purporting to record the terms on which the supply is made or to be made. The signature of the defenders' employee is, as the form shows, required for one purpose and one purpose only. Opposite the box containing the signature are the following words: 'Please note that your signature is proof that the quantity and description of the goods shown on this docket were received correctly.' There are not averments that the legend near the top left hand corner of the docket, referring to the pursuers' 'conditions of sale', which is in small print and not in bold type, was ever drawn to the attention of the person who signed it, and it is not averred that signature of the docket was required before the delivery was made (cf. the very different circumstances in *British Road Services Ltd. v. Arthur v. Crutchley & Co. Ltd.* where the delivery note was over stamped, referring to the conditions upon which the warehouse keeper would receive the load, and handed to the plaintiffs' driver before he brought his lorry into the premises; see the opinion of Lord Pearson at pp. 816 and 817)."

102. The form in which it was contended that the terms and conditions in that case were said to be incorporated into the contract was as follows:

"All offers and sales are subject to the company's current terms and conditions of sale, a copy of which will be supplied on request". (p. 167)

That case was relied on in the judgment in *Noreside* to which reference has been made previously.

103. Reference was also made in the course of the submissions to Treitel on *The Law of Contract* (12th Ed.) at paragraph 7 – 006 where it is stated:

"Nature of the document:

An exemption clause is not incorporated in the contract if the document in which it is set out (or referred to) is not intended to have contractual force: e.g. if the document is a mere receipt for payment. On the other hand, the mere fact that a document is called a 'receipt' will not prevent it from having contractual effect. The document will have such effect if the party to whom it was handed knew it was intended to be a contractual document or if it was handed to him in such circumstances as to give him reasonable notice of the fact that it contained conditions. It will also be contractual if it obvious to a reasonable person that it must have been intended to have this effect. This will be the case if the document is of a kind that generally contains contractual terms. Whether a document falls into this class depends on current commercial practice, which may vary from time to time."

104. The Court is satisfied that the delivery dockets herein are contractual documents in the sense that they are documents which were created in the course of the contracts at issue in these proceedings. However, the real question is whether they are contractual documents in the sense contended for by *Irish Asphalt? Chitty on Contracts* (London; Sweet and Maxwell; 2012; 31st ed; volume I) at paragraph 12 – 009, puts it well:

"Contractual Documents:

[T]he document must be of a class which either the party receiving it knows, or which a reasonable man would expect, to contain contractual conditions..."

105. When one looks closely at the cases referred to above and the academic commentary, a number of points emerge. First of all, a contractual document may take a variety of forms – a landing account as in *Spurling*, a delivery note as in *British Road Services Ltd v. Arthur*, a time sheet and letter as in *Thompson v. T. Lohan* – to give some examples. Thus, a delivery docket could be a contractual document.

106. The second point that seems to be clear from the authorities is that in those cases in which it was successfully argued that the document at issue was a contractual document, the document contained, in one form or another, the terms and conditions actually relied on. Thus, in *Spurling*, the document at issue was a landing account which referred on its face to conditions printed in small type on the back. Those conditions spelt out clearly the basis on which the goods were to be taken by the warehouse.

107. The case of *British Road Services Ltd v. Arthur* is notable in that the defendants' conditions were incorporated into the contract as described above, but the plaintiffs' conditions of contract were not found to have been incorporated in the contract, in circumstances where there was no evidence that their conditions of sub-contracting were ever sent to the defendants.

108. A third point to note is that the timing of the delivery of the relevant terms and conditions may not be the deciding factor in any given case. The decision in *James A. Slattery v. Córás Iompair Éireann* [1972] 106 I.L.T.R. 71 ("*Slattery v. CIE*") (to which reference will be made later) reinforces the point that a party may be bound by terms and conditions although they sign a consignment note containing the terms and conditions of the contract after performance of the contract by one of the parties.

109. What emerges from the authorities is that, to be a contractual document, the document must be one which contains contractual conditions or a reference to specific terms and conditions well known in a particular industry. It is not sufficient to refer in general terms to unspecified terms and conditions. The proviso on the delivery docket in this case is akin to that in the *Continental Tyre & Rubber Co. Ltd* case which was found not to incorporate the pursuer's terms and conditions. The Court is satisfied that the delivery dockets, signed by Mr Hannay for the most part, on behalf of Elliott Construction, were for the purpose of recording the type of material delivered, the date of delivery and quantity delivered, and did not set out the terms and conditions of the contractual arrangement between the parties. They are not documents which "generally contained contractual terms", as it is put in *Treitel*, or documents of a class which the party receiving it or which a reasonable man would expect to contain contractual conditions as *Chitty on Contracts* describes it. Accordingly, having regard to the facts and circumstances of this case, the Court rejects the contention that the delivery notes are contractual documents in the sense contended for by Irish Asphalt.

Incorporation by signature

110. Given the finding that the delivery dockets are not contractual documents, strictly speaking, it is not necessary to consider whether Irish Asphalt's terms and conditions were incorporated by signature into the contracts, as a party will only be found to have incorporated terms and conditions by signature on a contractual document. However some reference will be made to the authorities relied on by the parties in this context to the extent that they could have some bearing on other aspects of the issues herein.

111. Counsel for Irish Asphalt, in the course of his submissions, referred to the leading case of *L'Estrange v. F. Graucob Ltd* [1934] 2 K.B. 394 ("*L'Estrange v. Graucob*"). Scrutton L.J. at p. 403 of his judgment stated:

"In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."

112. Counsel for Irish Asphalt also referred to the well known decision in the case of *Curtis v. Chemical Cleaning & Dyeing Company* [1951] 1 K.B. 805 ("*Curtis*") in which a party's signature was described as "irrefragable evidence of his assent to the whole contract, including the exempting clauses" (p. 808). That was a case concerning a dress left for cleaning. The plaintiff signed a receipt which contained conditions exempting the cleaners from liability for damage however caused, but at the time of signing the receipt, she did so in circumstances where the assistant in the dry cleaning shop misrepresented the extent of the exemption clause, and it was held in that case, the defendants could not rely on the exemption clause by reason of the innocent misrepresentation of the shop assistant.

113. Reference was also made to *Slattery v. CIE*. This case related to the transport of a horse. The plaintiff in the case had signed a consignment note following the delivery of the horse. The consignment note signed by the plaintiff was headed in large heavy black print "Consignment note and delivery sheet for horses to be carried... at owners' risk". Teevan J. in the course of his judgment at p. 73 noted that the plaintiff's signature was about two or three inches below that heading. He went on the course of his judgment to observe:

"Be that as it may he signed the contract and no authority has been cited to me and no convincing argument presented to avoid the plaintiff's assent to its terms, or to support assertion that having been signed on delivery it cannot be read as the contract the parties entered into." (p. 74)

Accordingly, it was found that the plaintiff bound himself by the conditions on signing the contract note.

114. Irish Asphalt relies on the delivery dockets signed by Mr Hannay as and when goods were delivered by Irish Asphalt to Elliott Construction. It was contended that the delivery dockets were contractual documents and as such the signature by Mr Hannay on the delivery dockets was sufficient to incorporate the terms and conditions into the contract.

115. Counsel on behalf of Elliott Construction did not take issue with the principles identified by counsel for Irish Asphalt, but did not accept that they are applicable to the facts of this case. The delivery dockets, he contended, were not contractual documents in the sense put forward by Irish Asphalt, a point which the Court has accepted. He further argued that incorporation by signature only occurs where, in the course of the formation of a contract, a document is signed which contains the terms of that contract or some of them. He added, in his written submissions, that *Slattery v. CIE* was a case dealing with a post-contractual document, and was, in that sense, a decision which concerned acknowledgement and estoppel, rather than incorporation by signature. Teevan J. in that case had commented:

"The question is whether the plaintiff can be heard to deny that the conditions set out in the consignment note signed by him form part of the contract? 'The best way of proving (the terms of a contract) is by a written document signed by the party to be bound' (*per* Denning L.J. in *Olley v. Marlborough Court Ltd.* [1949] 1 K.B. 532 at page 549). Here we have such a document but the argument is that it must be ignored because it was signed after delivery of the horses, in other words after completion of the defendants' part of the transaction. The plaintiff could have refused to sign the document particularly as it was not shown or its terms otherwise made known to him at the inception of carriage: the fact is that he signed it. Before signing it he was aware, needless to say, of the damage to his horse but he did not then know that the injury was likely to result in loss." (p. 73)

In the concluding paragraphs, Teevan J. added:

"I must hold that the plaintiff bound himself by the conditions on signing the contract note. It amounts to a declaration by the plaintiff of what the terms of the contract were." (p. 74)

He went on to say (at p. 74):

"Having regard to the very prominent manner in which the defendants have called attention, almost at the very place where the plaintiff placed his signature, to the carriage being at owners' risk and subject to the condition over-leaf, the plaintiff has only himself to blame for failing to notice this."

116. The useful analysis of the decision in *L'Estrange v. Graucob* contained in McMeel on the *Construction of Contracts* at paragraph 15.64 explains the position thus:

"In any event, in the view of Scrutton L.J., an order form was a contractual document, which invariably contained terms. In the absence of fraud or misrepresentation and, given the heading of the document, the plaintiff was bound. . . . Nevertheless the term was clearly incorporated in an agreement which had been reduced to writing and which had been signed. No defence of non est factum was possible, because the document clearly related to the sale of the machine. Further, a representation that the document was an order was probably true, but not relevant. What the plaintiff would have to prove in order to succeed was that there was a representation that the document contained no exemption clause.

It is submitted that the reason why a signature is binding is because it demonstrates assent to the terms above it. There is no need to invoke arguments based on estoppel. As Lord Devlin stated in *McCutcheon v. David MacBrayne Limited*: 'the law is clear, without any recourse to estoppel, that a signature to a contract is conclusive.'

