

According to Advocate General Bot, the Slovak Republic did not infringe EU law when it refused to allow Mr Sólyom, the Hungarian President, to enter its territory

The movements of Heads of State fall within the sphere of diplomatic relations, which remains within the purview of the Member States, in accordance with international law

At the invitation of an association based in Slovakia, Mr László Sólyom, the President of Hungary, had planned to go to the town of Komárno (Slovakia) on 21 August 2009 to take part in the ceremony inaugurating a statute of Saint Stephen, the founder and first king of the State of Hungary. After several diplomatic exchanges between the respective embassies regarding the planned visit, the three highest representatives of Slovakia, namely, Ivan Gašparovič, the President of the Republic, Robert Fico, the Prime Minister, and Pavol Paška, the President of the Parliament, adopted a joint declaration in which they indicated that the visit of the Hungarian President was considered inappropriate, especially because the latter had not expressed any desire to meet Slovak dignitaries and because the date of 21 August was particularly sensitive. The planned visit was in fact due to take place on the 41st anniversary of the invasion of Czechoslovakia by Warsaw Pact troops, which included Hungarian troops.

By *note verbale* of 21 August 2009, the Slovak Ministry of Foreign Affairs informed the Hungarian Ambassador of Hungary at Bratislava (Slovakia) that the Slovak authorities had decided to refuse President Sólyom entry into Slovak territory on that date for security reasons, on the basis, inter alia, of Directive 2004/38¹. Having been informed of that note, the Hungarian President, who had in the meantime arrived at the Slovak border, refrained in the end from entering Slovakia.

Taking the view that it was not possible to refuse its President entry into Slovak territory on the basis of that directive, Hungary asked the Commission to bring infringement proceedings before the Court of Justice against the Slovak Republic. In Hungary's opinion, that directive permits Member States to refuse to allow a citizen of the Union to enter their territory only if his conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Such, in Hungary's view, was not, in the circumstances, the case.

The Commission considered, however, that European Union law did not apply to visits made by the head of one Member State to the territory of another Member State and that, in those circumstances, the alleged infringement was unfounded.

Hungary then decided to bring infringement proceedings before the Court of Justice on its own initiative against the Slovak Republic, as authorised by the Treaty (Article 259 TFEU)². The Commission decided to intervene in the proceedings in support of the Slovak Republic.

¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77 and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

² This is only the sixth time in the history of European integration that one Member State has initiated an action for failure to fulfil obligations directly against another Member State. Of the five earlier cases, only three were closed by final judgment (Case 141/78 *France v United Kingdom*; Case C-388/95 *Belgium v Spain*, and see also Press Release No 36/2000, and Case C-145/04 *Spain v United Kingdom*, and see also Press Release No 70/06).

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In his Opinion delivered today, Advocate General Yves Bot, established, first of all, that Mr Sólyom intended to go to the town of Komárno in order to attend the inauguration of a monument symbolic of the history of the Hungarian State, and that he was to give a speech on that occasion. There was, therefore, no question here of a visit of purely private interest, or even of a visit made incognito, since the Slovak authorities had been informed several times of this visit through diplomatic channels. In consequence, the Advocate General considered that **it was indeed in the performance of his duties as the President of Hungary, and not simply as a citizen of the Union, that Mr Sólyom wished to visit the town of Komárno.**

In that context, Mr Bot then stated that, while the movement of citizens of the Union between Member States is governed by EU law, the same does not apply to visits made to Member States by Heads of State. In fact, **those movements, although made within the Union, fall within the sphere of diplomatic relations, which remains within the purview of the Member States, in accordance with international law.** According to Mr Bot, **visits by Heads of State within the Member States of the Union depend on the consent of the host State** and the detailed conditions defined by the latter within the framework of its competence, **and may not be understood in terms of freedom of movement.**

The Advocate General went on to emphasise that Member States ought not to exercise their diplomatic competence in such a manner that it could lead to a lasting break in diplomatic relations between them. Such a break would, in fact, be incompatible with the integration process and contrary to their commitment to maintain good-neighbourly relations consubstantial with their decision to join the Union. It would, moreover, present an impediment to the attaining of the essential objects of the Union, one of which is to promote peace. For those reasons, a situation of persistent paralysis in diplomatic relations between two Member States would fall within the ambit of EU law. The Advocate General noted, however, that the Court is plainly not, in the circumstances, faced with such a situation, as is made evident by, in particular, the meeting of the Hungarian and Slovak Prime Ministers held a few days after the incident at issue.

