National Law on Pharmacies and its Non-Application by a Member State's Public Authorities – DocMorris again leading the way to accomplish Freedom of Establishment

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Table of Contents

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A. Introduction

On 29 June 2006, the Ministry for Justice, Health and Social Affairs of the German federal state Saarland permitted 0800 DocMorris N.V., a joint-stock company based in the Netherlands, to operate a pharmacy in Saarbrücken (Germany) – despite the wording of national law on pharmacies. Public reactions were fierce. Pharmacy Councils – though lacking the right to strike[1] – refused to control the compliance with the regulations of the Law on Pharmacies by the pharmacists any longer. Penal charges were brought against DocMorris chairmen and the Minister for Justice, Health and Social Affairs. DocMorris was further faced with civil law proceedings before the Landgericht Saarbrücken (district court) on charges of unfair competition and the Ministry's permission is still subject to pending proceedings before the Verwaltungsgericht Saarlouis (administrative court)[2]. However, after the first excitement has settled, the Ministry's decision received some positive reactions as well. The Public Prosecutor refused to open proceedings. The Landgericht (district court)[3] rejected the demand for a temporary injunction. The European Commission[4] approved the Ministry's decision and the Federal Government announced to change the national Law on Pharmacies if the administrative courts adopted the Saarland's position.[5]

The aim of this article is to examine whether the national Law on Pharmacies in Germany is contrary to EC law and whether there are similar conflicts of laws in other Member States (B.). Assuming there is a conflict of laws, it must be asked in a second step how a Member State's authorities are to tackle such a conflict of laws (C.). Finally an outlook on what the case might trigger concerning European administrative practice and national health legislation will be given (D.).

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1 Pharmacy Councils being appointed honorary officers, they incur civil service law obligations.

2 Verwaltungsgericht des Saarlandes, reference number: 1 K 66/06; 1 F 32/06.

3 Landgericht Saarbrücken, 9.8.2006 – reference number: 7 I O 77/06.

4 *Selmayr*, EU Commission Speaker, Statement on 9 August 2006, as cited by *Hauschild*, BDI begrüßt Vorrang für EU-Recht, Handelsblatt, 11.8.2006.

5 See Incl., Apothekerverbände geben sich nicht geschlagen, Spiegel, 9.8.2006, http://www.spiegel.de/wirtschaft/0,1518,430887,00.html (access date: 11.9.2006).

B. The Conflict between National Law on Pharmacies and EC Law

I. Relevant National Law

The operating of a pharmacy is subject to permission. The *DocMorris* case in particular involved the following provisions regarding the permission requirements:

German Law on Pharmacies[6]

"§ 1 [...]

(2) A person wanting to operate a pharmacy and up to three branch pharmacies needs the permission of the competent authority. [...]

§ 2

(1) The Permission is to be granted upon application, if the applicant [...]

(2) Different from section 1, an applicant being the national of one of the other Member States of the European Union, another Convention State of the European Economic Area Convention or a convention state, to which Germany and the European Union have conceded a corresponding right by convention, is only to be granted the permission, if it is applied for a pharmacy in operation for at least three years. [...]

(4) The permission for running several public pharmacies is to be granted upon application, if

1. the applicant meets the requirements of section 1 to 3 for each of the applied pharmacies and

2. the pharmacy to be operated by him and the branch pharmacies to be operated by him are situated within the same district or the same town not belonging to a district or in another neighbouring district or town not belonging to a district.

(5) For the operating of several public pharmacies, the provisions of this law apply correspondingly with the following provisions:

1. The operator has to run the pharmacy (principal pharmacy) personally.

2. For each further pharmacy (branch pharmacy), the operator has to name a pharmacist as the responsible having to meet with the obligations as they are laid down for directors of pharmacies in this law and in the Ordinance governing the running of pharmacies. [...]

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6 Gesetz über das Apothekenwesen, 20.8.1960, [1960] German Bundesgesetzblatt, vol. I, p. 687, last modification: 29.8.2005, [2005] German Bundesgesetzblatt, vol. I, p. 2570.

§ 7

The permission obliges to personal management of the pharmacy on one's own responsibility. In the case of § 2 section 4 the obligations corresponding to phrase 1 are incumbent upon the pharmacist named by the operator according to § 2 section 5 Nr. 2; the obligations of the operator remain untouched. The personal direction of a hospital pharmacy is incumbent upon the employee pharmacist.

§ 8

Several persons can not operate a pharmacy together but in the legal form of a civil law partnership or a mercantile partnership. In these cases, all partners need the permission. Participations in a pharmacy in form of sleeping partners and agreements, in which the refunding for loans granted to the permission owner or for other assets left is aligned to the pharmacy turnover or profit are inadmissible. [...] The phrases 1 to 3 apply correspondingly to pharmacies according to § 2 section 4."

This regime is not unique in Europe. Several other Member States have adopted likewise rules including the ban on owning more than one pharmacy as well as mandatory legal forms for pharmacies. The European Commission meanwhile decided to take Italy to the Court of Justice on account of its restrictions and furthermore to call in a formal request upon Austria and Spain to amend their national rules.[7] In the context of this study, I will refrain from analysing these rules in completion. However, for a more comprehensive view, an exemplary glance at some of them will be undertaken.

In the case of Italy, the European Commission tackles the ban on the acquisition of holdings by enterprises active in the distribution of medicines in private pharmaceutical companies or municipality pharmacies and the reservation of ownership for pharmacists or legal entities consisting of pharmacists. In the case of Spain, among other rules, the limitation of ownership only for pharmacists is held to be contrary to the EC Treaty. In the case of Austria, the European Commission requests to amend the discrimination by the Austrian law on the basis of nationality for the intention of obtaining a license to operate pharmacies. § 3 section 4 Austrian Law on Pharmacies, however, has been amended in 2006.[8] In the current version of the law, the requirement of a pharmacy being open for at least three years is no longer valid for non-Austrian nationals but it is still in force for applicants not in possession of an Austrian pharmacist's diploma. The Commission's request further concerns the ban on opening a pharmacy in a municipality without a doctor's practice

7 European Commission, Internal market: infringement proceedings concerning Italy, Austria and Spain with regard to pharmacies, IP/06/858, Brussels 2006.

8 Austrian Apothekengesetz, Austrian Reichsgesetzblatt 5/1907, last modification: 28.3.2006, [2006] Austrian Bundesgesetzblatt, vol. I, p. 41.

(§ 10 section 1 number 1 Austrian Law on Pharmacies) and the limitation of the number of pharmacies according to the demand measured by the number of inhabitants and the minimum distance between them (§ 10 section 2 Austrian Law on Pharmacies). Finally, it also concerns the ban on operating more than one pharmacy. In so far, § 2 section 1 Austrian Law on Pharmacies prohibits an accumulation of concessions. Under very restrictive conditions, the owner of a public pharmacy can be permitted to operate up to one branch pharmacy according to § 24 Austrian Law on Pharmacies.

II. Relevant Community Law

Secondary Community law only exists in regard to the recognition of diplomas. Chapter 2 Article 2 para. 2 Council Directive 85/433/EEC of 16 September 1985[9] allowed Member States

> "not [to] give effect to diplomas, certificates and other formal certificates referred to in paragraph 1 with respect to the establishment of new pharmacies open to the public. For the purpose of applying this Directive, pharmacies which have been in operation for less than three years shall also be regarded as new".

As far as primary Community law is concerned, the freedom of establishment is affected. Article 43 EC Treaty[10] provides that

> "(1) within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> (2) Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital."

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9 Council Directive 85/433/EEC of 16.9.1985 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in pharmacy, including measures to facilitate the effective exercise of the right of establishment relating to certain activities in the field of pharmacy, OJ L 253 of 24.9.1985, p. 37-42; see also Art. 21 para. 4 Directive 2005/36/EC of the European Parliament and the Council of 7.9.2005 on the recognition of professional qualifications, OJ L 255 of 30.9.2005, p. 22-142.

10 Consolidated Version of the Treaty Establishing the European Community, OJ C 325 of 24.12. 2002, p. 33-184.

According to Art. 48 para. 1 EC Treaty,

> "companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purpose of this Chapter, be treated in the same way as natural persons who are nationals of Member States."

Finally, we will have to bear in mind that according to Art. 45 para. 1 EC Treaty,

> "the provisions of this chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority"

and that according to Art. 46 para. 1 EC Treaty, the provisions of freedom of establishment and measures taken in pursuance thereof

> "shall not prejudice the applicability of provisions, laid down by law, regulation or administrative action providing for special treatment for foreign nationals on ground of public policy, public security or public health."

III. The Conflict of Laws

1. The Requirement to Take over an Existing Pharmacy

Measured by Council Directive 85/443/EEC, it must surprise that § 2 section 2 German Law on Pharmacies like the former version of the Austrian Law has not been queried until now, since the national provision is linked to the applicant's nationality and not to – in accordance with the Council's Directive – the country where the diplomas are awarded. Such an open, direct discrimination always constitutes an interference with the freedom of establishment.[11]

Discriminations of this kind are particularly incompatible with the idea of a Common Market. They can therefore only be considered as acceptable if they are exempted from the application of the freedom of establishment by Art. 45 EC Treaty or if they can be justified in terms of Art. 46 EC Treaty. However, pharmaceutical supply is not associated with the official authority's field of activity. This exemption is interpreted strictly by the Court of Justice. It only icludes what is absolutely necessary for safeguarding the interests mentioned in that provision.[12] The mere fact that pharmaceutical supply is part of the public health care system and that the pharmacist's obligation is legally proclaimed to be exercised in the pub-

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11 *Müller-Graff*, in: Streinz (ed.), EUV/EGV, Munich 2003, Art. 43 EGV, para. 43 et seq.; *Tietje/Troberg*, in: von der Groeben/Schwarze (eds.), Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft, vol. I, 6th ed., Baden-Baden 2003, Art. 43, para. 50; *Truchot*, in: Léger (ed.), Commentaire article par article des traités UE et CE, Basel 2000, Art. 43, para. 48.