Thus, a party signing a contractual document containing terms and conditions is bound by those terms and conditions regardless of whether or not they have read the terms and conditions. This is because the terms of the contract have been reduced to writing and have been signed. The key point is that the terms and conditions incorporated by signature are contained in the contractual document signed by the party sought to be bound.

117. In the present case, the documents relied on to argue that the terms and conditions were incorporated by signature are the delivery notes. The delivery notes did not contain the terms and conditions. They contained a proviso that "the material is sold subject to the terms and conditions available on request", but, in the view of the Court as explained previously, this is not sufficient for the purpose of incorporation by signature. The party, to be bound, must know what the terms and conditions are (for example, by reference to specific, well known, industry wide terms and conditions on the contractual document, such as the A.V.C. conditions in the *British Road Services Ltd v. Arthur* case) or by setting out the specific terms and conditions relied on in the document to be signed. A bland reference to terms and conditions alone cannot suffice. It could not be said that the inclusion of such a proviso on a delivery docket is reducing the terms of the contract to writing. How is one supposed to know what those terms and conditions are? As McMeel put it, "a signature is binding because it demonstrates assent to the terms above it." Thus, the Court is satisfied that the terms and conditions were not incorporated into the contract by the signature of the party to be bound as the delivery dockets could not be regarded as contractual documents.

Incorporation by Actual or Reasonable Notice

118. The learned trial judge in his judgment dealt with the question of notice in some detail. He commented on the disparate outcomes to be found in the cases dealing with the question of notice. As he said:

"The transport cases seem to establish that purchasing a ticket which contains conditions means that you can be bound by the conditions whether you have read them or not; that possibly you are not bound if you do not know that the ticket contained any such conditions; that if you know there is writing on a ticket and believe that it sets out conditions, you are bound whether you read them or not; and even if you do not believe the ticket contained conditions, you will nonetheless be bound if reasonable notice was given." (para. 251)

119. He referred at para. 251 to the case of *Richardson Spence & Co. Ltd v. Rowntree* [1894] A.C. 217, which concerned a passenger who had been handed a folded ticket. There was writing on the ticket when opened, and it contained conditions which limited liability for any loss on the journey:

"As the plaintiff did not know that the writing contained conditions and as it was held that the transport company had not done that which would have been sufficient to give the plaintiff notice of these conditions, an award, unlimited by the relevant condition, was upheld on appeal." (para. 251 of the High Court Judgment)

As the learned trial judge continued:

"Many of the cases as to notice remain peculiar to their own facts".

120. He then referred to a number of well known decisions on the question of notice. Thus, in *Thornton v. Shoe Lane Parking Ltd* [1971] 2 Q.B. 163, it was found that an exclusion clause could not be relied on as the particular clause could not be observed by a person entering a car park with an automatic ticket machine. Lord Denning M.R. explained the reasoning behind that decision as follows:

"... the offer was contained in the notice at the entrance giving the charges for garaging and saying 'at owner's risk,' i.e., at the risk of the owner so far as damage to the car was concerned. The offer was accepted when Mr. Thornton drove up to the entrance and, by the movement of his car, turned the light from red to green, and the ticket was thrust at him. The contract was then concluded, and it could not be altered by any words printed on the ticket itself. In particular, it could not be altered so as to exempt the company from liability for personal injury due to their negligence." (p. 169)

In that case, for the plaintiff to have observed the particular term relied on he would have had to exit his car, and walk around the car park until he found on an internal pillar opposite the ticket machine the set of printed conditions in a panel.

121. Reference was also made to the case of *Olley v. Marlborough Court Ltd* [1949] 1 K.B. 532. That case concerned the hire of a hotel bedroom. It was found that the contract between the party hiring the bedroom and the hotel was made before the guest had access to the bedroom. In the hotel bedroom, there was a notice which sought to limit the hotel's liability in respect of valuables that had not been deposited with the hotel. Mrs Olley found that furs and jewellery and other items were missing from her bedroom at a later stage during the course of her stay. The hotel tried to restrict its liability in respect of the loss by reliance on the notice in the plaintiff's bedroom. Denning L.J., in the course of his judgment (at p. 549), commented:

"Now people who rely on a contract to exempt themselves from their common law liability must prove that contract strictly. Not only must the terms of the contract be clearly proved, but also the intention to create legal relations - the intention to be legally bound - must also be clearly proved. The best way of proving it is by a written document signed by the party to be bound. Another way is by handing him before or at the time of the contract a written notice specifying its terms and making it clear to him that the contract is on those terms. A prominent public notice which is plain for him to see when he makes the contract or an express oral stipulation would, no doubt, have the same effect. But nothing short of one of these three ways will suffice. . . . So, also, in my opinion, notices put up in bedrooms do not of themselves make a contract. As a rule, the guest does not see them until after he has been

accepted as a guest. The hotel company no doubt hope that the guest will be held bound by them, but the hope is vain unless they clearly show that he agreed to be bound by them, which is rarely the case."

122. The learned trial judge contrasted those cases with the decision in the case of *Shea v. Great Southern Railways Co.* [1944] 1 Ir. Jur. Rep. 26 in which a receipt, indicating that a bicycle was carried on public transport at the owner's risk, and that the ticket was issued "subject to the company's rules and regulations" was held to have excluded liability for a damaged bicycle, even though the master copy of the terms and conditions was covered up by the opening of the door of the bus. It was pointed out that the essence of limitation was recorded on the receipt. That may explain the difference. By contrast, in *Ryan v. Great Southern and Western Railway Co.* [1898] 32 I.L.T.R. 108, a reference on a train ticket to terms and conditions which was not readily available was not sufficient to exclude liability.

123. For completeness, reference should be made to an ex tempore decision of the High Court (Barrington J.) in the case of *O'Beirne v. Aer Rianta*, (Unreported, High Court, 20 May 1987) ("*O'Beirne*"). The facts of that case were very similar to those in *Thornton v. Shoe Lane Parking Ltd.* Barrington J. came to a different conclusion, stating:

"One thing that caused me some trouble was [counsel for the plaintiff's] submission that in fact the contract was over by the time the plaintiff received his ticket, but I don't think that is so. I know all the evidence, the witnesses for the plaintiff accepted but it appears to be the case, that, for practical purposes, the driver of the car was committed to the car park once he had turned into the narrow passage or avenue leading to the car park. It will be difficult for him to retreat. Nevertheless, ... [counsel for the plaintiff] submits once he was in the car park he was subject to the minimum charge for being in the car park, but nevertheless the ticket, on its face, says the placing of a vehicle in the car park shall be deemed as acceptance of the conditions. That would appear to be an admission on the part of Aer Lingus (sic) that the motorist isn't bound until he has placed his car in the parking position and therefore it appears that had the plaintiff read the conditions and had he decided he did not like the conditions he would have been entitled to leave the car park without paying anything. He might have had difficulty in retreating or not but it appears to me that Aer Lingus (sic) couldn't keep him indefinitely in the car park if he did not wish to accept the terms and he would be entitled to leave if he did not accept the terms."

124. That decision is the subject of some criticism in McDermott on Contract law at para. 8.25. As he pointed out:

"The judgement of Lord Denning M.R. in Thornton does not appear to have been considered by Barrington J. and it is not even clear whether it was cited by counsel in argument... "

The Court is not of the view that the decision in *O'Beirne* is of any assistance in this case.

125. It was contended on behalf of Irish Asphalt that the learned trial judge failed to have regard to the fact that the Elliott Construction had actual notice of the terms and conditions prior to the commencement of the contract or contracts for the supply of materials at Ballymun. It was accepted that a credit note had been received by Elliott Construction on the 31st January, 2004 and two were received on the 30th June, 2004. It was submitted on behalf of Irish Asphalt that, once this had been established, Elliott Construction attempted to change the emphasis of their arguments by stating that the credit notes were only seen by those involved in the accounts department and not by senior management. It was also pointed out that Elliott Construction had conceded that Mr Hannay was aware of the proviso on the delivery notes, as indeed was Mr Elliott.

126. The Court does not agree with the submission on behalf of Irish Asphalt to the effect that the learned trial judge did not have regard to the fact that Elliott Construction had actual notice of Irish Asphalt's terms and conditions before the contract began. At para. 254 of the judgment, the learned trial Judge dealt comprehensively with the evidence in relation to the question of actual notice. He referred to a number of items of correspondence between the parties which Irish Asphalt relied on to demonstrate that Elliott Construction had received the terms and conditions. For example, one was a template letter of the 29th January, 2003, announcing the opening of the quarry at Bay Lane. The letter was sent by way of a mail merge and was identified in an affidavit of discovery as if terms and conditions were printed on the back. The learned trial judge commented as follows:

"This was formally sworn to in an affidavit by Irish Asphalt as being a copy in that form. It is not. The original letter was discovered by Elliott Construction. I have seen the letter. It does not have the terms and conditions on the back. The back is blank." (para. 254)

127. The trial judge went through the items relied on by Irish Asphalt and found that those items did not contain copies of the terms and conditions. Counsel for Irish Asphalt accepted that he was not in a position to challenge the finding of the learned trial judge in relation to those documents.

128. Having considered the evidence of Ciara Cassidy, on behalf of Irish Asphalt, and Patrick Elliot as to the correspondence, the trial judge made an observation in the course of para. 254 of the judgment in the following terms:

"Of these documents the most fundamental are the template letter of 29th January 2003 and, most importantly, the promotional letter to Mr. Dolphin of 30th January 2003 which is based on it. Were it not for the fact that Elliott Construction kept a copy of this letter, I would have been under the impression that by reason of the system supposedly in place the terms and conditions had been notified as at the time when Irish Asphalt began to deal with Elliott Construction. As regards the price increase letter and the price quotation letter I am urged to rely on the supposed system. I accept that Patrick Elliott is an honest witness. The apparent challenge to his evidence, in contrast, by way of office systems does not establish a probability to counter his evidence. The systems are established by the evidence, instead, as random. It is clear that they were not systematically followed."