Finally, the Advocate General stated that, even if the Slovak Republic was wrong to invoke Directive 2004/38 as a legal basis for refusing to allow the President of Hungary to enter its territory, that fact does not, for all that, amount to an abuse of rights within the meaning of the Court's case-law.

Consequently, the Advocate General proposed that the Court **should find that the Slovak Republic has not infringed European Union law and should dismiss Hungary's action.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a

failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.

Judgment in Case C-482/09
Budějovický Budvar, národní podnik v Anheuser-Busch Inc.

**Anheuser-Busch and Budějovický Budvar can both continue to use the
Budweiser trade mark in the United Kingdom**

*United Kingdom consumers are well aware of the difference between Budvar's beers
and those of Anheuser-Busch*

The Trade Mark Directive¹ provides that a trade mark is not to be registered or is liable to be declared invalid if it is identical with an earlier trade mark, and the goods or services covered by the two trade marks are also identical. However, if the proprietor of the earlier trade mark has acquiesced, for a period of five successive years, in the use of an identical later trade mark while being aware of such use, he is, as a general rule, no longer entitled either to apply for a declaration that the later trade mark is invalid or to oppose its use.

Since the Czech brewer Budvar and the American brewer Anheuser-Busch entered the United Kingdom market, in 1973 and 1974 respectively, they have each marketed their beers using the sign 'Budweiser' or expressions including that sign.

On 11 December 1979 Anheuser-Busch applied to the United Kingdom Trade Marks Registry to register the word 'Budweiser' as a trade mark for the goods 'beer, ale and porter'. While Anheuser-Busch's application was being examined, Budvar also submitted, on 28 June 1989, an application for registration of the word 'Budweiser' as a trade mark.

In February 2000 the United Kingdom courts decided that Anheuser-Busch and Budvar could each have the word 'Budweiser' registered as a trade mark. United Kingdom law expressly allowed concurrent registration of the same or confusingly similar marks in circumstances where there was honest concurrent use. Further to that decision, both companies were entered in the United Kingdom Trade Marks Register, on 19 May 2000, as a proprietor of the Budweiser trade mark.

On 18 May 2005, that is four years and 364 days after Budvar and Anheuser Busch registered the Budweiser trade mark, Anheuser-Busch lodged at the United Kingdom Trade Marks Registry an application for a declaration that Budvar's registration of that mark was invalid. In its application, the American company claimed that the trade mark of which it was the proprietor was earlier than Budvar's trade mark because its application for registration of the word 'Budweiser' (on 11 December 1979) was made earlier than the application of the Czech brewer (on 28 June 1989).

The question referred to the Court of Justice by the Court of Appeal (England & Wales), before which the case was brought on appeal, is whether Anheuser-Busch's application for a declaration of invalidity should be granted although both companies have used the word 'Budweiser' in good faith in the United Kingdom for more than 30 years.

In its judgment today, the Court of Justice clarifies, first, its case-law on the rules applicable to the period of five years (the period of 'limitation in consequence of acquiescence') on the expiry of which the proprietor of the earlier mark loses his right to oppose the use of the later mark. In that regard, the Court holds that, according to the wording of the directive, that period starts to run only

¹ Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1)

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after the registration of the later mark in the Member State concerned. Accordingly, mere use of the later mark without any steps to have it registered cannot start that period running.

On the other hand, registration of the earlier mark does not constitute a prerequisite for that period to start running. The directive states that a trade mark can be considered to be earlier without having been registered, as in the case of 'applications for trade marks ... subject to their registration' and trade marks which are 'well known'.

The Court also states that the proprietor of an earlier trade mark cannot be held to have acquiesced in the long and honest use by a third party of an identical later trade mark if he was not in any position to oppose that use. Consequently, the period during which the proprietor of the earlier trade mark was not capable of opposing the use of the later mark cannot be taken into account when calculating the expiry of the limitation period.

Next, the Court states that a later registered trade mark can be declared invalid only if it has or is liable to have an adverse effect on the essential function of the earlier trade mark which is to guarantee to consumers the origin of the goods covered by it.

In that regard, the Court recalls that Anheuser-Busch and Budvar had each marketed their beers in the United Kingdom using the sign 'Budweiser' or a trade mark including that sign for almost 30 years prior to registration thereof and that the two companies were authorised to register jointly and concurrently their Budweiser marks in the United Kingdom. The Court also stresses that while Anheuser-Busch submitted an application for registration of the word 'Budweiser' as a trade mark in the United Kingdom earlier than Budvar, both of those companies have from the beginning used their Budweiser trade marks in good faith.