12 ECJ, case C-114/97, *Commission / Kingdom of Spain*, [1998] ECR, I-6717, para. 34.

lic interest[13] does not open the field of responsibility for official authorities, since the pharmacist's activity requires no, concerning this matter, specific constraint.[14] Likewise, the Court of Justice held that professions such as lawyers – though organs of judicature – and certified accountants are not exempted from the freedom of establishment.[15] There is no reason to come to different results for pharmacists.[16]

Any justification according to Art. 46 EC Treaty would have to be proportional to the purpose of public policy or public health. These exceptions are interpreted in a strict sense as well.[17] The maintenance of traditional domestic pharmacists structures is certainly not part of the public order reservation, as freedom of establishment could simply be by-passed. As far as public health is concerned, § 2 section 2 German Law on Pharmacies apparently is not suitable to achieve the purpose of maintaining a high level as regard to the quality for pharmaceutical supply, since this has nothing to do with the nationality, but rather with the equivalence of diplomas and the vocational training. The German Law therefore apparently is contrary to European Law.[18]

However, the current Austrian Law is not beyond any doubt either. Chapter 2 Article 2 para. 2 Council Directive 85/443/EEC exempts the three years period from the obligation of para. 1 containing a general obligation to recognize diplomas. This does not provide a justification for any possible violation of primary law. The fact that Article 47 para. 3 EC Treaty makes the progressive abolition of restrictions in this field dependent on coordination of the requirements for their exercise in the

13 § 1 German Law on Pharmacies.

14 For this criterion see *Müller-Graff*, in: Streinz, (fn. 11), Art. 45, para. 4 et seq.; *Tiedje/Troberg*, in: von der Groeben/Schwarze (eds.), (fn. 11), Art. 45, para. 9.

15 ECJ, case 2/74, *Jean Reyners/Belgium*, [1974] ECR, 631; ECJ, case C-42/92, *Thijssen*, [1993] ECR, I-4047.

16 As well *Streinz/Herrmann*, Europarechtliche und verfassungsrechtliche Rahmenbedingungen der Erteilung einer Genehmigung zum Betrieb einer Internetversandapotheke in Deutschland – Rechtsgutachten im Auftrag des saarländischen Ministeriums für Justiz, Gesundheit und Soziales, Munich 2006, p. 28 (cited: *Streinz/Herrmann*, Rechtsgutachten); for a short version of the in-depth expert opinion see *Streinz/Herrmann*, Und wieder Doc Morris: Das apothekenrechtliche Mehr- und Fremdbesitzverbot aus der Perspektive des Gemeinschaftsrechts, [2006] EuZW, p. 455 et seq.; in this sense also *Dettling/Mand*, Fremdbesitzverbote und präventiver Verbraucherschutz – Zur Gemeinschaftsrechtskonformität des apothekenrechtlichen Fremd- und Vielbesitzverbots, Frankfurt 2006, p. 255. This publication appearing shortly before the print of this paper could only be taken into account punctually.

17 ECJ, case 67/74, *Bonsignore/Oberstadtdirektor der Stadt Köln*, [1975] ECR, 297; see also *Forsthoff*, Die Tragweite des Rechtfertigungsgrundes aus Art. 46 EG für die Niederlassungsfreiheit, die Dienstleistungsfreiheit und für Gesellschaften, [2001] EWS, p. 59 et seq.

18 As well *Streinz/Herrmann*, Rechtsgutachten, (fn. 16), p. 28; *Streinz/Herrmann*, [2006] EuZW, (fn. 16), p. 456, 457.

various Member States, does not prevent primary law from being applicable directly in areas where secondary law has not abolished restrictions yet.[19] The European Court of Justice holds that claims concerning the establishment can be derived from primary law even if measures of coordination have not been enacted yet.[20]

This has not been altered by a recent decision[21] concerning Article 2 of the Council Directive 85/433. An Irish court considered it necessary to decide whether Article 2 means that a Member State which complies merely with the minimal level of recognition was exercising any discretion conferred by that directive. Irish Law provides that directives can only be transposed into national law by means of regulations which amend primary legislation if such is necessary due to the membership in the European Communities. Otherwise, amendments are subject to the *Oireachtas*. The Court of Justice held that where a Member State merely complies with the minimal requirements of this Article, it is not exercising any discretion. More important however, are the grounds of this finding. The Court does not hold that the directive regulates the three years regime concludingly, which would dispose the Member States of any discretion. It rather argued that "it followed from a reading of Article 2 of Directive 85/433, that that provision imposed an obligation of mutual recognition only in respect of pharmacies which have been in operation for at least three years". It thereby seems to understand the Directive to be limited to the phase after three years passing, giving no definite answer to the three years period at all.

Nothing else derives from Directive 2005/36/EC[22]. *Dettling* and *Mand*[23] assume that the considerations concerning the directive recognized the restriction of legal form for pharmacies. But those saying that this directive "leaves unchanged the legislative, regulatory and administrative provisions of the Member States forbidding companies from pursuing certain pharmacists' activities or subjecting the pursuit of such activities to certain conditions"[24] is merely to clarify that the directive which concerns exclusively the recognition of professional qualifications, does not intervene in the field of the restrictions in question here.

Assuming therefore the applicability of primary law, the Austrian Law might contravene Art. 43 EC Treaty. Although the wording of Art. 43 para. 1 EC Treaty

19 As well *Bröhmer*, in: Calliess/Ruffert (eds.), Kommentar zum EU-Vertrag und EG-Vertrag, 2nd ed., Neuwied 2002, Art. 47 EGV, para. 3; *Müller-Graff*, in: Streinz, (fn. 11), Munich 2003, Art. 47 EGV, para. 31; *Scheuer*, in: Lenz/Borchardt (ed.), EU- und EG-Vertrag, 3rd ed., Cologne 2003, Art. 57, para 7.

20 Compare ECJ, case C-209/03, *Bidar*, [2005] ECR, I-2119 et seq., para. 45 et seq.; ECJ, case C-238/98, *Hocsman*, [2000] ECR, I-6623, para. 26 et seq.

21 ECJ, case C-221/05, *Sam Mc Cauley Chemists and Sadja*, available at http://curia.europa.eu.

22 Directive 2005/36/EC of the European Parliament and the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255 of 30.9.2005, p. 22-142.

23 *Dettling/Mand*, (fn. 16), p. 169.

24 Consideration No. 26.

seems to contain only the principle of non-discrimination,[25] its interpretation by the Court of Justice gradually developed towards a comprehensive freedom from restrictions.[26] In its *Gebhard* jurisdiction, the European Court of Justice held that even though a national of another Member State intending to pursue an activity abroad has to comply in principle with the conditions set up by the host state, these rules "must fulfil certain requirements where they are liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the Treaty, such as freedom of establishment."[27] Consequently, any measures or regulations that make the establishment abroad less attractive can be considered as restrictions falling into the application field of Art. 43 EC Treaty.

The current Austrian Law can be considered as such a restriction. Even though the criterion is not that of nationality, the criterion of the country in which diplomas are awarded typically affects foreigners, as regularly, they only constitute a small part of a country's students. This shows that the freedom of establishment could easily be by-passed. The European Court of Justice therefore postulates a principal obligation to recognize equivalent knowledge and capacities acquired in another Member State.[28] A restriction of the freedom of establishment can be justified for imperative reasons of public interest.[29] However, according to the European Court of Justice, "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."[30] Such a justification is hardly to be found with

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25 Initially, the freedom of establishment was interpreted in this sense, see ECJ, case 2/74, *Jean Reyners/Belgium*, ECR 1974, 631, about this initial interpretation also *Streinz*, Europarecht, 7th ed., Heidelberg 2005, para. 803; *Roth*, in: Dauses (ed.), Handbuch des EU-Wirtschaftsrechts, vol. I, Munich 1999 et seq., para. 61; *Coles*, Law of The European Union, 3rd ed. 2003, p. 174.

26 See ECJ, case 71/76, *Thieffry/Conseil de l'Ordre des avocats à la Cour d'appel de Paris*, [1977] ECR, I-765; ECJ, case C-55/94, *Gebhard*, [1995] ECR, I-4165 et seq.; ECJ, case C-250/95, *Futura*, [1997] ECR, I-2471; for further details about this tendency see *Tiedje/Troberg*, in: von der Groeben/Schwarze (eds.), (fn. 14), Art. 43, para. 87; *Coles*, (fn. 25), p. 174; in the context of pharmaceutical law also *Ress/Ukrow*, Niederlassungsrecht von Apothekern in Europa, Stuttgart 1991, p. 17 et seq.; starting from the same point of view in so far also *Dettling/Mand*, (fn. 16), p. 259.

27 ECJ, case C-55/94, *Gebhard*, [1995] ECR, I-4165 et seq.

28 ECJ, case C-340/83, *Irène Vlassopoulou/Baden-Württemberg*, [1991] ECR, I-2357, 2384; in the same sense also *Streinz*, Europarecht, (fn. 25), para. 806, about this issue see also *Arnull/Dashwood/Ross/Wyatt*, European Union Law, 4th ed., London 2000, p. 460 et seq.

29 ECJ, case C-384/93, *Alpine Investments BV*, [1995] ECR, I-1141 et seq.; ECJ, case 33/74, *van Binsbergen*, [1974] ECR, 1299, 1309 et seq., para. 10 et seq.

30 ECJ, case C-55/94, *Gebhard*, [1995] ECR, I-4165 et seq., para. 37; ECJ, case C-424/97, *Haim*, [2000] ECR, I-5123, para. 57.

regard to the provision in question here. The maintenance of traditional domestic pharmacists' structures can not be considered as a purpose approved by Community law and the quality of pharmaceutical supply is not in danger if the qualification awarded abroad is equivalent. Therefore current German and Austrian Law are contrary to Community law.

In the *DocMorris* case, this provision, however, was not in question since DocMorris, going the safest way, decided to take over an already existing pharmacy.

2. Limitations According to the Demand of Pharmaceutical Supply

The German Law on Pharmacies contains no limitations according to the demand of pharmaceutical supply. Therefore, in the *DocMorris* case this issue was not at stake. § 10 Austrian Law on Pharmacies, however, contains detailed rules defining the requirements that justify a concession. The current law stipulates that pharmaceutical supply shall only be provided by public pharmacies in municipalities with a doctor's practice[31] and if there is a demand for an additional pharmacy[32], the number of inhabitants and the minimum distance between the pharmacies are the decisive factors[33].