The learned trial judge also rejected the suggestion that the credit notes could be viewed as providing actual notice stating:

"Claiming back credit for relatively small errors is not a reasonable context within which the party in error as to price charging is to announce a limitation clause for all future contracts. Such discourse is unlikely to be noticed. It does not concern the formation of a contract but the true performance of an existing obligation by reference only to price and perhaps, on occasion, to quantity." (para. 254)

129. The Court is satisfied that, contrary to the contention of Irish Asphalt in relation to the question of actual notice, the learned trial judge had regard to the evidence in relation to actual notice, and found as a fact that there had not been such notice in respect of the formation of the contract between the parties relating to the Ballymun project. The role of the credit notes will be further

considered later in the course of the judgment as they were relied on before the trial judge to establish a system of dealing between the parties.

130. The issue then arises as to the correctness of the view of the trial judge as to whether or not Irish Asphalt had given reasonable notice of its terms and conditions to Elliott Construction at any stage. In the course of his judgment, the learned trial judge stated at para. 251:

"There is very little in terms of amplification of the fundamental principle that a party seeking to rely on an exclusion or limitation clause must give the party to be bound reasonable notice of that clause."

As Sir Kim Lewison put it in the *Interpretation of Contracts* at p. 126:

"The degree of notice will vary according to the nature of the terms sought to be incorporated."

131. The trial judge was clearly in agreement with that view as he stated at para. 251 as follows:

"Sometimes the approach of the courts seems to depend on the onerousness of the clause in question. In *Thornton v. Shoe Lane Parking*, Lord Denning M.R. referred (at 170) to clauses which are 'so wide and so destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way'. Rhetorically, he referred to some clauses as requiring 'to be printed in red ink with a red hand pointing to it – or something equally startling'. This dictum based on the reasonableness of notice of an apparently unattractive exclusion clause has been developed by some later decisions so that unusually onerous clauses are required, as Dillon L.J. noted in *Interfoto Library v. Stiletto Ltd.* [1989] Q.B. 433 at 438 to 439, to be 'fairly brought to the attention of the other party'. This suggests an analysis of the quality of the clause as opposed to the quality of the notice whereby any clause in issue was incorporated into a contract."

132. The delivery dockets were relied on by Irish Asphalt to argue that the proviso on the delivery dockets in which reference was made to terms and conditions, together with the three credit notes and/or the three credit notes, amounted to reasonable notice of the terms and conditions or, in the alternative, incorporated the terms and conditions by a course of dealing.

133. In support of his arguments in this regard, counsel for Irish Asphalt referred to a passage from McMeel in *The Construction of Contracts* (at p. 430) where the following observation was made:

"The second alternative route of incorporation is by reasonable notice. This is the principal mode of incorporation for unsigned printed documents. It first came to prominence in the nineteenth century 'ticket cases' as the Industrial Revolution and the railway age made standard terms a feature of everyday life. In the leading case of *Parker v. South Eastern Railway Company*, Mellish L.J. distinguished the case of incorporation by signature and continued:

'The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it. In that case, also, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement and did not know its contents. Now if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are.' – see (1877) 2 CPD 416, 420.'

This passage suggests that in the ordinary case it is sufficient to prove that a document containing terms was provided by one party to or sent to the other and was retained without demur. As with incorporation by signature, Mellish L.J. was emphatic that reading or familiarity with the terms was irrelevant.

In *Circle Freight International Ltd. v. Medeast Gulf Exports Ltd.*, the invoices each stated in small print at the bottom: 'All business is transacted by the company under the current trading conditions of the [ISF] a copy of which is available on request'. This was, in the words of Bingham L.J., both "clear and legible" and "placed immediately below the price where the eye would naturally light on it". The exporters never requested a copy and none was sent. Having reviewed the authorities Taylor L.J. concluded:

"It is not necessary to the incorporation of trading terms into a contract that they should be specifically set out provided that they are conditions in common form or usual terms in the relevant business. It is sufficient if adequate notice is given identifying and relying upon the conditions and they are available on request."

134. Lewison in the *Interpretation of Contracts* (at p. 127) commented:

"It is not necessary to the incorporation of trading terms into a contract that they should be specifically set out provided that they are conditions in common form or usual terms in the relevant business. It is sufficient if adequate notice is given identifying and relying upon the conditions and they are available on request. Clear words of reference suffice to incorporate the terms referred to. Other considerations apply if the conditions or any of them are particularly onerous or unusual. In *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, *Interfoto* ran a photographic transparency lending library. Following a telephone inquiry by *Stiletto*, *Interfoto* delivered to them forty seven transparencies together with the delivery note containing nine printed conditions. Condition 2 said that all the transparencies had to be returned within fourteen days of delivery otherwise a holding fee of £5 per day and Value Added Tax would be charged for each transparency retained thereafter. *Stiletto*, who had not used *Interfoto* services before, did not read the conditions. Dillon L.J. said:

'It is in my judgment a logical development of the common law into modern conditions that it should be held . . . that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.'

In the present case, nothing whatever was done by the plaintiffs to draw the defendants' attention particularly to condition 2; it was merely one of four columns' width of conditions printed across the

135. The passages cited above from McMeel and Lewison on incorporation by notice are useful summaries of the relevant case law, particularly the reference to the case of *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] Q.B. 433 (“*Interfoto*”). Bearing in mind the passages referred to, it would be useful then to consider the observations of the trial judge as to whether or not there was reasonable notice in this case. At para. 257 of the judgment the learned trial judge said:

“Looking at this contract of sale from the point of view of Irish Asphalt, it was entitled, should it have so chosen, to seek to limit its liability by reference to an exclusion clause. As a matter of law, incorporation of the exclusion clause in the contract requires it to take reasonable steps to that end. It is obvious what it thought such reasonable steps were. Firstly, it drew up a one page template letter. Instead of being a one page letter, this could have been a two page letter with all of the terms and conditions as part of the text. After all, the terms and conditions are not voluminous and would fit readily on a page. Its expectation was that each template letter would be placed on standard notepaper which had the terms and conditions clearly printed on the back. Anyone who was proposing to buy from the new Bay Lane quarry, therefore, would have known, from the very start, that if the material that he/she purchased was not of good quality, and would ruin any building into which it was put, that his/her recourse would be limited to the purchase price of the material. This, for the reasons stated, is a highly onerous clause and one which would otherwise not be expected. It would leave the builder to lose his reputation and possibly his profit, and more, should the material turn out not only to be of bad quality but also to be actively dangerous to the contemplated construction project. Therefore, it was entirely reasonable for Irish Asphalt to set out its terms and conditions from the very start. This it failed to do; though that is probably what it would have done had office systems been reliable. It also felt that it was worthwhile to remind customers, on every price increase, that liability was so severely limited. There is no evidence in this case that such notice was ever given to Elliott Construction. Then it has delivery dockets with every delivery it makes. These merely recite that the delivery is made subject to terms and conditions. The delivery docket is generated as evidence of delivery. What term or condition did Irish Asphalt regard as important in the context of such delivery? It was certainly not the limitation clause. As regards the person to whom such a notification of an onerous limitation clause should be made before any contract was entered into, it is clear again that Irish Asphalt, by choosing the purchasing manager of Elliott Construction, Tom Dolphin, or indeed by writing to any appropriate executive in that firm, felt that notification of this exclusion clause should be made at the top level. This is reasonable because notification is then reliable; the people who would make any relevant decision within the company are to be told. They can then make the crucial decision to buy what may be unreliable or even destructive building materials without recourse. This may be argued that it should be regarded as reasonable notice. Because of an error in notepaper, this reasonable step in notification was not taken by Irish Asphalt. I do not regard isolated instances where terms and conditions appear in the context of Elliott Construction seeking to be reimbursed for overcharging through an accounts system that no one would reasonably expect would involve people at the level of Tom Dolphin, or any decision making level as to the formation of important contracts, to be reasonable notice.”

136. When one examines that passage in the light of the passage referred to above from Dillon L.J. in the judgment in *Interfoto*, the views of Charleton J. take on additional force, bearing in mind the onerous nature of Clause 8. In the present case, not only were the terms and conditions not printed on the delivery notes, there is nothing to suggest that the actual terms and conditions, and, in particular Clause 8, were ever brought to the attention of anyone in Elliott Construction. In *Interfoto* where a delivery note did contain the specific terms and conditions sought to be relied on, that was not found to be sufficient to incorporate the term into the contract in circumstances where the evidence demonstrated that that term had not been brought to the attention of the parties sought to be bound by it. That being so, and in circumstances where not only was there no evidence as to any steps taken by Irish Asphalt to bring its terms and conditions to the attention of Elliott Construction, but where the delivery notes themselves did not contain the terms and conditions, the contentions on behalf of Irish Asphalt as to the incorporation by way of reasonable notice cannot succeed by reference to the phrase used on the delivery dockets alone.

137. The question then arises as to the role of the credit notes which did contain Irish Asphalt’s terms and conditions. One point to bear in mind is that the credit notes were furnished to Elliott Construction by Irish Asphalt prior to the formation of the relevant series of contracts. The second point to note is that the credit notes were provided to the accounts department of Elliott Construction, and evidence was given by Patrick Elliott to the effect that the personnel in the accounts department who would have seen the credit notes were not at a managerial level within the company, a fact accepted by the trial judge. Regardless of the question of the status of the personnel within the accounts department, there was no evidence to suggest that the provisions of Clause 8 of the terms and conditions of contract set out in the credit notes were ever drawn to the attention of any representative of Elliott Construction.