Further, the Court notes that, according to the referring court, although the names are identical, United Kingdom consumers are well aware of the difference between Budvar's beers and those of Anheuser-Busch, since their tastes, prices and get-ups have always been different. Likewise, it follows from the coexistence of those two trade marks on the United Kingdom market that, even though the trade marks are identical, the beers of Anheuser-Busch and Budvar are clearly identifiable as being produced by different companies.

Accordingly, the Court notes that, in the circumstances of this case, **a long period of honest concurrent use of the two identical trade marks concerned neither has, nor is liable to have, an adverse effect on the essential function of the earlier trade mark of Anheuser-Busch. Consequently, Budvar's registration in the United Kingdom of the later 'Budweiser' trade mark need not be declared invalid.**

A trade mark containing the geographical indication ‘Cognac’ cannot be registered to designate a spirit drink not covered by that indication

The commercial use of such a mark would adversely affect the protected indication

Under the regulation on the protection of geographical indications for spirit drinks¹, it is possible to register as a geographical indication the name of a country, region or locality from which a spirit drink originates, where a given quality, reputation or other characteristic of that drink is essentially attributable to its geographical origin. A registration of that kind is made upon application by the Member State of origin of the drink. The application must be accompanied by a technical file listing the specifications which the drink must meet if it is to be able to be designated by the protected geographical indication.

Furthermore, the regulation prohibits the registration of trade marks which may adversely affect a protected geographical indication and states that, as a general rule, where such a mark has already been registered, it must be invalidated.

The regulation mentions ‘Cognac’ as a geographical indication identifying wine spirits originating from France.

Gust. Ranin Oy, a Finnish company, applied in Finland for the registration, for spirit drinks, of two figurative marks in the form of a bottle label bearing descriptions of the spirit drinks containing the term ‘Cognac’ and its Finnish translation, ‘konjakki’. Although the Finnish authorities have accepted the application for registration, the Bureau national interprofessionnel du Cognac – a French organisation of cognac producers – contests the legality of that registration before the Finnish courts.

The Korkein hallinto-oikeus (Supreme Administrative Court, Finland) asks the Court of Justice whether it is permissible under the regulation to register national trade marks containing the term ‘Cognac’ for products which, in terms of manufacturing method and alcohol content, do not meet the requirements set for the use of the geographical indication ‘Cognac’.

In its judgment given today, the Court states, first of all, that although the contested marks were registered on 31 January 2003 – that is to say, before the regulation entered into force – that regulation is applicable in the present case. In that connection, the Court observes that the retrospective application of the regulation does not undermine the principle of legal certainty or the principle of the protection of legitimate expectations. The obligation on Member States to prevent the use of a geographical indication identifying spirits for alcoholic beverages which do not originate from the place designated by that indication has existed in EU law since 1 January 1996.

Next, the Court observes that the two Finnish trade marks, registered on 31 January 2003, cannot benefit from the derogation provided for under the regulation, in

accordance with which the use of a mark which was acquired before the date of protection of the geographical indication in the

¹ Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89 (OJ 2008 L 39, p. 16).

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country of origin (or before 1 January 1996) is permitted, even if it adversely affects the geographical indication concerned. In that regard, **the Court points out that, independently of the protection it enjoys under French law, the term ‘Cognac’ has been protected as a geographical indication under EU law since 15 June 1989.**

The Court also finds that the use of a mark containing the term ‘Cognac’ for products which are not covered by that indication constitutes a direct commercial use of the protected indication. Such a use is prohibited by the regulation in so far as it concerns comparable products. The Court finds that this may be the position in the case of spirit drinks.

Likewise, the Court finds that the fact that the two Finnish marks incorporate part of the name ‘Cognac’ means that, when the consumer is confronted with the name of the marks on the bottles of spirit drinks not covered by the protected indication, the image triggered in his mind is that of the product whose designation is protected. The Court points out that such ‘evocation’ is also prohibited under the regulation.

In those circumstances, **the Court holds that the Finnish authorities must invalidate the registration of the contested marks.**

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court’s decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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Judgments in Cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08, C-61/08 and C-52/08
Commission v Belgium, France, Luxembourg, Austria, Germany, Greece and Portugal

Member States may not reserve access to the profession of notary to their own nationals

Even if the activities of notaries, as currently defined in the Member States concerned, pursue objectives in the public interest, they are not connected with the exercise of official authority within the meaning of the EC Treaty

The Commission brought actions for failure to fulfil obligations against six Member States (Belgium, Germany, Greece, France, Luxembourg and Austria) because they reserve access to the profession of notary to their own nationals, which in the

Commission's opinion is discrimination on grounds of nationality, prohibited by the EC Treaty. The Commission also complains that Portugal, together with the Member States mentioned above other than France, does not apply the directive on recognition of professional qualifications¹ to notaries.