The Austrian Verfassungsgerichtshof admitted that the legal restriction concerning the access to the profession constitutes a severe infringement of the constitutionally granted freedom of profession.[34] This can only be justified if it is required by public goods, suitable and adequate to achieve the legal purpose and no other legal objections could be brought forward against it.[35] With regard to § 10 section 1 number 2 Austrian Law on Pharmacies, the Austrian Court stated that proper pharmaceutical services are a part of the public goods and, in order to guarantee its functions, including particularly an optimal pharmaceutical storekeeping, that the legislator could set up provisions providing a sufficient income for the existence of pharmacies. The court therefore generally accepted demand-induced access criteria provided they are adequate.[36]

One will notice that the approach of the Austrian Verfassungsgerichtshof with regard to demand-induced access criteria is not too severe, since it accepts the leg-

31 § 10 section 1 number 1 Austrian Law on Pharmacies.

32 § 10 section 1 number 2 Austrian Law on Pharmacies.

33 § 10 section 2 Austrian Law on Pharmacies; see about the current version in force Austrian Verfassungsgerichtshof, 14.10.2005 – G 13/05 and others.

34 Austrian Verfassungsgerichtshof, 2.3.1998 – G 37/97, G 224-232/97, VfSlg. 15.103, confirmed in Austrian Verfassungsgerichtshof, 14.10.2005 – G 13/05 and others.

35 In this sense already Austrian Verfassungsgerichtshof, 6.10.1997 – G 1/87, VfSlg. 11.483; Austrian Verfassungsgerichtshof, 7.3.1992 – G 198/90 and others, 13.023.

36 This position is confirmed by Austrian Verfassungsgerichtshof, 14.10.2005, G 13/05 and others.

islator's intention to guarantee the best possible pharmaceutical supply. This becomes particularly clear when the court comments on the optimal storekeeping conditions. The German Bundesverfassungsgericht, although its dogmatic approach scarcely differed from that of the Austrian Verfassungsgerichtshof, in 1958 developed a much stricter result.[37] The Court distinguished between provisions that merely regulate the modalities under which a profession is carried out and those restricting the choice of and the access to a profession. It found that the latter could be divided into restrictions by subjective criteria depending upon personal requirements of the applicant and objective criteria upon the fulfilment of which the applicant has no influence. The Court held that the latter restrictions being most severe, could only be justified by proving the necessity of such regulations in order to prevent provable or most likely serious danger for public goods of overwhelming importance. In its judgement concerning the admissions of pharmacies in Bavaria, the Court was not convinced that pharmaceutical supply was endangered under a more liberal system. Its reasoning was based on empirical research and expert reports. Particularly with regard to Switzerland the court could not discover an unrestrained increase of pharmacies.

This argument seems still valid. At the end of 2004, in Switzerland the about 7.400.000 inhabitants were supplied by 1.657 public pharmacies.[38] In Austria, about 8.200.000 inhabitants are being supplied by 1.184 public pharmacies.[39] But to make a complete comparison, one has to take into account the specific, supplementary role of doctor's house pharmacies in Austria. Including this particularity, empirical data does not seem to prove that the absence of a demand criterion leads to an unbridled multiplying of pharmacies. For Germany, figures may be different. But even though the number of public pharmacies is meanwhile exceeding 20.000, it remains to be proven that the mere freedom from demand-induced admission criteria had caused an insufficient quality or obtainability of pharmaceutical services. The Bundesverfassungsgericht further acknowledged sufficient economical knowledge to the average pharmacist – if necessary he might be advised by its professional associations – permitting him to evaluate realistically the chances for setting up a new pharmacy. This knowledge, combined with the capital expenditure necessary for setting up a pharmacy would prevent their unrestrained multiplication. Indeed there is some plausibility for the assumption that free market mechanisms would sufficiently regulate the adequate number and distribution of pharmacies. Besides, if profitability was crucial for the maintenance of pharmaceutical supply and quality, the legislator would have to control the permanent economic development of pharmacies as well, not restrained to an admission control. This, however, is not the case in Austria either.

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37 German Bundesverfassungsgericht, 11.6.1958 – 1 BvR 596/56, BVerfGE 7, 377.

38 Schweizerischer Apothekerverband, Geschäftsbericht 2004, p. 12.

39 Österreichische Apothekerkammer, www.apotheker.or.at.

With regard to § 10 section 1 number 1 Austrian Law on Pharmacies, it is even doubtful whether it is suitable to achieve a legitimate purpose. The Austrian Verfassungsgerichtshof, excluding only a purpose "which can by no way be considered to be in the public goods", in principle accepts the legislator's intention of gap-filling with doctors' home pharmacies.[40] It did not express itself though on § 10 section 1 number 1 Austrian Law on Pharmacies directly. However, it seems imaginable that there are places without medical surgeries where nevertheless some pharmaceutical supply might be advantageous. By preventing pharmacists from installing themselves in these places, current Austrian law even seems to be contraproductive to the purpose of providing optimal pharmaceutical services.

Whatsoever, the national jurisprudence on conformity to constitutional law does not prejudice upon the Community law's attitude. Considering the spread of pharmacies already installed in Austria, the limitations linked to the demand and to the existing doctor's practices are suitable to inhibit nationals from other Member States to enter the Austrian Market. They thereby infringe the freedom of establishment in the sense of Art. 43 EC Treaty. In this context, this can not be contested by a strict interpretation of the freedom of establishment,[41] as today, the freedom of establishment must be interpreted in the broad sense of freedom from restrictions.[42]

Requirements limiting the access to the market depending upon the objective criterion of the demand of the market are particularly severe. Therefore, the justification requirements must be strict. In a first step, the legitimate purpose of the regulation must be defined carefully, since the European Court of Justice denies a legitimate purpose in case of purely economic deliberations.[43] Therefore, the maintenance of public pharmacies in their present shape is not a legitimate purpose on its own. Only avoiding the danger of insufficient pharmaceutical supply in a region and thereby protecting public health can be recognized as a legitimate purpose of restriction. With regard to the proportionality test, it must be noted that the approach of the European Court of Justice will probably be more severe than that of some national constitutional courts. Whilst the latter tend to concede a substantive prerogative of evaluation[44] to the legislator, the proportionality test applied by the

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40 Austrian Verfassungsgerichtshof, 14.10.2005 – G13/05 and others.

41 Open though: *Ress*, Niederlassungsfreiheit und nationale Konzessionssysteme – dargestellt am Beispiel der grenzüberschreitenden Apothekerzulassung, Vorträge, Reden und Berichte aus dem Europa-Institut der Universität des Saarlandes, No. 203, p. 2 et seq.

42 See above B.III.2.

43 See ECJ, case C-137/04, *Amy Rockler/Försäkringskassan*, para. 24, available at http://curia.europa.eu; ECJ, case C-385/99, *Müller-Fauré*, [2003] ECR, I-4509, para. 72.

44 German Bundesverfassungsgericht, 28.3.2006 – 1 BvR 1054/01, juris-para. 116; German Bundesverfassungsgericht, 19.7.2000 – 1 BvR 539/96, BVerfGE 107, 197, 218; and the above-mentioned decisions of the Austrian Verfassungsgerichthof, for further details on this see *Pieroth/Schlink*,

European Court of Justice regularly is considerably more strict.[45] Taking the experiences with the liberal systems in countries such as Switzerland and Germany, there seem to be substantial arguments to assume that the Austrian provisions will not meet the test in terms of European law.

3. The Restriction of the Choice of Legal Form

Here lies the main point of controversy in the *DocMorris* case. By its §§ 7 and 8, the German Law on Pharmacies outlines the job of the pharmacist in his pharmacy,[46] meaning that as a rule a pharmacist should have direct and personal responsibility for a pharmacy that exclusively belongs to him. This national law principle in its literal interpretation refuses to grant permission for joint-stock companies. This constitutes a considerable restriction concerning the access to the market since the exceptions for two specific German law partnerships in many cases provide no realistic alternative as they require a personal and unlimited liability of the partners. Here lies an interference into the freedom of establishment. As outlined above[47], this freedom can be interpreted as the freedom from any unjustified direct or indirect restriction from operating an establishment in another Member State. As far as some authors, who have been dealing with the restrictions in question have maintained a different view,[48] this point is no longer up to date considering the permanent jurisdiction of the Court of Justice. With regard to Art. 48 EC Treaty, there is no doubt that the freedom of establishment applies to joint-stock companies as well.[49] It is not limited to the transition of a whole business but applies also for the

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Grundrechte – Staatsrecht II, 21st ed., Heidelberg 2005, para. 287; *Starck*, Die Vereinbarkeit des apothekenrechtlichen Fremd- und Mehrbesitzverbotes mit den verfassungsrechtlichen Grundrechten und dem gemeinschaftlichen Niederlassungsrecht, 1999, p. 16 et seq.

45 See about this *Streinz/Herrmann*, (fn. 16), p. 28; *Streinz/Herrmann*, [2006] EuZW, (fn. 16), p. 456, 458.

46 This formulation was shaped by the German Bundesverfassungsgericht, 13.2.1964 – 1 BvL 17/61, 1 BvL 494/60, 1 BvR 128/61, BVerfGE 17, 232, 240.

47 See B.III.1.

48 See *Friauf*, Das apothekenrechtliche Verbot des Fremd- und Mehrbesitzes – Ein Beitrag zur Tragweite und zu den Grenzen der Niederlassungsfreiheit im freiberuflichen Bereich, Heidelberg 1992, p. 44 ff.; *Starck*, (fn. 44), p. 30 et seq.; diverging however *Ress/Ukrow*, (fn. 26), p. 17 et seq.; *Taupitz*, Das apothekenrechtliche Verbot des „Fremd- und Mehrbesitzes" aus verfassungs- und europarechtlicher Sicht, Heidelberg 1998, p. 80 et seq.; *Becker*, Lockerung des Mehr- und Fremdbesitzverbots von Apotheken im Lichte des Grundgesetzes und der Grundfreiheiten des EG-Vertrags, [2004] Apothekenrecht, p. 8, 9 et seq.

49 On the ECR jurisprudence concerning corporate relocations and its consequences see for instance *Lafontaine* et al., Company Mobility and Employee Rights – A Continental Approach to Reconcile Individual Protection with Corporate Politics while Addressing the Needs of the Common Market, [2006] ZöR, p. 263, 306 et seq.

opening up of a branch shop abroad, as derives from the wording of Art. 43 para. 2 EC Treaty. This opening up a branch pharmacy in Germany by a foreign joint-stock company is prohibited by §§ 7, 8 German Law on Pharmacies.