138. Complaint is made by Irish Asphalt that, in considering the question of reasonable notice, the trial judge adopted an incorrect test, in that he introduced a test that a company is only bound by an exclusion clause if it is brought to the notice of senior management level within the company. Reference was made to the position of Mr Hannay, the foreman who signed the delivery dockets, and it was contended that the evidence established that he was a senior person within the company. Charleton J. at para. 252 of the judgment stated:

“Here, unlike in many of the cases, we are not dealing with an individual. Both plaintiff and defendant are corporations. This is of a degree of importance. It is reasonable, in the context of contract law, to have regard to the fact that a decision that a limitation clause should be incorporated into a contract would be made at senior management level within a company that might later seek to rely upon it. It would also be reasonable to expect that such a corporation would notify any other corporation that it seeks to be bound by that limitation clause at the same level. Even if that were not so, ordinary sense would suggest that the rule in contract law whereby reasonable notice should be given of an exclusion clause requires that the concept of reasonableness should incorporate at least a potential analysis as to whether the corporation which is expected to be bound by the clause would be notified in a reasonable way. In terms of ordinary sense as to the workings of corporate structures, this requires notification at a level within the corporation which might reasonably be expected to be effective in terms of bringing the clause to the attention of the appropriate decision making level within that corporation. It is thus of significance that a choice was made by Irish Asphalt to notify the terms and conditions by way of a marketing letter that was addressed to Elliott Construction at high level where these kinds of decisions might reasonably be expected to be made after appropriate analysis as to the risks and consequences of entering into such a contract with such a limitation clause.”

He went on to conclude that Mr Hannay was a responsible person within the company but that his responsibility was limited. He was

the on-site foreman.

139. The manner in which the contracts were dealt with was that there was an original engagement between Mr Elliott and Mr Lagan on behalf of Irish Asphalt. They agreed the terms of the contracts in relation to this particular project. Thus, they agreed on such matters as price, terms of credit, cost of delivery and so on. Thereafter, from time to time, and as and when required, individual deliveries were made to the site in accordance with those terms. Undoubtedly, the day to day orders were placed by Mr Hannay but there is nothing to suggest that he had any involvement beyond deciding what quantity of Clause 804 was required on any given day; he accepted deliveries duly made, and did so by means of his signature on the delivery docket.

140. The negotiations between the parties prior to the commencement of this project took place at a high level. In order to give reasonable notice of the terms and conditions relied on by Irish Asphalt, it is logical to conclude that such notice should be provided at the same level. It would be somewhat surprising to reach the conclusion that reasonable notice of an exclusion clause could be given to the party to be bound by informing a low level member of staff of the existence of the exclusion clause. In this case, there is no doubt that Mr Hannay is a valued and responsible member of staff but he could not have negotiated the terms of the contract between the parties, and it is hard to see how the giving of notice as to an exclusion clause to someone in his position could satisfy a requirement as to reasonable notice, even if such notice had been given to Mr Hannay. It could not be suggested on the facts of this case that Mr Hannay was in a position to renegotiate terms of the contract such as price. To put it very simply, notice to a person in the position of Mr Hannay would not be reasonable notice. These observations are equally applicable to the personnel in the accounts department. Obviously, every case will turn on its own facts and circumstances. Looking at the overall situation and the nature of the dealings between the parties, the Court is satisfied that the approach taken by Charleton J. in the context of this case was correct, as was the conclusion that reasonable notice of the actual terms and conditions sought to be relied on was not provided by Irish Asphalt to Elliott Construction.

Incorporation by Course of Dealing

141. There was a course of dealing between the parties but the question arises as to whether that course of dealing could have incorporated the terms and conditions into the contract between the parties. Comprehensive written submissions dealt with the topic of incorporation by course of dealing. Counsel for Irish Asphalt in his oral submissions placed particular emphasis on the observations of Lewison, *op. cit.* at p. 129 *et seq.* Lewison had the following to say:

"Terms may be incorporated by a previous consistent course of dealing between the parties, or by their common understanding.

In some cases although the standard terms have not been drawn to the attention of the contracting party before the conclusion of the contract in question, nevertheless he is bound by them because of the pre-existing course of conduct, or a common understanding between the parties. Incorporation of terms by prior course of dealing is a question of fact and degree. It depends on the number of previous contracts, how recent they are, and their similarity in terms of subject matter and the manner in which they were concluded. As Lord Pearce said in *McCutcheon v. Macbrayne (David) Limited*:

"It is the consistency of a course of conduct which gives rise to the implication that in similar circumstances a similar contractual result will follow. When the conduct is not consistent, there is no reason why it should still produce an invariable contractual result."

Accordingly, where a previous course of dealing does not exhibit consistency, it will not have the effect of incorporating terms. Likewise, as Donaldson J. said in *Salsi v. Jetspeed Air Services Limited*:

"Usage apart, no one can contend that he has usual trading conditions if he has never used them or brought them to the attention of anyone."

In general a large number of transactions will require to be proved before the Court will permit one party a contract to rely on a course of dealing in order to rely upon standard terms of business. In cases of contracts made between commercial organisations of equal bargaining power, it seems that less stringent standards are applied as compared with consumer contracts. In view of the Unfair Contract Terms Act 1977, which gives wide protection to consumers against exemption clauses, it is questionable whether this approach is justified any longer.

However, in cases where the number of transactions proved is insufficient to amount to a course of conduct, it is still possible that standard terms will be held to have been incorporated into a contract. In *British Crane Hire Corp. Ltd. v. Ipswich Plant Hire Ltd.*, it was proved that the hirer of a crane expected that the hire would be subject to conditions imposed by the supplier. However, there was no course of dealing between the parties, and the actual terms of business of the supplier had not been drawn to the attention of the hirer before the contract was concluded. Nevertheless, the supplier's terms were held to have been incorporated into the contract of hire. Lord Denning M.R. (with whom Megaw L.J. agreed) said:

"I would not put it so much on the course of dealing, but rather on the common understanding which is to be derived from the conduct of the parties, namely, that the hiring was to be on the terms of the plaintiffs' usual conditions."

Sir Eric Sachs gave a slightly different reason. He said that the terms were incorporated because on the facts the supplier was entitled to conclude that the hirer accepted its conditions."

It was urged on the Court by counsel for Irish Asphalt that the observations of Lewison in the passage referred to above are a correct summary of the law.

142. The general proposition identified by Lewison, namely, that terms may be incorporated by a previous consistent course of dealing between the parties, or by their common understanding, is hardly controversial. Thus, if in the course of a consistent period of dealing, the parties to a contract entered into a series of contracts including terms and conditions, actually known to the party to be bound or drawn to their attention, and that if, on the conclusion of a subsequent contract, the party relying on the terms and conditions omitted to either draw the terms and conditions to the other party, or failed to include them on a contractual document, it would be wrong to permit the party affected by the relevant term to say that, even though they were aware of the terms and conditions, they could avoid its consequences because the relevant term was not expressly incorporated into the subsequent contract.

143. Obviously, in considering whether a party's terms and conditions have been incorporated into a contract, it is necessary to consider the facts and circumstances of each individual case. It has already seen that in the case of *Spurling* referred to above, one

of the factors taken into account was the course of business and conduct of the parties. In the passage previously referred to from the judgment of Denning L.J. (at p. 467 of the judgment), it was stated as follows:

"On receiving this landing account, he took no objection to it, left the goods there, and went on paying the warehouse rent for months afterwards. It seems to me that by the course of business and conduct of the parties, these conditions were part of the contract."

144. By contrast, in the case of *Hollier v. Rambler Motors (AMC) Ltd* [1972] 2 Q.B. 71, the evidence was that the plaintiff had had his car serviced by the defendant on three or four occasions during a five year period. The plaintiff in that case had signed a document described as an invoice. It contained the following clause:

"The company is not responsible for the damage caused by fire to customer's cars on the premises." (p. 75)

The plaintiff had signed the form on at least two previous occasions when repairs had been carried out to his car. The car was damaged by fire while on the defendants' premises. It was held that the defendants were liable because three or four transactions in the course of five years were not sufficient to establish a course of dealing; the clause on the invoice form could not therefore have been incorporated in the oral contract made between the parties.

145. Reference was also made in the submissions to the case of *McCutcheon v. David MacBrayne Ltd* [1964] 1 W.L.R. 125, a decision of the House of Lords. In that case, the course of dealing was described as follows by Lord Reid (at p. 128):

"If two parties have made a series of similar contracts each containing certain conditions, and then they make another without expressly referring to those conditions it may be that those conditions ought to be implied. If the officious bystander had asked them whether they had intended to leave out the conditions this time, both must, as honest men, have said 'of course not'."

146. It would also be helpful to refer to an Irish authority on the subject, namely, the decision of the High Court in *Sugar Distributors Ltd v. Monaghan Cash & Carry Ltd (in Liquidation)* [1982] I.L.R.M. 399. That was a case which concerned a "retention of title" clause. It was a condition of sale contained on the front of the plaintiffs' invoices sent out to customers that ownership of the sugar to be delivered would only be transferred to the purchasers when the full amount of the purchase price had been discharged. One of the issues in the case was whether the clause shown on the face of the invoices was a binding condition. In that case, Mr McAllister, the managing director of the defendant company, said that his attention was not drawn to the retention of title clause either by phone or letter. In relation to invoices, he was only concerned to check each for quantity and price. He did not read all the small print on the invoices. He did notice a change in the form or size of the invoices. The manager of the defendant company, a Mr Murphy, said that he could not remember being told by anyone about the retention of title clause. It was held that the plaintiffs had failed to prove that the special attention of the defendants was drawn to the retention of title clause which was introduced by the plaintiffs approximately two years after the parties had first commenced trading with each other. On that basis Carroll J. identified the question arising as whether there was a duty on the plaintiffs to draw the defendants' attention to the clause specifically, or whether the defendants ought to have known of the existence of the clause because it was on all invoices for a period of about fifteen months before the relevant dates. She said:

"I have been urged by Mr. Gleeson for the defendants to hold as Barrington J. held in Western Meats Ltd. v. National Ice and Cold Storage Ltd. & Anor. [1982] ILRM 99 that the plaintiffs had not given the defendants reasonable notice of the contents of their standard conditions.