The principal issue in these cases is whether the activities of the profession of notary are connected with the exercise of official authority within the meaning of the EC Treaty. The Treaty provides that activities which are connected, even occasionally, with the exercise of official authority are excepted from the rules on freedom of establishment². The Member States concerned in these cases, while acknowledging that notaries generally provide their services in those States as members of a liberal profession, argue that a notary is a public office-holder connected with the exercise of official authority whose activities are excluded from the rules on freedom of establishment.

In the first parts of the judgments delivered today, the Court of Justice states that the actions brought by the Commission concern solely the nationality condition imposed by the national laws in question for access to the profession of notary, and do not relate to the organisation of the notarial profession as such.

In order to assess whether the activities of notaries are connected with the exercise of official authority within the meaning of the EC Treaty, the Court then analyses the powers of notaries in the Member States concerned, noting at the outset that only activities that are directly and specifically connected with the exercise of official authority can be excepted from the application of the principle of freedom of establishment.

The Court notes in this respect that the principal function of a notary, as a public official, is to authenticate legal instruments. When he does so – his intervention being compulsory or optional, depending on the nature of the instrument – he verifies that all the conditions laid down by law for the drawing up of the instrument are satisfied and that the parties have legal personality and capacity to enter into legal transactions. An authentic act also has enhanced probative force and is enforceable.

¹ Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16), as amended by Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 (OJ 2001 L 206, p. 1), and/or Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22).

² Article 45 of the EC Treaty (now Article 51 of the FEU Treaty).

The Court observes, however, that the instruments that are authenticated are documents and agreements freely entered into by the parties. They decide themselves, within the limits laid down by law, the extent of their rights and obligations and choose freely the conditions which they wish to be subject to when they produce a document or agreement to the notary for authentication. The notary's intervention thus presupposes the prior existence of an agreement or consensus of the parties. Furthermore, the notary cannot unilaterally alter the agreement he is called on to authenticate without first obtaining the consent of the parties. **The activity of authentication entrusted to notaries does not therefore involve a direct and specific connection with the exercise of official authority.** The fact that some documents and agreements are subject to mandatory authentication, in default of which they are void, cannot call that conclusion into question, as it is normal for the validity of various documents to be subject to formal requirements or even compulsory validation procedures.

Similarly, the fact that the activity of notaries pursues an objective in the public interest, namely to guarantee the lawfulness and legal certainty of documents entered into by individuals, is not in itself sufficient for that activity to be regarded as directly and specifically connected with the exercise of official authority. Activities carried out in the context of various regulated professions frequently involve an obligation for the persons concerned to pursue such an objective, without falling within the exercise of official authority.

As regards the probative force of notarial acts, the Court points out that that force derives from the rules on evidence of the Member States and thus has no direct effect on the classification of the notarial activity of drawing up those acts. As regards the enforceability of notarial acts, the Court observes that it is based on the intention of the parties appearing before the notary precisely to draw up the instrument and to make it enforceable, after its conformity with the law has been checked by the notary.

In addition to the activity of authenticating instruments, the Court examines the other activities entrusted to notaries in the Member States concerned – such as involvement in the attachment of immovable property or in connection with the law on successions – and finds that those too are not connected with the exercise of official authority. Most of those activities are carried out under the supervision of a court or in accordance with the wishes of clients.

The Court then observes that, within the geographical limits of their office, notaries practise their profession in **conditions of competition**, which is not characteristic of the exercise of official authority. They are also **directly and personally liable** to their clients **for loss arising from any default in the exercise of their activities**, unlike public authorities, liability for whose default is assumed by the State.

In those circumstances, **the Court finds that the activities of notaries as currently defined in the Member States in question are not connected with the exercise of official authority within the meaning of Article 45 of the EC Treaty.** Consequently, **the nationality condition required by the legislation of those States for access to the profession of notary constitutes discrimination on grounds of nationality prohibited by the EC Treaty.**

Finally, in the second parts of the judgments, the Court finds that, in view of the particular circumstances of the legislative procedure, there was a situation of uncertainty in the European Union as to whether there was a sufficiently clear obligation³ on the Member States to transpose the directive on recognition of professional qualifications with respect to the profession of notary. For that reason the Court rejects the claim for a declaration that the Member States have failed to fulfil their obligations under that directive.