An interference with the freedom of establishment cannot be denied by reference to the *Keck* jurisprudence either.[50] In the *Keck* case[51], the Court of Justice clarified its *Dassonville* formula[52] on the free movement of goods, saying that national provisions containing sales modalities were not suitable to hinder the trade between Member States if these provisions were applied to all participants of the domestic market and if they had the same legal or factual effects on the sales of domestic products and products from other Member States. If this correction is transferred to the freedom of establishment, it means nothing else than a tracing back of the Treaty freedoms into the sense of market access rights.[53] For foreign companies though, the restrictions in question not only contain modalities for the exercise of the profession. They totally ban market access for any joint-stock company.[54] Therefore, the *Keck* exception is not applicable here.

The Court of Justice repeatedly dealt with restrictions concerning the number of practices operated. In these cases, which can be compared to this constellation, the Court repeatedly affirmed that there was an interference.[55] It was the same in the *optician* case explicitly dealing with a quite similar restriction of the choice of legal form.[56]

Nothing else can be derived from Art. 152 para. 5 EC Treaty. It is said that due to the responsibility of the Member States in the field dealing with Art. 152 para. 5 EC Treaty, freedom of establishment is reduced to a mere freedom from discrimination.[57] This interpretation can not be followed. To start with the wording, Art. 152 EC Treaty appears to be very verbose and vague. The meaning of the untechnical term "responsibility" remains obscure in this context. A systematic approach can

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50 See *Zuck/Lenz*, Der Apotheker in seiner Apotheke – Zur verfassungsrechtlichen und europarechtlichen Zulässigkeit des Fremd- und Mehrbesitzes bei Apotheken, 1999, p. 95.

51 ECJ, case C-267/91, C-268/91, *Keck*, [1993] EuZW, p. 770.

52 See ECJ, case 8/74, *Dassonville*, [1974] ECR 1974, 837.

53 See about this *Streinz*, Europarecht, (fn. 25), para. 864; *Koenig/Haratsch/Pechstein*, Europarecht, 5th ed., Tübingen 2006, para. 629.

54 Cf. *Becker*, (fn. 48), [2004] Apothekenrecht, p. 8 et seq.

55 ECJ, case 96/85, *Commission/France*, [1986] ECR, II-1475, para. 10 et seq.; ECJ, case C-351/90, *Commission/Luxemburg*, [1992] ECR, I-3945, para. 10 et seq.; ECJ, case C-117/05, *Seidl/Bezirkshauptmannschaft Grieskirchen*, non-authentic version available at http://curia.europa.eu; see also opinion of Advocate General *Ruiz-Jarabo Colomer*, case C-140/03, *Commission/Greece*, [2005] ECR, I-3177, para. 22; see also *Streinz/Herrmann*, (fn. 16), [2006] EuZW, p. 456, 457.

56 ECJ, case C-140/03, *Commission/Greece*, [2005] ECR, I-3177.

57 See *Dettling/Mand*, (fn. 16), p. 294 et seq.

enlighten its meaning. As it results from para. 1, Art. 152 EC Treaty exclusively concentrates on preventive action.[58] The measures taken into consideration by the Treaty – information and prevention (para. 1), encouragement and support of cooperation (para. 2), adoption of minimal standards, measures in the veterinary and phytosanitary fields and incentive measures (para. 3) – will hardly intermingle with the domain of para. 5 as they fulfil a function supplementary to national health services and medical care.[59] In an attempt to clarify this, it makes sense to point out that the Member States' right to legislate in the fields of health services and medical care remains unchanged. However, this may not lead to a relativistic interpretation of the Treaty freedoms. Given the limited Community competences in public health politics as described in Art. 152 EC Treaty and given its focus on prevention, Art. 152 EC Treaty can hardly be considered systematically as a meaningful decision for the (non-)application of freedom of establishment in public health legislation. This result is confirmed by Art. 47 para. 3 EC Treaty when applying the freedom of establishment to pharmaceutical professions. The contrary position would lead to the alternation of the concept of freedom of establishment which in its current interpretation presents a unified freedom. No legal text permits to split it up into a freedom from discrimination and a freedom from other restrictions or to tone down the intensity of judicial control. Consequently, the Court of Justice repeatedly accepted a justification ground of organizing the national health system by applying nevertheless Community freedoms and the test of proportionality.[60]

Here again the restriction can only be justified if the restrictions considered are inevitably necessary for the preservation of the goods legitimately protected by the Member State.[61]

The provisions in question here were subject to a decision of the German Bundesverfassungsgericht[62] which, however, only had to decide on the compatibility with the occupational liberty in terms of the German Grundgesetz and not with Community law. The Court in its permanent jurisdiction distinguishes between interferences with the choice of profession restricting even the access to a profession and interferences with the exercise of a profession not restricting the access but merely

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58 See *Oppermann*, Europarecht, 3rd ed., Munich 2005, § 29, para. 72.

59 For this aspect see also *Geiger*, EUV, EGV, 4th ed., Munich 2004, Art. 152 EGV, para. 6.

60 ECJ, case C-120/95, *Decker*, [1998] ECR, I-1831, para. 30 et seq.; ECJ, case C-158/96, *Kohll*, [1998] ECR, I-1931, para. 45 et seq.; ECJ, case C-368/98, *Vanbraekel*, [2001] ECR, I-5363, para. 42.

61 ECJ, case C-114/97, *Commission/Spain*, [1988] ECR, I-6717, para. 34; see also opinion of Advocate General *Ruiz-Jarabo Colomer*, case C-140/03, *Commission/Greece*, [2005] ECR, I-3177, para. 31 et seq.

62 German Bundesverfassungsgericht, 13.2.1964 – 1 BvL 17/61, 1 BvR 494/60, 1 BvR 128/61, BVerfGE 17, 232 et seq.

the objective or subjective modalities of the exercise.[63] Whilst the first kind of interferences can only be justified by qualified purposes, provisions concerning the modalities of the exercise of a profession are permitted for mere reasons of suitability.[64] As the Court's point of view focussed only on the national perspective of a single pharmacist whishing to operate a second pharmacy, it found that only a modality of the exercise of the profession was affected. Seen in this light, the Court did not object to the provisions. It declared that the legislator has the right to specify restrictions concerning the job for reasons of health policies; furthermore it underlined German professional traditions and a generally accepted economic policy to promote middle classes business. It further said that without the principle of a pharmacist in its pharmacy, there was a risk of concentration in the pharmacies market impeding independent pharmacists from operating an independent pharmacy.

Concerning the compatibility with European Law, this decision provides no substantial argument. First, one may wonder whether the German Bundesverfassungsgericht in line with its current standards would still maintain its more than forty years old decision. Since the case decided by the German Bundesverfassungsgericht was clearly focussed on the admission of a natural person, the Court found no reason to deepen into the consequences of its judgement upon legal persons being guaranteed occupational liberty by Art. 19 para. 3 German Grundgesetz. Their constitutional right by the Court's judgement is reduced to zero in the pharmacies market. With a divergent focus, the assumption of a provision merely regulating the modalities of professional exercise is therefore less evident even in German law. At least, this reasoning might give way to a more stringent test of proportionality within the frame of professional modalities, since today it is undisputed that the Court's scrutiny regarding the justification is not exclusively bound to the strict scheme of the level of interference.[65] Even assuming a regulation of the modalities of professional exercise, justification requirements can be strict if the provision has a severe impact, as it is the case here. And even on this level of interference, there is a strong holding in German doctrine saying that a restriction on this level can no longer be justified by the mere interests of a profession, such as to ban competition.[66] The German Bundesverfassungsgericht therefore regularly abstains from such an argument today.

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63 See German Bundesverfassungsgericht, 11.6.1958 – 1 BvR 596/56, BVerfGE 7, 377 et seq.; German Bundesverfassungsgericht, 25.3.1992 – 1 BvR 298/86, BVerfGE 86, 28 et seq.

64 See German Bundesverfassungsgericht, 29.11.1961 – 1 BvR 760/57, BVerfGE 13, 237, 240; German Bundesverfassungsgericht, 17.11.1992 – 1 BvR 168/89, 1 BvR 1509/89, 1 BvR 638/90, 1 BvR 639/90, BVerfGE 87, 363 et seq.; for further details see *Pieroth/Schlink*, (fn. 44), para. 855 et seq.

65 See *Wieland*, in: Dreier (ed.), Grundgesetz-Kommentar, vol. 1, 2nd ed., Tübingen 2004, Art. 12, para. 112, with further references.

The more important point, however, lies in the fact that the examination of consistency under EC law is not bound to the same rules. With regard to Art. 43 EC Treaty, German Law not only regulates the modalities of the exercise of a profession, but it also prohibits foreign companies and other juristic persons completely from entering the market. Considering EC requirements, it therefore not only constitutes a mere regulation of professional modality but a severe barrier hindering market entrance. Consequently, in the light of European law, a stricter scrutiny of proportionality has to be applied. And indeed, the justification requirements in European law, as interpreted by the European Court of Justice, are much stricter. According to the *Gebhard* jurisdiction, restrictions muss be applied in a non-discriminatory way, they must be justified as being in the general good, being suitable to achieve that purpose and being proportionate.[67]

A mere economically motivated purpose is not recognized to be in the general good.[68] Therefore, the outlining of the profession of pharmacists as well as the wish to provide independent pharmacists a comfortable livelihood is not a legitimate purpose by itself.

The main question is therefore: Is the limitation of the choice concerning the form of law suitable and necessary to protect public health by providing a high standard of pharmaceutical supply? The German legislator[69] – approved by the German Bundesverfassungsgericht[70] – considered, taking the specifity of pharmaceutical products and the harm they can cause into account, that a special regime is necessary. The personal and thereby the effective control of a pharmacy was guaranteed in the best way if the pharmacist was independent from a third person's influence. Besides, the formation of chains should be prevented since there was no experience with pharmacies owned by third parties in Germany and therefore the consequences of such a situation on competition and drug prices were unclear.

In the light of community law, these considerations can not convince any longer. The most important argument for a possible justification is that of protecting public health. The European Court of Justice acknowledges the legitimacy of this pur-

66 See *Tettinger*, in: Sachs (ed.), Grundgesetz-Kommentar, 3rd ed., Munich 2003, Art. 12, para. 102 a; *Czybulka*, Berufs- und Gewerbefreiheit – Ende oder Fortbildung der Stufentheorie?, Neue Zeitschrift für Verwaltungsrecht 1991, p. 145, 146; *Gubelt*, in: von Münch/Kunig (eds.), Grundgesetz-Kommentar, vol. I, 4th ed., Munich 1992, Art. 12, para. 46.