But the circumstances of that case are not similar to the present one. There was a businessman offering a specialist service (i.e. cold storage) but accepting no responsibility for it. There the business relationship was commenced by a meeting followed by a letter, in the text of which there is no mention of standard conditions. Here there is a supplier of goods, the plaintiffs, incorporating a condition of sale via its invoices which according to the cases cited has apparently become quite common. The managing director of the defendant company said he did not read it and that he never read the small print on invoices but apparently if he had read it, it would not have made any difference to him. The invoice itself is a simple enough document. Three conditions appear on its face and they are not intimidating in complexity.

I consider that the defendants having received these invoices for fifteen months, ought reasonably to have known the terms on which the goods were supplied. In my opinion the plaintiffs gave reasonable notice of the conditions applicable to these transactions by putting them on the face of the invoices and there was no special duty on the plaintiffs to draw the defendants' attention specifically to the retention of title clause. I therefore hold that the condition was a valid and binding condition." (p. 401)

147. Carroll J. referred in her judgment to the judgment of Barrington J. in *Western Meats Ltd v. National Ice and Cold Storage Co. Ltd & v. Nordic Cold Storage Ltd* [1982] I.L.R.M. 99, a decision of the High Court. The circumstances in that case were that the plaintiffs had placed meat with the defendants for storage in cold storage facilities, and, subsequently, the defendants were unable to locate the plaintiffs' meat within their facility. The conditions of trade relied on by the defendants by way of defence included a clause to the effect that all goods were stored at the owner's risk. There was a further provision providing that the company would not be responsible for any delay, loss or damage arising from maintaining too high or too low a temperature in the stores, failure of machinery or plant, negligence, thefts, including theft by the company's servants, "or any other cause whatsoever". In the course of the judgment, Barrington J. identified the question as to whether the plaintiffs were given reasonable notice of the conditions or not. Evidence was given that Mr Lyons, a director of the plaintiff company, was not aware of them, and there was no evidence that they were ever expressly brought to his attention. In the early years, when the parties first started dealing with one another, the conditions and terms sought to be relied on by the defendants did not appear on their letters. In later years, it appears that the conditions were set out on the back of the defendants' notepaper and also on the back of many of their storage documents. Barrington J. concluded that the terms were never expressly brought to the attention of the plaintiffs' director. In those circumstances the defendants were found to be guilty of negligence and breach of contract.

148. In the present case, great emphasis is placed on the fact that in the course of the dealings between Irish Asphalt and Elliott Construction, some eleven hundred and ninety delivery dockets containing the proviso "This material is sold subject to the terms and conditions available on request" were provided by Irish Asphalt to Elliott Construction and signed by a representative of Elliott Construction, usually Mr Hannay. The Court is satisfied that the terms and conditions relied on and, in particular Clause 8 of the terms and conditions, cannot be incorporated into the contract by relying on the delivery dockets alone in circumstances where those delivery dockets did not actually set out the terms and conditions and were not contractual documents. The position in this case can

be contrasted with the position in many of the cases cited above, for example, *Spurling, Hollier v. Rambler Motors (AMC) Ltd* and *Burda* where the terms relied on were set out in the contractual documents. What about the position in relation to the credit notes which contained terms and conditions on the back including Clause 8 and which were undoubtedly furnished to Elliott Construction prior to the commencement of these contracts?

149. The existence of the three credit notes does not demonstrate the sort of consistent course of dealing or conduct which could result in the incorporation of terms and conditions in a contract. It is worth remembering the circumstances in which the credit notes came to light. At para. 255 of his judgment, Charleton J. observed:

"In addition, I note that in the course of the case a box of correspondence and business documents was handed over by Elliott Construction to Irish Asphalt. Of all the varied correspondence in this box, only three credit notes contain the terms and conditions on the back. There are three further credit notes among these documents which are on original Irish Asphalt notepaper which have no terms and conditions on the back. In addition to that, there are two others with no terms and conditions on the back and here the Irish Asphalt notepaper is photocopied and not professionally printed."

This could hardly be regarded as the conduct necessary to establish a course of dealing such that the terms and conditions relied on by Irish Asphalt could be said to have been incorporated into the contracts between the parties by a course of dealing.

150. For the reasons set out above, the Court is satisfied that, despite the very careful and extensive submissions of counsel on behalf of Irish Asphalt, the terms and conditions relied on have not been incorporated into the contract between the parties on any basis put forward by Irish Asphalt. Given that the Court is satisfied that the terms and conditions relied on by Irish Asphalt have not been incorporated into the contract between the parties, it is not necessary to consider whether Clause 8 of the terms and conditions was fair and reasonable having regard to the provisions of s. 55(4) of the 1893 Act, as inserted by s. 22 of the 1980 Act.

The Issues Arising under European Law

151. Assuming this was a matter of purely national law, and the standards invoked national standards, then this Court would come to the following conclusions:

1. That the contract required Clause 804 and therefore required compliance with the standard;
2. That such standard was adopted to facilitate the marketing of the product, and that, accordingly, the time at which compliance of the standard was to be assessed was first at the time of delivery of the product;
3. It was however possible by subsequent testing to prove that as of the date of delivery, the particular product did not, as a matter of probability, comply with the standard. Also since under the Construction Products Directive products were intended to satisfy the essential requirements during an economically reasonable working life, breach could be proved by evidence of testing during such lifetime;
4. That the testing protocols identified in the appendix to the standard were not, and could not be, the only method of determining compliance;
5. That the evidence here was sufficient, in light of the judge's conclusion, that the product could not have complied with the standard on the day of delivery and later demonstrate the degree of deterioration found in 2009, to demonstrate that there had been a breach of the standard both in 2009 and as of the date of supply and therefore a breach of the contractual term requiring compliance with it;
6. The contract also incorporated a term as to merchantability pursuant to the Sale of Goods and Supply of Services Act 1980, and that the term had not been excluded by the parties though they were entitled in law to do so;
7. That the implied term as to fitness for particular purpose made known to the seller did not arise on the facts in this case, but that the evidence did establish breach of the term as to merchantability, and that the provisions relied upon by the defendant seeking to limit liability, had not been incorporated within the contract between the parties.

152. Accordingly, as a matter of national law, Elliott Construction would be entitled to succeed on the grounds that there was breach of both the express term as to the supply of aggregate described as Clause 804 and the implied term as to merchantability, and Irish Asphalt's against the outcome of the High Court decision would fail.

153. However Irish Asphalt here contend that any such conclusions are inconsistent with, and precluded by, the law of the European Union. More immediately they contend that sufficient issues have been raised to require a preliminary reference to the Court of Justice of the European Union ("CJEU") pursuant to Article 267 of the Treaty on the Functioning of the European Union ("TFEU").

154. As this Court is a court of final appeal, there is a mandatory obligation on it to refer questions of European law to the CJEU where the resolution of the case involves a question of European law and where the resolution of that issue is not, by virtue of the law of the European Union as interpreted by the CJEU, obvious, or as the well known phrase describes, *acte clair*. The test which must be applied by a national court in deciding whether a reference is required is identified in Case C-283/81 *C.I.L.F.I.T. Srl & Ors v. Ministero della Sanita'* [1982] ECR 3415 ("*CILFIT*"). One difficulty facing national courts considering the question of whether or not to refer one or more questions to the CJEU is not merely that the threshold in *CILFIT* is low, but that the parties arguments inevitably focus not upon the correctness of the proposition contended for, but simply its arguability. This will often mean, in effect, seeking to establish a lack of clarity in the existing law. This test provides a perverse incentive to parties seeking references to search not for clarity, but for doubt, uncertainty and conflicting views. In this rather unreal world, the absence of any authority or academic support for a proposition becomes an argument to be deployed as to why the views of the CJEU should be obtained on, what on this argument becomes, a novel argument. This is no criticism of the exhaustive and thorough arguments advanced by Irish Asphalt in this case but rather an observation of the structure to which those arguments are required to conform. It is necessary and important however to seek to identify with some clarity the precise arguments made which are said to be both necessary for the determination of this dispute between the parties and can be said to be not so obvious so that a reference to the CJEU is required.

155. There are two aspects of this case which Irish Asphalt contend raise issues of European law requiring a reference to the CJEU. These relate to the two separate findings of breach of contract made in the High Court: first, that the product supplied did not

comply with the standard for Clause 804; and second, that it did not comply with the implied term as to merchantability, which was part of the contract between the parties by virtue of the provisions of the 1980 Act.

156. In relation to the first argument, Irish Asphalt say that the finding of breach of contract for failure to comply with the standard itself involves a question of interpretation of those standards by reference to the specific question of whether total sulphur content was specified, or available to be specified, and perhaps more comprehensively, whether the testing protocols were mandatory both as to the manner of testing and the time thereof, so that it was only possible to prove either breach or compliance at the time and by the tests contemplated by the protocols. These questions raise further questions as to the status of standards whether mandated or not adopted pursuant to the mechanisms established by the Technical Standards Directive as to such standards are law, soft or hard, and whether a standard adopted may itself be the subject of a preliminary reference under Article 267 TFEU which provides that the CJEU shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

157. On the second finding of breach of contract by reference to the implied term as to merchantability, Irish Asphalt argue that the effect of the High Court Judgment, either of its own force, or by reason of the provisions of statute, has been to introduce new standards of "inertness" "durability" and "strength" which are incompatible with the standard, and furthermore have not been notified in accordance with the provisions of the Directive. Accordingly, Irish Asphalt argue that those terms must be disapplied by this Court in what it acknowledges is, a private law dispute between itself and Elliott Construction. Again, Irish Asphalt acknowledge that this would amount to the giving of limited indirect horizontal effect to a Directive but they argue that this follows unavoidably from the decisions in Case C-194/94 *CIA Security International v. Signalson SA & Securitel SPRL* [1996] E.C.R. I-2201 ("*CIA*") and Case C-443/98 *Unilever Italia SpA v. Central Food SpA* [2000] E.C.R. I-7535 ("*Unilever*") which were also decided in the field of standards albeit in a somewhat different context. The difficulty of this question and the degree to which it has been debated, the difference of views between the CJEU and the Advocates General in some of the decisions, means, it is said, that even if the Court were inclined to reject Irish Asphalt's argument in this respect on grounds that to accept the argument would be to offend the general principle against indirect horizontal effect laid down in Case C-91/92 *Faccini Dori v. Recreb Srl* [1994] E.C.R. I-3325 ("*Faccini Dori*"), the Court could not do so without first referring the question to the CJEU. Finally, in the particular context of this case, they point to the observations made by Weatherill in a comment upon the decision in *CIA* in "Breach of Directives and Breach of Contract" [2001] 26 (2) EL REV 177-186 where the author appeared to raise an issue similar to that argued by the appellants:

"The opportunities for parties seeking to escape obligation that have become unappealing because of changing market conditions are real, and await the attention of ingenious legal minds ready to exploit the *Unilever* ruling. Might it be argued, for example, that a party in England to whom goods are delivered that are not of "satisfactory quality" within the meaning of section 14 of the Sale of Goods Act (as amended) can nevertheless not refuse to accept the goods on the basis of their non conformity with the statutory condition because the United Kingdom has not notified the Sale and Supply of Goods Act 1994 to the Commission?"