67 ECJ, case C-55/94, *Gebhard*, ECR 1995 I-4165 et seq, para. 37; ECJ, case C-424/95, *Salomone Haim/Kassenärztliche Vereinigung Nordrhein*, ECR 2000, I-5123, para. 57.

68 ECJ, case C-385/99, *Müller-Fauré*, [2003] ECR, I-4509, para. 72; ECJ, case C-137/04, *Amy Rockler/Försäkringskassan*, para. 24, available at http://curia.europa.eu; in this sense also *Streinz/Herrmann*, Rechtsgutachten, (fn. 16), p. 28.

69 Bundestags-Drucksache 15/1525, p. 160; see also Bundestags-Drucksache 3/1769, p. 3.

70 Bundesverfassungsgericht, 13.2.1964 – 1 BvL 17/61, 1 BvL 494/60, 1 BvR 128/61, BVerfGE 17, 232.

pose.[71] Examining the means engaged to achieve this purpose, we can analyse the restriction of the choice of legal form by the criterion of professional competence and by the criterion of personal reliability.

As far as professional competence is concerned, a pharmacist's diploma proves adequate specialist competence irrespective from his status as an independent owner of a pharmacy or as an employed pharmacist responsible for the pharmaceutical services. In the parallel case of opticians, the Advocate General points out that "there are two spheres of relationship in the shops, one internal and the other external. The first comprises ownership […]. The second comprises relations with third parties, particularly with […] buyers, customers or, if you prefer, patients."[72] The European Court of Justice therefore argued that "public health could be protected by guaranteeing that certain actions will be carried out by qualified, salaried opticians or under their supervision"[73]. Against this parallelism, some argue that the health risks inherent to drugs are much higher than the danger of glasses.[74] However, the Court is right not do differentiate in this context[75] between the potential of risks since pharmaceutical training certified with a diploma guarantees the sufficient competence of pharmacists. Some critics also argue that the judgement concerning the opticians could not be transferred to this case since the Court relied on rules of liability, whereas in this case, due to the high risks at stake, any faults had to be prevented. But the European Court of Justice in so far refutes both arguments. The reasoning behind its judgement on public health is the idea that even in the *opticians* case, preventive protection of public health is guaranteed by the presence of a salaried optician. The same can be done in the *pharmacists* case.

As far as reliability is concerned, the salaried pharmacist can be subject to a reliability test no matter whether he is independent or employed. § 2 section 5 number 2 German Law on Pharmacies provides this for branch pharmacies in the restricted cases where they are admitted. In contrast, a general prohibition of company ownership could only be justified if this fact by itself produced a considerable inherent risk of dependence. It is true that an employer has a general right to give instructions. But this right is limited by law. For branch shops, § 2 section 5 number 2, § 7 phrase 2 German Law on Pharmacies requires that the employed pharmacist in the case of admitted branch shops manages the pharmacy personally. This excludes any instructions concerning specific pharmaceutical questions endangering the standard of pharmaceutical supply. An illicit instruction would give way to legal actions. A

71 See ECJ, case C-140/03, *Commission/Greece*, [2005] ECR, I-3177, para. 30.

72 See opinion of Advocate General *Ruiz-Jarabo Colomer*, case C-140/03, *Commission/Greece*, [2005] ECR, I-3177, para. 34.

73 ECJ, case C-140/03, *Commission/Greece*, [2005] ECR, I-3177, para. 30.

74 *Dettling/Mand*, (fn. 16), p. 29 et seq.

75 In ECJ, case C-103/03, *DocMorris I*, [2003] ECR, I-14887, the question was posed in another context, i.e. in the context of the specific risks of direct mail selling.

subsisting risk of sublime influence can not be found either. The employee is protected against any pressure or termination by labour law. The rules of profession he has accepted oblige him to resist any attempt of manipulation. If he does not do so, this is a question of surveillance and sanction of professional behaviour but not of choosing the legal form.

Regarding this surveillance and sanction it cannot be argued either that only the existing system allows a suitable work on behalf of state (control) authorities. The exercise of these mechanisms remains untouched: In the local law of the Saarland – as in other German Länder – the obligatory membership in the Pharmacists' Association (Apothekerkammer), a self-administrating body exerting control and sanction – is linked to the exercise of the profession in the Saarland (§ 4 Saarland Pharmacists Rules), not to the ownership of the pharmacy. This strengthens the responsibility of the employed pharmacist, but also his or her independence towards the owner. As it is the case with doctors, the person exerting the profession and not the owner of a practice is obliged personally to fulfil all professional duties. Even if the rules concerning state authorities were not sufficient in a Land, this would have no impact on the conformity with European law but would rather emphasize the need for reforms in the Member State's legislation.[76]

Besides, it must be taken into account that inheriting a pharmacy exposes the pharmacist to different but not less substantive risks. The owner of a pharmacy can be faced with equally existential fears resulting from his income situation. This risk is even greater under the current law, since the ban on the ownership of several pharmacies and the limitation of the choice of the legal form considerably restrict the basis for an independent pharmacist to earn his living in less profitable regions. Due to this it is argued that under the present circumstances, the running of unprofitable pharmacies is even fostered.[77] Some say, in joint-stock companies a "tone from the top" could induce negative influence more easily since stockholders only risked their investment whereas inheriting pharmacists risked their job.[78] However, employed pharmacists risk their job as well and they risk even further jobs if they give in to any negative influence on their pharmaceutical activity. Thus, it is necessary – but also sufficient – that the State and pharmacists' professional self-administration supervise the correct application of pharmaceutical standards and statutes. It is therefore consistent that the German Bundesgerichtshof recently held that the

76 It should be noted that the organization of state control by means of self-administrative bodies does not change anything to this result, since it is recognized that such chambers are equally obliged by Community law, see *Karpenstein*, Praxis des EG-Rechts, Munich 2006, para. 128, with further reference.

77 See on this *Taupitz/Schelling*, Das apothekenrechtliche Verbot des „Mehrbesitzes" – auf ewig verfassungsfest?, [1999] NJW, p. 1751 et seq.; *Koenig/Meurer*, Das apothekenrechtliche Fremdbesitzverbot auf dem Prüfstand von Verfassungs- und Gemeinschaftsrecht, [2004] Apothekenrecht, p. 153 et seq.

78 *Dettling/Mand*, (fn. 16), p. 82 et seq.

regulations concerning the pharmaceutical work were possibly no longer up to date. It could not be held without some qualification that a pharmacist tested upon reliability would give in to external pressure and act according to economic motives neglecting his specific duties.[79]

The legislator's considerations can further be refuted by the series of exceptions the legislator admits – apparently without assuming any danger for the quality standard and the impeachability of the exercise of the job: § 1 section 2 German Law on Pharmacies permits a pharmacist to operate a (principal) pharmacy and up to three branch pharmacies, the latter being managed personally by an employed pharmacist. In practice, the owning pharmacist can contribute nothing to the quality of the exercise of pharmaceutical activity in the branch pharmacies, since he cannot prevent any mistake in the consultation of a client or the delivery of a medicament if he is not present. This, however, constitutes no major problem since the employee pharmacist is equally skilled. As far as the exercise of any sublime pressure influencing the pharmacist's independence is concerned, the case of a permitted branch pharmacy is no better than that of a company owning a pharmacy.[80]

There are further examples where the legislator accepts that a pharmacy is not run by its owner: According to § 14 German Law on Pharmacies, hospital pharmacies can be run by the hospital owner no matter in what form of company it is organized, the specific direction of the pharmacy being under the responsibility of an employed pharmacist. Apparently, the legislator sees no problem in this, even though hospitals generally are not in the hands of a pharmacist, hospital pharmacies regularly are big pharmacies, and moreover often provide dangerous medicaments such as narcotics for critically ill patients.

Furthermore, the legislator accepts in § 9 German Law on Pharmacies that, if the pharmacy is inherited by the children, it can be lend to someone until the youngest child has completed his or her twenty-third year of living, providing an additional prolongation until the end of his or her professional education if he or she wants to be a pharmacist and providing even further prolongation if the children should die. Here we have an accepted case of divergence between owner and pharmacist again. If this constellation provided serious danger for public health, the individual interests of the pharmacist's heirs could hardly justify its admission.

Additionally, it can be pointed out that the German legislator even seems to have no objections to company-run pharmacies abroad. § 43 German Law governing the manufacturing and prescription with drugs[81] and § 11 a German Law on Pharma-

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79 German Bundesgerichtshof, 25.11.1993 – I ZR 281/91, BGHZ 124, 224.

80 For the inconsistency of German Law on Pharmacies in regard to branch shops see also *Becker*, (fn. 48), [2004] Apothekenrecht, p. 8 et seq.

81 German Gesetz über den Verkehr mit Arzneimitteln, 12.12.2005, [2005] German Bundesgesetzblatt, vol. I, p. 3394

cies allow the mail order business with medicaments even if they are only available on prescription. The German law thereby goes beyond the requirements laid down in a former *DocMorris* case of the Court of Justice[82] holding that Member States could restrict the mail order of these medicaments for their specific danger. In consequence, Germany has to accept mail delivery of medicaments – even if they are only available on prescription – from abroad, no matter whether the foreign pharmacy is run by the pharmacist or by a company. By voluntarily admitting mail delivery the German legislator cannot prevent the organization of foreign pharmacies as the legislator deliberately dispenses with the general rule in a substantive field. The synopsis of all these exceptions to the rule let the limitations of the choice of legal form appear as an inconsistent principle without sufficient justification.

This, we can see a series of exceptions to the restriction of the choice of legal form in German law proving a lack of consistency in the legal concept. As it has been pointed out correctly, the legislator had to decide "either – or", i.e. when making substantial exceptions to the principle, the legislator cannot justify the remaining restrictions any longer.[83]

A glance to other professions in the health service sector confirms this impression: Doctors are practicing in hospitals or out-patient. Nobody has ever seriously doubted that an employed doctor at a hospital could not provide services meeting the high working standards as required. For out-patient departments, it is meanwhile accepted by the German Bundesgerichtshof that they can be run by private limited companies as well.[84] Why should this not apply to pharmacies? It has been argued that the case of doctors or advocates different from that of pharmacists, the specific professional functions do not have to be exercised permanently in one place.[85] But this argument does not convince, as the permanent exercise of the profession in place is being sufficiently done by an employed pharmacist as well – as the admission of branch pharmacies proves.