158. Irish Asphalt also rely on specific provisions of Annex ZA of European Standard EN 13242:2002 implemented by Irish Standard IS EN 13242:2002, which provides at ZA.1 that "[c]ompliance with these clauses confers a presumption of fitness of the aggregates covered by this European Standard for their intended uses indicated herein". Irish Asphalt argue that this presumption of fitness for intended use is relevant to the issue arising as to merchantability which is itself a question of fitness for purpose. It is argued that compliance with the Standard therefore satisfies the term implied by s. 14 (2) of the 1893 Act as inserted by s. 10 of the 1980 Act, or at least creates a presumption of compliance which could only be rebutted by testing carried out in accordance with the protocols set out in the Standard. In this regard Irish Asphalt seek to invoke the arguments they already made in respect of the finding of a breach of contract by direct breach of the Standard.

159. The Court is conscious of its obligation in law to refer to the CJEU any issue which properly requires reference, in accordance with the terms of Article 267 TFEU, as interpreted by the CJEU. Such a reference does not however come without costs to the litigants, this Court and indeed the CJEU itself. It inevitably delays judgment in a dispute between the parties, increases costs and necessarily increases the burden on the CJEU already labouring under an extensive workload. It is important therefore to go beyond the level of generalisations and consider with some care the precise issues arising and to determine whether conscientiously applying the decision of the CJEU in *CILFIT*, a question or questions arise which it is necessary to refer in order to decide the case. It follows that there may be issues on which there is a degree of uncertainty, which if squarely raised would require a reference but which on analysis, it is apparent are not necessary to decide in order to decide the case. By the same token it may be possible to decide a case on grounds of national law, or by application of EU law in relation to which there is or can be no dispute. In such cases it will not be necessary to decide contentious issues of European law which are raised in the case and therefore not necessary to refer a question.

160. It is important not to lose sight of the fact that this is a private law dispute between two private parties in respect of the quality of goods supplied by one to the other, and as it happens, wholly within this jurisdiction. The Standards and their interpretation become part of this case only because Elliott Construction ordered and agreed to buy, and Irish Asphalt agreed to supply, Clause 804 which is taken to mean a product complying with the specification in the Standards. Other than the private contractual agreements between the parties there was no other legal requirement to do so: neither Irish law nor European law required the use of product meeting the Standards. The parties could have contracted for inferior, better, or simply different, material.

161. By the same token, the terms as to merchantability and fitness for purpose are implied into the contract by statute because this was a contract for the sale of goods. Again, however, there is no sense in which, as a matter of law, these terms were imposed upon the parties against their will. Since this was not a consumer transaction, s. 55 of the 1980 Act imposed no restraint on the parties excluding, altering or modifying the terms implied by the statute. All the 1980 Act does in such a case, like its 1893 predecessor, is to set a default position against which the parties can make their own agreement. Here the default position is one which sensibly accords with the expectation of most people carrying out transactions for the sale of goods i.e. that the product will be merchantable and fit for any specific purpose if made known to the supplier. But the parties could if they wished come to some different agreement and make either more specific and demanding (or just as possibly less demanding) terms, and in each case, perhaps with a consequential adjustment of price. The implication of the terms by statute seeks to facilitate parties and therefore facilitate commerce and to provide some transparency, clarity and commercial efficacy by incorporating a term the meaning of which is reasonably clear and agreed upon and understood by buyers and sellers (even if as this case shows, there is still room for some dispute at the margins). The parties remain free to depart from that standard and agree specific terms. But where they do not do so, the legal position as a matter of Irish law is the same as if the parties here, instead of specifying Clause 804, had somewhat laboriously set out all the specifications for the product, and the method of testing in the contractual document itself, and had expressly agreed that the product would be of merchantable quality and indeed also agreed what that meant. The High Court Judge's finding amounts in Irish law to a finding that Irish Asphalt had, albeit unwittingly, been in breach of the terms of its agreement with Elliott Construction, in that, on the High Court's findings, it had not supplied to Elliott Construction what it had agreed to provide. This

is a breach of a private law obligation and not any provision of public law.

162. Irish Asphalt's submissions lay particular stress on the provisions of the Technical Standards Directive laying down procedure for the provision of information in the field of technical standards and regulations. That Directive was adopted in the context of the so called "new approach" to the securing of the internal market to permit the free movement of goods, services and capital. Article 1.2 of that Directive defines a technical specification as "a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions". Standard is defined as a "technical specification approved by a recognised standardisation body for repeated or continuous application, with which compliance is not compulsory" (Article 1.4). This sub-article goes on to state that the standard could be an international, European or national standard. The Directive also defines "technical regulations" as:

"technical specifications and other requirements, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacturing, importation, marketing or use of a product". (Article 1.9)

Article 2 of the Directive requires that the Commission and the standardisation bodies be informed of new subjects in respect of which the national standardisation bodies have decided to prepare or amend a standard. The Directive then requires Member States to provide assistance for communication by the Member States of any proposal to adopt a new standard. The Commission may, pursuant to Article 6, request the European Standardisation Institution to draw up the European Standard during a given time period. Article 7 then requires that during the preparation of the European Standard the standardisation bodies of Member States do not take any action which could prejudice the harmonisation intended. Article 8 requires Member States to immediately communicate to the Commission any draft technical regulation, other than one merely transposing the full text of an international or European standard. Article 9 provides for a standstill provision while the Commission is considering any draft national regulation.

163. It may be noted that the Directive seeks to achieve harmonisation of national standards and regulations by a requirement of notification by national standards setting bodies' observation of a standstill period and an obligation to refrain from adopting national standards which are not completely in line with the existing European standards. While standards adopted by the European standards bodies are properly described as European standards in a general sense, the bodies are not institutions or bodies of the EU and are not established by the law of the EU.

164. Irish Asphalt points to European Standard EN 13242: 2000 for aggregates for unbound and hydraulically bound materials for use in civil engineering work and road construction. This is drawn up by the European Committee for Standardisation ("CEN") pursuant to whose internal regulations, members are obliged to give effect to the European Standard as a national standard. It relies in particular on Annex ZA described as "informative". Annex ZA is entitled "Clauses of this European Standard addressing essential requirements or other provisions of EU Directives". Annex ZA.1 is entitled "Scope and relevant characteristics" and it states:

"This European Standard and this Annex have been prepared under a mandate given to CEN by the European Commission and the European Free Trade Association.

The clauses of this European Standard shown in this annex meet the requirements of the mandate given under the European Construction Products Directive (89/106/EEC).

Compliance with these clauses confers a presumption of fitness of the aggregates covered by this European Standard for their intended uses indicated herein; reference should be made to the information accompanying the CE marking.

WARNING Other requirements and other EU directives, not affecting the fitness for intended uses, can be applicable to aggregates falling within the scope of this annex.

Note 1 In addition to any specific clauses relating to dangerous substance contained in this Standard there may be other requirements applicable to the products falling within its scope (e.g. transposed to European legislation and national laws, regulations and administrative provisions). In order to meet the provisions of the EU Construction Products Directives these requirements need also to be complied with when and where they apply." (emphasis added)

165. In pursuance of the obligations imposed on members of CEN, the National Standards Authority of Ireland ("NSAI") adopted Irish Standard IS EN 13242:2002. which is in identical terms to EN13242:2002

166. It is a curiosity of this case (and perhaps more than that) that Irish Asphalt's submissions focus almost entirely on the provisions of the Technical Standards Directive, and the contents of Annex ZA as creating a presumption (almost irrebuttable) of fitness for intended use. It appears to this Court however that a broader focus is necessary. It seems clear that if the presumption of fitness for intended use referred to in Annex ZA has any legal effect it cannot be by virtue of its inclusion in the Annex alone, and cannot be derived from the Technical Standards Directive. In fact, as indeed Annex ZA seems to make clear, the presumption is a consequence of the fact that the harmonised standards and aggregates were produced pursuant to a mandate issued by the European Commission on the 6th of July 1998 pursuant to the "Construction Products Directive". The effect of a mandated standard is well described at page 493 of Chalmers et al, op. cit:

"There are two types of European Standard: mandated and unmandated standard. Mandated standards are where the Commission calls upon the European Standardisation bodies to draw up a standard. In this mandate they will set down certain safety parameters that these bodies must observe. The majority of standards adopted by the standardisation bodies, over 75% are unmandated. These standards are not initiated by the Commission but by the standardisation bodies themselves. The effect of a mandate are twofold:

The first is that the product is presumed to be "safe" under the General Product Safety Directive [Directive 2001/95/EC on General Product Safety Article 3(2)]. States can still impose restriction on its marketing when the threshold is higher than would otherwise be the case. Whereas Article 30 EC allows for restrictions to be imposed on grounds of public health wherever there is scientific uncertainty about the risk posed by a product, the General Product Safety Directive allows for restrictions to be imposed only where there is evidence that it is dangerous. The onus of proof is reversed. Whereas Article 30 EC requires the safety of goods to be proved, here it is its danger that must be proved before restrictions can be imposed. This has been criticised both for making industry too central in a setting of levels of

health and safety and consumer protection, and for unduly restricting the discretion of Member States.