But how about the legislator's doubts about competitive effects and concentration processes without this principle? Indeed there is some plausibility for concentration as the Norwegian experience shows. But this cannot be considered as an evil by itself, since – it has been pointed out above[86] – the structure of the market is not a legitimate purpose for legal shaping. Only if concentration endangered the existence

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82 ECJ, case C-322/01, *Deutscher Apothekerverband e.V./0800DocMorris N.V.*, [2003] ECR, I-14887, para. 117 et seq.

83 For this aspect see *Dettling/Lenz,* Der Arzneimittelvertrieb in der Gesundheitsreform 2003 – Eine apotheken- und verfassungsrechtliche Analyse des GMG-Entwurfs, Stuttgart 2003, p. 203 et seq., 213.

84 German Bundesgerichtshof, 25.11.1993 – I ZR 281/91, BGHZ 124, 224.

85 *Friauf*, (fn. 48), p. 59 et seq.

86 See fn. 64.

of a sufficient net of pharmacies, this might have some impact. However, such an evolution is rather improbable. Pharmacies in form of companies are admitted in a series of European Member States such as Belgium, Denmark, Great Britain, Ireland, the Netherlands and – with some reservations – in France.[87] These legislators saw no need to restrict the freedom for companies to establish. It is argued that even the German Bundesverfassungsgericht had acknowledged that these liberal systems had no insufficient pharmaceutical supply.[88] In fact, there is some plausibility for the assumption that in a liberal market a lack of pharmacies is even less probable than under the current restrictions. Operating a pharmacy is becoming more and more expensive.[89] Under these circumstances in less profitable regions a pharmacy can rather be operated if the costs can be kept low. Such cost factors are for instance the means of finance: Whilst an individual pharmacist is often relying on expensive loan capital, joint-stock companies can finance easily via own capital. Moreover, in a concentrated market, better buying conditions can be negotiated which might give big companies larger margins facilitating the running of a business even in less profitable regions. In the extreme case of a real lack of pharmacies, current law already provides for the option to operate a pharmacy by the local authorities (§ 17 German Law on Pharmacies). However, this option seems not very probable at the moment, average annual profits of a pharmacy amounting 85.000 Euro in 2005.[90] Therefore, it is not probable that a liberalisation of the market would lead to dangers for public health.

Finally one might reflect on the initial legislator's thought that medicament prices might increase if pharmacies are not operated by the pharmacists themselves.[91] However, as *Streinz* and *Herrmann*[92] point out, this motive can be considered as outdated. The recent legislator considers the running of branch shops as an opportunity to increase economic efficiency and flexibility in the pharmaceutical services.[93] This latter reflection is indeed more convincing. There seems no greater peril caused

87 See *Ress/Ukrow*, (fn. 26), p. 4 passim; *Glaeske/Klauber/Lankers/Selke*, Stärkung des Wettbewerbs in der Arzneimittelversorgung zur Steigerung von Konsumentennutzen, Effizienz und Qualität – Gutachten im Auftrag des Bundesministeriums für Gesundheit und Soziale Sicherung (BMGS), 2003, p. 117.

88 See *Taupitz/Schelling*, (fn. 77), [1999] NJW, p. 1751 et seq. with regard to the German Bundesverfassungsgericht, 11.6.1958 – 1 BvR 596/56, BVerfGE 7, 377, 415.

89 See *Taupitz/Schelling*, (fn. 77), [1999] NJW, p. 1751 ff.; *Koenig/Meurer*, (fn. 72), [2004] Apothekenrecht, p. 153 et seq.

90 Incl., Der regulierte Apotheker – Kaufmännische Freiheit gibt es kaum – und sie wird nicht genutzt, Frankfurter Allgemeine Zeitung, 11.8.2006 (number 185), p. 12.

91 Bundestags-Drucksache 3/1769, p. 3; see also on the aspect of avoiding competition Bundestags-Drucksache 11/6985, p. 20.

92 *Streinz/Herrmann*, Rechtsgutachten (fn. 16), p. 27.

93 Bundestags-Drucksache 15/1525, p. 160.

by pharmacy-owners letting out their pharmacies in large scales, on the contrary it is more realistic that companies will establish chains of pharmacies. This, however, might lead to a horizontal concentration of demand putting pressure on medicine prices. Drug expenses have considerably increased within the last few years.[94] Countries having abolished the restriction of legal form though reported a decline in drug expenses.[95] Even though these do not necessarily correspond exactly to drug prices, there seems to be a considerable price margin in case of an increased concentration of market demand, as public health experts have pointed out.[96] Norway for instance can report one of the lowest expenditures on health care as share of GDP and the lowest spending on medicines as share of spending on health care in Europe.[97]

The application of the *opticians* judgement in the case of pharmacists cannot be refuted by relying on the *Åklagaren* judgement[98] either. While the Advocate General took the view that not only Art. 31 EC Treaty but also Art. 43 EC Treaty precluded maintenance of an exclusive right to retail medicinal products such as that conferred on a state-run monopolist pharmacy in Sweden, the European Court of Justice retained a judgement on the mere grounds of Art. 31 EC Treaty. It has been argued that the Court thereby implicitly accepted an even more restrictive system than the German one. However, this interpretation of the *Åklagaren* judgement is daring. The first question referred to the European Court of Justice was dealing with the question of whether an agreement between the Swedish State and a company concerning the sale and marketing of medicinal products constituted a monopoly contrary to the EC Treaty because it made no provisions for a purchasing plan or a system of "calls for tenders". The Advocate General who was pleading in great detail for a violation of Art. 31 EC Treaty just touched the problem of Art. 43 EC Treaty, and there are reasonable grounds to believe that since it was not necessary to decide on Art. 43 EC Treaty in this case, the Court's judgement – completely silent on Art. 43 EC Treaty – contains no implicit statement on this provi-

94 Within the first six months of 2006, German public medical insurance companies spent about 11.700.000.000 € on drugs, within the first half of 2005, it were about 11.100.000.000 €, within the first half of 2004, it were about 9.300.000.000 €, see Allgemeine Ortskrankenkasse, Informationen zur Entwicklung der Arzneimittel-Ausgaben, http://www.aok-gesundheitspartner.de/bundesverband/arztundpraxis/arzneimittel/ausgaben/ (access date: 18.9.2006).

95 See *Glaeske/Klauber/Lankers/Selke*, (fn. 87), p. 119 et seq.; current figures report a slower sales evolution than in other countries, see Legemiddelindustriforenigen, Facts and Figures 2006, Sentrum 2006, p. 95.

96 According to *Lauterbach*, the admission of DocMorris by the Saarland Ministry will lead to savings of at least 1.000.000.000 €, see Tagesschau of 10.8.2006, http://www.tagesschau.de/aktuell/meldungen/0,1185,OID5794944,00.html (access date: 13.9.2006).

97 Legemiddelindustriforenigen, op. cit. (fn. 95), p. 43 et seq., 95 et seq.

98 ECJ, case C-438/02, *Åklagaren v. Krister Hanner*, [2005] ECR, I-4551.

sion either.[99] Indeed, there are significant differences between a monopolistic system on the one hand (prohibiting any private professional activity) and a system which reserves freedom of professional activity to natural – and *de facto* regularly domestic – persons.

Coming to a conclusion, no sufficient justification can be presented for the limitations concerning the choice of the legal form for a pharmacy.[100] This result is also confirmed by the *optician* decision of the European Court of Justice.[101] Here the Court affirmed that the almost identical provisions for opticians in Greece though lacking open discrimination with regard to nationality, constitute restrictions to the freedom of establishment. Applying the *Gebhard* examination of proportionality[102] the European Court of Justice holds that the purpose to protect public health can also be achieved by means less impeding the freedom of establishment such as the requirement that in every opticians shop a qualified optician has to be present, the regulations of civil liability for third persons or regulations of a compulsory liability insurance. These considerations are equally valid for the *pharmacists'* case. It can be noted that this can not be denied with reference to the specific product sold by pharmacists because the Court of Justice even in the *optician* case accepts the purpose to protect public health but applies nevertheless the above-mentioned criteria.

4. The Requirement of Proximity between a Principal and a Branch Pharmacy

German law provides specific requirements for the admission of branch pharmacies. Thus, one could ask if § 2 section 4 number 1 German Law on Pharmacies requires that – even if foreign companies were admitted as outlined under 3. – the foreign company had to fulfil the admission requirements of a German pharmacy according to sections 1 to 3. However, this is not the case: section 4 number 1 can only be used for the pharmacies that have been applied for. In the *DocMorris* case, the permission was only applied for the branch pharmacy and not for the principal in the Netherlands. Therefore, the German law does not apply.

Moreover, any tendency to extend the literal interpretation is not permitted in this context. An extension of § 2 section 4 number 1 German Law on Pharmacies would, as a consequence, impose German national requirements on the main

99 See *Dettling*, Fremdbesitzverbote, Corporate Governance im Gesundheitswesen und Gemeinschaftsrecht, [2006] Apothekenrecht, p. 1, footmark 1.

100 In this sense also *Taupitz*, (fn. 48), p. 100 et seq.; *Koenig/Meurer*, (fn. 72), [2004] Apothekenrecht, p. 153, 159; *Streinz/Herrmann*, Rechtsgutachten, (fn. 16), p. 37 et seq.; *Streinz/Herrmann*, (fn. 16), [2006] EuZW, p. 455, 458, *Becker*, (fn. 48), [2004] Apothekenrecht, p. 8 et seq.

101 ECJ, case C-140/03, *Commission/Greece*, [2005] ECR, I-3177.

102 In ECJ, case C-140/03, *Commission/Greece*, [2005] ECR, I-3177, para. 35, the Court of Justice refers to case C-18/92, *Kraus*, [1993] ECR, I-1663, para. 32.

branch of a pharmacy registered in another Member State, thereby building up even larger obstacles for foreigners to have access to the German market. Such an extension is not accepted by European Law, since it would constitute an even higher and by no means justified barrier. As it is accepted, that national law due to the priority of European law has to be interpreted in a sense of conformity with European Law,[103] so that such an extension has to be refuted.

Things are more complicated with regard to the requirement saying that the branch pharmacy has to be situated in the same municipality district or within the municipality neighbouring that of the principal. At first glance, one might be tempted to consider this to be a mere modality of the exercise of the profession applicable equally for foreign and domestic owners. But this interpretation would not take into account that in practice this criterion is not only of a particularly high relevance for foreigners but it also totally bans foreign competitors from large parts of the German territory. Article 48 para. 1 EC Treaty implies that the opening of branches is guaranteed in general and for the entire territory of a Member State, even if the principal remains in another Member State. Therefore § 2 section 4 number 2 German Law on Pharmacies constitutes an interference with the freedom of establishment.