The second effect of a mandate is that compliance with the standard entitles the product to free circulation around the European Union, however, also carry a safeguarding provision, which allows a Member State to prohibit the marketing of the goods if it is liable to endanger public safety, property or the safety of animals. It must, however, immediately inform the Commission ...

Unmandated standards have some legal effects. They set market expectations of safety and reliability and are often relied upon in contracts between private parties. They also give them some public recognition. In addition the General Product Safety Directive notes that an element to be taken into consideration in determining whether a product was safe is whether it meets an unmandated standard." (emphasis added)

167. The Construction Products Directive provides at Article 2 that Member States shall take all necessary steps that products which are intended for use in works (i.e. construction works) may be placed on the market only if they are fit for this intended use, that is to say that they have such characteristics that the works in which they are to be incorporated assembled, applied or installed, can, if properly designed or built, satisfy the essential requirements referred to in Article 3, when and where such works are subject to regulations containing such requirements. The essential requirements such products are required to satisfy are, by Article 3, set out in terms of objectives in Annex 1 to the Directive. Article 4.2 provides that Member States shall presume that products are "fit for their intended use" if, in essence, they bear the EC mark indicating they comply, inter alia, with the relevant national standards transposing the harmonised standards. Article 6 requires that Member States shall not impede the free movement placing on the market or use in their territory products which satisfy the provisions of this Directive.

168. Finally in this regard, it is worth noting that the protocols for testing upon which Irish Asphalt rely (being EN932-1 test for general properties of aggregates, test for sampling EN1097-6, test for mechanical and physical properties of aggregates and EN 1744-1 test for chemical properties of aggregates), are all adopted as European standards, pursuant to the obligations imposed by membership of CEN-CENELEC (CENELEC: The European Committee for Electrotechnical Standardisation) Ireland adopted such standards as national standards without alteration. These standards however, are not mandated standards. There is no procedure established by the standards bodies for the interpretation of a standard or the resolution of any dispute as to their meaning, which accordingly becomes a matter for a court to resolve if it arises in any dispute.

169. In the light of the foregoing it is now possible to return to the issues raised by Irish Asphalt and upon which it is said a reference to the CJEU is necessary. Again, it is useful to distinguish between the issues raised in respect of the finding that the Clause 804 supplied to Elliott Construction and used in Ballymun Civic Centre did not comply with the standards for Clause 804, on the one hand, and to the finding of breach of contract on the basis that the Clause 804 was not of merchantable quality on the other.

170. There is no doubt that aspects of this case involve the interpretation of Irish Standards adopted pursuant to European Standards: first, the mandated standard in respect of aggregates (EN 13242) and second, the non-mandated standards for testing (EN 932-1, EN 1097-6 and EN 1744-1). Furthermore there was considerable argument about the proper interpretation of those Standards and how compliance or non-compliance was to be established. If therefore, those Standards can be described as acts of the "institutions, bodies, offices or agencies of the Union" then it is argued that it would be appropriate to refer the question of the interpretation to the CJEU. One question which may arise here therefore is the logically anterior question of whether the standards, mandated or unmandated are, particularly in the private law context of this case, properly to be described as acts of the institutions, bodies, offices or agencies of the Union. Even then a question arises as to whether, when a standard is incorporated by parties in a private contract and breach is alleged, the interpretation of the term is a matter of European law or purely domestic law. It is said that that itself is a question which must ultimately be decided by the CJEU unless the answer to the question is so obvious as to not require reference.

171. However, the finding of breach of contract by reference to breach of the standards was only one of the basis on which the Court found that there had been a breach of contract. The High Court also found that there was a breach of the implied term of merchantability which finding this Court would as a matter of national law uphold. If there is no referable issue in relation to that determination, then Irish Asphalt's appeal against the High Court determination would fail and it would not be necessary to consider the question of the interpretation of the standards by reference to Clause 804. Accordingly it is necessary to consider Irish Asphalt's contention that this aspect of the case also raises issues of European law which must be referred to the CJEU.

172. Irish Asphalt rely heavily on the decisions in *CIA* and *Unilever* and the comments made in the *Unilever* decision by Professor Weatherill already set out at paragraph 157 above. Those cases, they say, are examples of the Technical Standards Directive having effect in litigation between private parties. Thus it is argued that this disposes of any preliminary objection that Irish Asphalt's case involves impermissible horizontal giving impermissible horizontal effect to a Directive contrary to the decision in *Faccini Dori*. However *CIA* involved an attempt by one party to enforce the provisions of a national standard adopted in breach of the explicit requirements of the Technical Standards Directive as to publication and notification, and therefore constituted a plain breach of Article 4.2 of the Directive. Arguably therefore, the nature of the action was more important than the identity of the actor. *Unilever* undoubtedly involved a further step. There, the dispute was an entirely private law and contractual matter rather than one of enforcement of a national regulation. But, equally, there the Italian provision was relied on to reject the olive oil had been notified in accordance with the Directive, but the standstill period had not been observed. Again, this was a plain breach of the provisions of the Directive. Neither of these cases therefore addressed the issue which arises here which is whether the provisions of the Sale of Goods and Supply of Services Act, or those provisions as interpreted by the High Court Decision can be said to be the adoption of standard or technical regulation contrary to the provisions of the Technical Standards Directive.

173. Standing back from the intricate detail of the documents, commentary and argument in this case, it is worth considering the necessary sweep and extent of the argument made on behalf of Irish Asphalt. Counsel accepted that the argument was bold and indeed revolutionary. If Irish Asphalt's argument is correct, then there has been a dramatic shift in the law relating to the sale and supply of goods even when involving goods sold to a consumer, and the law relating to defective products and product safety and product liability generally. Hitherto it has been a well accepted principle, not limited to the common law, that liability in contract for a defective product may arise independent of fault, and it is accordingly no defence in contract to show that a product was manufactured with care and indeed in accordance with existing best practice if the product subsequently proves defective and dangerous. It was also always possible to demonstrate in a product liability claim or a claim for negligent manufacture, that even if samples taken on supply passed scrutiny the product actually delivered was defective. By the same token it was possible to establish that the existing standard no longer accorded with best practice or the requirements of the law. Now however, if Irish Asphalt is correct the effect of the adoption of a standard is that if a product is produced in accordance with the standard then it is presumed fit for purpose, and indeed that presumption could only be rebutted with difficulty, if at all, by proof by tests at the time of

manufacture and supply that the product did not in fact meet the standard (even if the testing showed that the product as defective more generally). All claims, whether contractual, tortious or statutory would be reduced to the question whether the product complied with the standard, as assessed by the tests approved, and at the time of supply.

174. The adoption and promulgation of standards has an obvious area of intersection with issues of contractual clarity, product safety and liability as indeed is illustrated by the first issue in this case in relation to the interpretation of the Standard in the context of a contractual dispute. The fact that the parties contracted for the sale and supply of a product in respect of which there is a mandated standard means that the resolution of the contractual dispute between the parties may depend upon the terms of such a standard. This is not surprising. A standard, whether national, European, or international, is after all intended to assist contracting parties in providing an agreed and standard definition as to content. Furthermore, standards are not arbitrarily chosen, but will instead aim to ensure acceptable function, safety and durability among other things. In that sense standards complement other aspects of the law addressed to market access, competition, contractual clarity, product safety and liability for defective products whether by statute or by private law of negligence or contract. It is entirely conceivable that the adoption of the standard will have some interaction with these areas of law, and may have a significant impact in practice. But while it is conceivable and indeed expected that the law relating to the adoption of standards will complement the law on product liability or consumer protection, for example, it has not been suggested until now that it supplants all that law entirely, so that all claims are reduced to a question of whether the product complied with the standard. Indeed, if Irish Asphalt is correct, then that issue in turn must be determined by the application of testing protocol at the point of supply (at a time when the product is within the possession of the supplier and its characteristics within its knowledge), rather than at the point when an alleged defect arises (when the product is in the hands of the purchaser or consumer). This would be a radical, indeed revolutionary change in a large area of the law of considerable importance not merely within Member States but in areas of law pursuing important objectives of the European Union. It must be said therefore that there is not the slightest hint in either the Technical Standards Directive or the Construction Products Directive or in the extensive commentary thereon, both official and academic, that such a dramatic alteration in the law and indeed in the relative positions of producer and purchaser and user, was to be contemplated.

175. Approaching this issue at the more precise level of the terms of the relevant instruments, it becomes important to consider once more the relative importance in this case of the Technical Standards Directive when compared with the Construction Products Directive. In our view, the Construction Products Directive is of particular importance, albeit that it did not feature significantly in the argument on behalf of Irish Asphalt. The Technical Standards Directive relates to all technical standards, whether mandated or not, and imposes obligations important but limited, of notification, publication, circulation and standstill pending consideration of the documents. It does not however say anything about the legal significance of the adoption of a standard. It is the Construction Products Directive which contemplates mandated standards, and confers upon products complying with such mandated standards certain legal consequences. In particular, compliance with the mandated standards creates a presumption, relied upon in this case by Irish Asphalt, of fitness for intended use. It is to be noted that EN 13242 is a mandated standard whereas the testing standards EN932-1, EN1097-6 EN17434-1 are not.