This leads to the question, whether the proximity requirement can be justified. § 7 phrase 3 German Law on Pharmacies shows what idea the legislator had in mind when enacting this law: The owner of the principal is personally responsible for branch pharmacies, notwithstanding the employed pharmacist's responsibility. Seen in this context, the motive for the proximity requirement can be seen in the attempt to permit an adequate attainability and an effective control on behalf of the owner in order to guarantee the standard of quality. But are the means suitable to achieve the purpose? Here again we have to distinguish the qualification criterion and the impeccability criterion. With regard to the first one, in a single case of consultation or delivery of a medicament, the owner can by no means prevent a mistake made by an employed pharmacist and it is without any significance whether he or she is 10 or 1.000 kilometres away. But it is not his or her obligation to prevent mistakes in a single case since the employed pharmacist must have an equivalent qualification. Maybe the law supposes that the owner can check the equipment and exercise exemplary control of the service by regular visits. However, as the employed pharmacist has to be equally qualified, with regard to the necessary qualification there is no need for the owner to do this personally. With regard to an eventual risk of liability, the owner may estimate by himself/herself whether he or she can cope with the risk of a large distance to the branch pharmacy – taking into account liability rules for employed persons and existing liability insurance rules. As far as impeccability is concerned, the proximity criterion is not suitable to add anything. On the

103 Cf. *Larenz/Wolf*, Allgemeiner Teil des Bürgerlichen Rechts, 9th ed., Munich 2004, § 4, para. 72 et seq.; *Brechmann*, Die richtlinienkonforme Auslegung, Munich 1994, p. 247 et seq.; *Di Fabio*, Richtlinienkonformität als ranghöchstes Normauslegungsprinzip? – Überlegungen zum Einfluß des indirekten Gemeinschaftsrechts auf die nationale Rechtsordnung, [1990] NJW, p. 947 et seq.

contrary: If the legislator fears eventual pressures by the owner upon the employed pharmacist, a renunciation of the proximity criterion might even reduce permanent control and immediate instructions by the owner, who then would be fully responsible for any pharmaceutical concern in the sphere of the branch pharmacy.

C. The Competence Not to Apply National Law by Member State Authorities

The consequences of a conflict between national law and European Law have been – as it seems – clarified decades ago. They are determined by the principles of direct effect and the priority of European law.

I. The Direct Effect of European Law

When signing an international treaty, a State regularly reserves itself the ways and means in which the results agreed upon are to be administrated. Unless the State has implemented the agreed results into national law, authorities are not bound by the treaty in carrying out national laws. It only is different if a treaty exceptionally is applicable in the legal system of a State without the State having to adopt any legislation specifically providing for the application of the treaty the case is different, i.e. if the treaty is directly effective.

In the *DocMorris* case, the first condition for any public authority to apply Community law is to make sure that the Treaty provisions on the freedom of establishment have such a direct effect. The European Court of Justice held in its *van Gend* & *Loos* case[104] that treaty provisions may induce direct effect and may confer rights on private individuals. Meanwhile, in its permanent jurisprudence the European Court of Justice attributes direct effect to any provision that is unconditional, clear and unambiguous and whose operation is not dependent on further action being taken by Community or national authorities.[105]

What are the grounds for the assumption of a principle of direct effect? The European Court of Justice found the reason for the direct effect in the fact that the EC Treaty was more than a Convention only creating reciprocal obligations between the contracting states and that the Community constituted a new legal order of *jus gentium* in favour of which the States restricted their sovereignty.[106] Therefore,

104 ECJ, case 26/62, *van Gend* & *Loos*, [1963] ECR, 1; see also ECJ, case 43/75, *Defrenne/Sabena*, [1976] ECR, 455 et seq.

105 See also *Dashwood*, The Principle of Direct Effect in European Community Law, [1976] JCMS, p. 229, 231.

106 ECJ, case 26/62, *van Gend* & *Loos*, [1963] ECR, 1, para. 9 f.

it is often said that the Court of Justice deduced the principle of direct effect immediately from European law.[107] This leads to the question of the relationship between European and national law.

In *jus gentium*, a monist view assuming that there is a unity between *jus gentium* and national law is often opposed to a dualist view assuming that *jus gentium* and national law are two different legal orders.[108] The problem of direct effect only emerges under a dualist view arguing that, as the two systems are independent of each other, no rule of Community law can itself bring about direct effect unless Member State law says so. The reception of some Member States seems to adopt such a (moderate) dualist view. Thus the German Bundesverfassungsgericht stated that Community law applies only because German Constitutional law provided this due to the ratification of the Community Treaty, the national order of law opened itself deliberately for the application of European law.[109] This appears to correspond with British[110] and Danish[111] law.

However, in the context of direct effect, the theories dispute in *jus gentium* needs not to be decided since it is generally accepted today that the nature of Community law cannot exclusively be explained by regular *jus gentium*. The Community shows some particularity which led some authors to the thesis that its legal basis was completely detached from *jus gentium*.[112] But even without denying the EC Treaty its character of a *jus gentium* treaty, it can be held that due to its particularities, the rule of direct effect can be derived immediately from EC law: Even if – under a dualist view – Community law only applies if the Member States say so, the parties of an international treaty are free to agree not only to achieve a certain result but also to agree

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107 So *Classen*, in: von Mangoldt/Klein (eds.), Das Bonner Grundgesetz, vol. 2, 5th ed., Munich 2005, Art. 23, para. 52; *Streinz*, Europarecht, (fn. 25), para. 216; *van Raepenbusch*, Droit institutionnel de l'Union et des Communautés européennes, 2e ed., Paris 1998, p. 353 et seq.

108 For this distinction and the differentiation with the two categories of theories see *Brownlie*, Principles of Public International Law, 5th ed. 1998, p. 31 ff.; *Seidl-Hohenveldern*, Völkerrecht, 8th ed., Cologne 1994, para. 539 et seq.; *Stein/von Buttlar*, Völkerrecht, 11th ed., Cologne 2005, para. 173 et seq.

109 German Bundesverfassungsgericht, 12.10.1993 – 2 BvR 2134/92, 2159/92, (1994) 1 CMLR 57; German Bundesverfassungsgericht, 12.12.1993 – 2 BvR 2134/92, 2 BvR 2159/92 ("*Maastricht*"), BVerfGE 89, 155 et seq.; see about this *Classen*, in: von Mangoldt/Klein, (fn. 107), Art. 24, para. 13; *Randelzhofer*, in: Maunz /Dürig (eds.), Grundgesetz, Munich 1996, Art. 24 Abs. 1, para. 7, 62.

110 See Queen's Bench Division, *Thoburn v. Sunderland City Council*, [2002] Weekly Law Report, p. 247.

111 See Danish Højesteret (*Carlsen v. Rasmussen*), [1999] CMLR, p. 854.

112 In this sense *Ipsen*, Europäisches Gemeinschaftsrecht, Tübingen 1972, p. 285 et seq.; similar also *Grabitz*, Gemeinschaftsrecht bricht nationales Recht, Hamburg 1966, p. 98 et seq.; Belgian Cour de Cassation, ("*Ski*"), [1971] EuR, p. 261, 262 f. As far as German law is concerned, this thesis must be considered as refuted by the German Bundesverfassungsgericht in BVerfG, 22.10.1986 – 2 BvR 197/83, BVerfGE 73, 339, 383 et seq.

on the way to bring about the result, i.e. on its direct effect.[113] It is being argued that Community law provides some indication for this interpretation, as for instance Art. 249 section 2 EC Treaty states that a directive shall be binding, the Protocol Nr. 35 of the EC Treaty[114] says that EFTA-States are obliged to provide EEA law priority, or in the Protocol on the Application of the principles of subsidiarity and proportionality.[115] The European Court of Justice in its reasoning did not refer to any historic treaty parties' will to attribute directly applicable rights to individuals. Such a deliberate will would be hard to maintain. But important is their will to institute a new legal order with its own bodies and rules under deliberate restriction of their sovereignty rights, which implicitly required the obligation to give direct effect to Community law in the Member States.[116]

The exact grounds for the direct effect being still discussed in doctrine, the existence and validity of such a principle though is generally accepted. The reception in so far is unanimous in the Member States.[117]

With regard to Art. 43 EC Treaty, the European Court of Justice affirmed that Art. 43 EC Treaty has direct effect as well.[118] This lies within the Treaties concept of Community freedoms and is being generally accepted by doctrine within Member States recognizing the authoritative effect of the Court's interpretation competence resulting from Art. 220, 230, 234 EC Treaty.

II. The Supremacy of European Law

Accepting the principle of direct effect, the question of hierarchy between European law and national law in case of conflict arises. The EC Treaty contains no express provision referring to the question of the supremacy of Community law over national law.[119]

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113 So *Hartley*, The Foundations of European Community Law – An Introduction to the Constitutional and Administrative Law of the European Community, Oxford 2003, p. 193; *Classen*, in: von Mangoldt/Klein (eds.), (fn. 107), Art. 24, para. 14; *Verhoeven*, Droit de la Communauté Européenne, Louvain, 1996, p. 264.

114 [1993] German Bundesgesetzblatt, vol. II, p. 266, 422.

115 [1997] OJ C 340/105.

116 Cf. on this point also *Boulouis*, Droit institutionnel de l'Union européenne, 6th ed., Paris 2000, p. 26; *Hartley*, (fn. 113), p. 193; *Verhoeven*, (fn. 113), p. 263 f.

117 For German doctrine see for instance *Oppermann*, (fn. 58), § 7, para. 10; § 26, para. 17; *Streinz*, Europarecht, (fn. 25), para. 407; for British doctrine, see *Hartley*, (fn. 113), p. 197 et seq.; for French doctine, see *Manin*, Les Communautés Européennes – L'Union Européenne – Droit Institutionnel, 5th ed., Paris 2000, para. 611 et seq., 620; *Icard*, Droit Matériel et Politiques Communautaires, Paris 1999, p. 22; *Truchot* in: Léger (ed.), op. cit., fn. 11, Art. 43, para. 4; for Belgian doctrine: *Verhoeven*, (fn. 113), p. 261 et seq.