176. When considered closely, it seems apparent that the Construction Products Directive appears intended to operate entirely in the area of access to the market. This is apparent from a number of the recitals which, for example, identify as an impetus for the adoption of the Directive, paragraph 71 of the "White Paper on Completing the Internal Market" approved by the European Council in June 1985 which placed emphasis on certain sectors including construction, and that the removal of technical barriers in the construction field called for a definition of the essential requirements to which construction works must comply. The recital further states:

"Whereas these essential requirements provide the basis for the preparation of harmonised standards at European level of construction products; whereas, in order to achieve the greatest possible advantage for a single market, to afford access to that market for as many manufacturers as possible, to ensure the greatest possible degree of market transparency and to create the conditions for a harmonized system of general rules in the construction industry, harmonised standards should be established as far as, and as quickly as possible". (emphasis added)

Later the recitals records that:

"Whereas a product is presumed fit for use if it performs to a harmonized standard, a European technical approval or a non-harmonized technical specification recognized at Community level;

...

Whereas products thus considered fit for use are easily recognizable by the EC mark; whereas they must be allowed free movement and free use for their intended purpose throughout the Community". (emphasis added)

177. Thus Article 2 at the outset of the Directive obliges Member States to:

"[T]ake all necessary measures to ensure that the products referred to in Article 1, which are intended for use in works, may be placed on the market only if they are fit for this intended use, that is to say they...satisfy the essential requirements referred to in Article 3". (emphasis added)

By Article 4(2) it is provided that Member States shall:

"[P]resume that the products are fit for their intended use if they enable works in which they are employed, provided the latter are properly designed and built to satisfy the essential requirements referred to in Article 3, and those products bear the EC mark." (emphasis added)

Article 6 then contains the important provision that:

"Member States shall not impede the free movement, placing on the market or use in their territory of products which satisfy the provisions of this Directive."(emphasis added)

Article 6.2 however provides that Member States:

"[S]hall, however, allow products not covered by Article 4(2) to be placed on the market in their territory if they satisfy national provisions consistent with the Treaty."

178. The important focus of this Directive seems to be ex-ante regulation of access to the market, not the ex-post determination of defects in a contractual dispute between parties. Compliance with the Directive confers the significant benefit (and achieves the important Treaty objective) of permitting the product to circulate freely with the EU. But compliance with the Directive says nothing about subsequent contractual disputes between private parties.

179. Even if the Construction Products Directive concept of "fitness for intended use" is capable of being taken out of its legal context, and because of a verbal similarity to the time honoured phrase "fitness for purpose" derived from the 1893 Act considered to create some presumption of fitness for purpose pursuant to a term implied under the 1980 Act, then the implemented Directive still only creates a presumption of fitness such purpose, which in this case can be said to have been comprehensively rebutted on the evidence. Irish Asphalt argue that the presumption could only be rebutted by proof of non compliance with the Standard and thus by the tests set out in the testing protocol (and thus recycling the argument as to proof of compliance with the standards). However there is if anything greater difficulty in accepting this. The presumption is of fitness for intended use, not compliance with the Standard. Indeed, if Irish Asphalt is correct, and the only method of rebuttal of the presumption is proof of non compliance with the Standard, then, logically, that would mean that the presumption does not properly arise, not that it arose but was been rebutted. At its highest therefore Irish Asphalt's argument in this regard seems to be that proof of compliance with a mandated standard creates a presumption of fitness for purpose for the purposes of the implied term as to merchantability. But fitness for purpose may be disproved and the presumption rebutted by proof that the product was not in fact fit for purpose. This does not appear sufficient for Irish Asphalt in this case.

180. It is necessary here to advert to a further potentially complicating argument relating to the question of a limit for sulphur discussed above and considered at paragraphs 111 to 124 as to whether a limit of 1% for sulphur is specified by, or pursuant to, the standard EN13242:2002. While for reasons already discussed it is not necessary for Elliot Construction to establish the existence of such a limit to prove its case, it may be relevant to the claim made by Irish Asphalt in relation to the effect of the presumption. The trial judge found that a limit for sulphur was established by a guidance note to Standard EN13242:2002 which was issued by the NSAI in 2004: S.R.21:2004: "Guidance on the use of I.S. EN13242:2002 - Aggregates For Unbound and Hydraulically Bound Materials For Use in Civil Engineering Work and Road Construction". It is clear that Irish Asphalt did not test for the presence of sulphur, consistent perhaps with the contention that no such limit was specified. If a limit was specified and not tested for, it might be argued that, even if Irish Asphalt was correct in every part of its argument, it would not avail it, because it could not show compliance with the standard such as to enable it to rely on the presumption contained in Annex ZA. That in turn may however depend upon an interpretation of the European standard which Irish Asphalt contends is a matter upon which a reference is necessary.

181. Turning to the Technical Standards Directive, upon which Irish Asphalt place more reliance, it is noteworthy that the legal obligations contained therein, addressed to Member States, apply in the context of the adoption of national standards or regulations. Member States must notify and publicise the adoption of a national standard and allow for a standstill period for a national implementation to allow for the possibility of consultation and/or the consideration of the adoption of a European standard. It is these obligations (publication notification and standstill) that were breached by Belgium and Italy in *CIA* and *Unilever* respectively. Looked at in this way and leaving aside the controversy as to indirect horizontal effect, the decisions are relatively straightforward in that they seek to insist upon the performance by the Member States of the notification and standstill obligations placed upon them by the law of the EU. However, those decisions do not go so far as to suggest that they can be applied, outside the field of the adoption of national standards or regulations, to pre-existing law on the sale of goods and court decisions interpreting such laws in the context of a private contractual dispute. There was perhaps understandably, a certain lack of clarity in Irish Asphalt's submissions when pressed to explain how the situation in this case could be brought within the template of this *CIA/Unilever* line of authority or any plausible extension thereof. In particular what was the standard or regulation alleged to have been adopted in breach of the obligations imposed under the Technical Standards Directive which should lead to the reversal of the High Court Decision? By whom was the standard or regulation adopted: the High Court (or indeed this Court) in a decision on the interpretation of the term implied into the contract between the parties, or the Oireachtas when it permitted the implication of a term in the contract, most recently by the terms of the 1980 Act albeit in this respect essentially re-enacting the provisions of the 1893 Act? In either case, what is it that can be said to be a breach of Ireland's obligations under the Directive?

182. Approached at this level, it must be said that it seems difficult to bring this case within the terms or structure of the Technical Standards Directive. It seems that the decision of the High Court cannot be considered to be the adoption of a standard requiring notification and standstill pursuant to the Directive. The Directive does not appear to contemplate or provide for a procedure in the context of judicial proceedings such as these. It seems clear that the High Court cannot be said to be a national "standardisation body" identified in Annex 2 to the Directive to whom the obligation of notification is addressed, nor can its decision be said to be a "technical specification approved by a recognised standardisation body." A judgment, even a draft judgment, could not be said to be a "draft standard containing the text of a technical specification concerning a given subject which is being considered for adoption in accordance with the national standard procedure" which is required to be notified. In any event, as a matter of law, the decision of the High Court and indeed this Court, is no more than the interpretation and application of requirements of the 1980 statute.

183. It also seems that the 1980 Act cannot itself be considered a "standard" for the purposes of the Technical Standards Directive. It is not a "technical specification" approved by a recognised standardisation body for repeated or continuous application with which compliance is not compulsory. It was argued therefore that it amounted to a technical regulation. But such regulations are (as previously stated):

"technical specifications and other requirements including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product". (Article 1.9 of the Standards Directive)

It does not appear easy to fit the 1980 Act in to this definition however broadly it is interpreted. It is undoubtedly a law but it does not prohibit the manufacture, importation, marketing or use of a product. Even assuming so, the obligation on Member States in respect of such technical regulations is, pursuant to Article 8, to immediately notify "any draft technical regulation". This appears to refer to a draft of a measure intended to be introduced. It may for that reason that the hypothetical referred to by Professor Weatherill refers to 1994 legislation in the UK which post dated the Directive. Again, it is difficult to see how this definition even on the most generous interpretation can be made applicable to the 1980 Act. The hypothetical query raised by Professor Weatherill, upon which Irish Asphalt place such reliance was an observation made in passing in the course of a short comment intended to highlight what the author considered undesirable aspects of the *Unilever* decision. It is understandable that Irish Asphalt place heavy, indeed almost exclusive, reliance on this observation. But so far as counsel's researches suggest, there does not appear to have been any further discussion on this point by this or any other distinguished author.

184. This Court is however conscious that in the context of considering a reference it should not adopt too narrow a reading of the

Technical Standards Directive, or indeed the decisions of the CJEU. Furthermore, it should consider the issue of a reference to the CJEU by engaging in the sometimes difficult task of considering hypothetical arguments, and whether they might conceivably be considered meritorious in some Member States. While the Court has some difficulty in accepting that that argument by reference to the law of the European Union can lead to a result where Irish Asphalt succeeds in this appeal, Irish Asphalt has raised a number of issues which cannot be said to be so clear or self evident as to not require a reference, applying the low threshold established by *CILFIT*, and the Court cannot in conscience rule out the possibility that such issues either separately or cumulatively might at some level be capable of being resolved in a manner that could have some impact on the outcome of the case. Accordingly, the Court considers itself obliged to make a reference pursuant to Article 267 TFEU.

185. It is necessary finally to acknowledge the very considerable assistance the Court received from the submissions made. In this case the papers prepared for this Court were extremely extensive given not only the lengthy hearing in the High Court, but the very detailed and complex legal arguments submitted on this appeal. The preparation of papers for this Court was exemplary. The papers and particularly the authorities and materials were organised by reference to individual issues in a logical fashion clearly labelled and indexed and the relevant extracts clearly highlighted. Considerable thought went into the planning, preparation and presentation of the books submitted to the Court and achieved a standard which all parties with appeals to this Court should be able to meet but rarely do. It is a regrettable fact that this Court is often presented with badly planned, poorly organised and often irrelevant material supplemented by a flurry of last minute documentation which make the case more difficult for the Court, and the parties. That should not be acceptable in any court but particularly in a court of final appeal. When papers are prepared to a high standard that also deserves comment, acknowledgement and appreciation from the Court.