118 ECJ, case 2/74, *Jean Reyners/Belgium*, [1974] ECR, 631; today generally accepted in doctrine as well, see for instance, *van Raepenbusch*, (fn. 107), p. 358.

In *Costa v. ENEL*[120], the European Court of Justice proclaimed the principle of supremacy. Again the Court argues that contrary to other international treaties, the EC Treaty had created a legal order of its own and that the Member States restricted their own sovereignty by transferring sovereignty rights to the Community. This was also confirmed by Art. 249 EC Treaty. Therefore the law stemming from the Treaty was an independent source of law which could not, due to its special and original nature be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.[121] The principle of supremacy meanwhile is part of the Court's permanent jurisdiction.[122] The European Court of Justice thereby deduces the principle of supremacy from independent European law. It pursues the purpose to safeguard a uniform and comprehensive application of Community law.

The reception of this jurisdiction within the Member States was not without hesitation in the beginning. Today, the principle of supremacy is in its result generally accepted.[123] What still varies to some extent is the dogmatic deduction. Some Courts such as the Belgian Cour de Cassation have accepted in general the argument deduced from European law.[124] Belgian authors have followed this position, supplementary pointing to Art. 10 EC Treaty or the general obligation to execute the Treaty in good faith as an argument in favour of the European Court of Justice's position.[125] In other countries, such as the Netherlands[126], the same result is pro-

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119 However Art. I-6 Draft European Constitution provides for such an express rule.

120 ECJ, case 6/64, *Costa/ENEL*, [1964] ECR, 1251 et seq.

121 ECJ, case 6/64, *Costa/ENEL*, [1964] ECR, 1251 et seq.

122 See ECJ, case 106/77, *Simmenthal II*, [1978] ECR, 629, 643 ff., para. 17 et seq.; ECJ, case C-10/97, *In.CO.GE.'90*, [1998] ECR, I-6307, para. 21.

123 See German Bundesverfassungsgericht, 29.5.1974 – 2 BvR 52/71 ("*Solange I*"), BVerfGE 37, 271, 280; German Bundesverfassungsgericht, 12.12.1993 – 2 BvR 2134/92, 2 BvR 2159/92 ("*Maastricht*"), BVerfGE 89, 155 et seq.; German Bundesverfassungsgericht, 7.6.2000 – 1 BvL 1/97 ("*Bananenmarkt*"), BVerfGE 102, 147; French Conseil d'Etat, 20.10.1989 ("*Nicolo*"), EuGRZ 1990, p. 99 et seq.; Belgian Cour de Cassation, 27 mai 1971 ("*Ski*"), op. cit., fn. 112, [1971] EuR, p. 261; Danish Højesteret ("*Carlsen v. Rasmussen*"), [1999] CMLR, p. 854; Italian Corte Costituzionale, 27.12.1973, [1974] EuR; for the doctrine in the Member States see e.g. *Pescatore*, Das Zusammenwirken der Gemeinschaftsordnung mit den nationalen Rechtsordnungen, [1970] EuR, p. 307 et seq.; *Rasmusssen*, Über die Durchsetzung des Gemeinschaftsrechts in Dänemark, [1985] EuR, p. 66; *Fromont*, Frankreich und die Europäische Union, [1995] DÖV, p. 481 et seq.; *Quérol*, in: Léger (ed.), (fn. 117), Art. 90, para. 44; further reference at *Oppermann*, (fn. 58), § 7, para. 4 et seq.

124 Belgian Cour de Cassation, 27.5.1971 ("*Ski*"), op. cit., fn. 112, [1971] EuR, p. 261.

125 *Verhoeven*, (fn. 113), p. 273 et seq.

126 Art. 93, 94 Grondwet voor het Koninkrijk der Nederlanden. However it is said that these provisions do not apply in the case of EC law since EC law by itself requires supremacy, cf. *Pernice*, in:

vided by the national constitution. Other countries are aiming to bring about the same result by their law transposing the treaty of accession.[127] If the legal order of a Member State contains no explicit statement on this issue, the reasoning is less evident. In such countries, the prevailing of Community law is recognized because the joining act of these countries in combination with the constitutional provisions allowing the participation in the European Communities let Community law enter the national order of law with its full effects, the Member State thereby reducing its own sovereignty rights.[128]

Independently from the deduction of the principle of supremacy in national law, the reception in the Member States has in common that it generally accepts the prevailing of Community law as a principle implicitly intended by the setting up of the Community with its specific organisation and purpose.

As the consequence of the principle of supremacy, national law inconsistent with Community law is not applicable.[129] This is generally accepted today, contrary to a proposition saying that national conflicting law was null and void.[130]

III. The Competence Not to Apply National Law

1. The Position of the European Court of Justice

Its seems to be the logical consequence deriving from the principle of direct effect as defined above,[131] that Community law has to be applied by any public authority on any scale within the administrative organisation of a Member State. With regard to the principle of supremacy, this should also be true in case of conflicting national law. The *DocMorris* case, however, has led to a public debate in Germany on whether this can be valid, even when a national law is not applied under reference to the freedom of establishment as such.

Dreier (ed.), (fn. 65), vol. 2, 2nd ed., Tübingen 2006, Art. 23, para. 15. For further provisions concerning supremacy in national constitutions see *van Raepenbusch*, (fn. 107), p. 373 et seq.

127 See Part I, section 2 British European Communities Act (1972 c. 68).

128 See German Bundesverfassungsgericht, 29.5.1974 – 2 BvL 52/71 ("*Solange I*"), BVerfGE 37, 271, 280 et seq.; German Bundesverfassungsgericht, 12.10.1993 – 2 BvR 2134, 2159/92 ("*Maastricht*"), BVerfGE 89, 155 et seq.; German Bundesverfassungsgericht, 7.6.2000 – 2 BvL 1/97 ("*Bananenmarkt*"), BVerfGE 102, 147 et seq.; Danish Højesteret ("*Carlsen v. Rasmussen*"), [1999] CMLR, p. 854; Italian Corte Costituzionale, 5.6.1984 – No. 170, [1985] EuGRZ, p. 98, 100; House of Lords, 27.3.1980 ("*Henn, Darby*"), [1980] CMLR, p. 229 et seq.; House of Lords, 10.10.1990 ("*Factortame*"), [1990] CMLRep., p. 375, 379 et seq.

129 ECJ, case 106/77, *Simmenthal II*, [1978] ECR, I-629; ECJ, case C-10/97-C-22/97, *In.Co.Ge'90*, [1998] ECR, I-6307, para. 21.

130 *Grabitz*, (fn. 112), suggested such a "*Geltungsvorrang*".

131 See C.II.

The European Court of Justice at the occasion of several cases affirmed an obligation on behalf of Member State Authorities not to apply inconsistent national law. In *Rewe/Hauptzollamt Kiel*[132], the European Court of Justice held that it resulted from the binding character of a directive that a national authority could not rely on a national provision inconsistent with a provision of this directive if it meets all requirements to be applied by the courts. In *Fratelli Costanzo SpA/Commune di Milano*[133], the European Court of Justice affirmed this point of view stating, that "the reason for which an individual may, in the circumstances described above, rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States". The Court added that "it would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions".

In the *Ciola* case[134], the Court extends this rule to the conflict between the EC Treaty and national provisions,[135] saying that "since the provisions of the EC Treaty are directly applicable in the legal systems of all Member States and Community law takes precedence over national law, those provisions create rights for the persons concerned which the national authorities must observe and safeguard, and any conflicting provision of national law therefore ceases to be applicable (see Case 167/73 Commission v France [1974] ECR 359, paragraph 35)". The European Court of Justice further emphasised that "all administrative bodies, including decentralised authorities, are subject to that obligation as to primacy, and individuals may therefore rely on such a provision of Community law against them (Case 103/88 Fratelli Costanzo v Comune di Milano [1989] ECR 1839, paragraph 32)"[136].

132 ECJ, case 158/80, *Rewe/Hauptzollamt Kiel*, [1981] ECR, 1805 et seq.; para. 41 et seq.

133 ECJ, case 103/88, *Fratelli Costanzo SpA/Commune di Milano*, [1989] ECR, 1839 et seq.; para. 31.

134 ECJ, case C-224/97, *Erich Ciola/Land Vorarlberg*, [1999] ECR, I-2517, para. 26.

135 This is correctly pointed out by *Streinz/Herrmann*, Rechtsgutachten, (fn. 16), p. 53.

136 ECJ, case C-224/97, *Erich Ciola/Land Vorarlberg*, [1999] ECR, I-2517, para. 26.

2. The reception within the Member States

The reception of this jurisdiction within the Member States is divided. Some authors accept the position of the Court of Justice entirely.[137] Others are warning that the obligation for public authorities to let national provisions unapplied could cause legal uncertainty.[138] In order to cope with this problem, scolars draw different consequences. Some are pleading against any competence on behalf of public authorities to evaluate the inconsistency of national law with Community law. The competence of annulment should rather be reserved to the German Bundesverfassungsgericht.[139] Others make exceptions to the obligation of non-application in cases of unacceptable gaps of law.[140] Others again tend to limit the competence of non-application to cases of a severe or an apparent offence[141] or to reserve the competence to public authorities of supreme rank.[142]

3. The Dogmatic Grounds of a Competence of Non-Application

In the debate about a competence of non-application on behalf of public authorities, sometimes parallels are alledged – particularly by German scolars – with the conflict of laws between statutory law and constitutional law. In a first step the arguments brought forward in this context shall be examined before commenting on the specifities of Community law.

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137 See *Verhoeven*, (fn. 113), p. 273; *Manin*, (fn. 117), para. 649; *Streinz* in: Sachs (ed.), (fn. 66), Art. 23, Rn. 59; *Jarass*, in: Jarass/Pieroth (eds.), Grundgesetz für die Bundesrepublik Deutschland, 8th ed., Munich 2006, Art. 23 GG, para. 42; *Pernice*, in: Dreier (ed.), (fn. 126), Art. 23, para. 352; *Gilbert/Triie*, Die Rechtsprechung des EuGH zum europäischen allgemeinen Verwaltungsrecht – Teil 2, [1993] JZ, p. 934, 938; *Karpenstein*, (fn. 71), para. 125 et seq.

138 See *Schmidt-Assmann*, Zur Europäisierung des allgemeinen Verwaltungsrechts, Festschrift für Peter Lerche zum 65. Geburtstag, Munich 1993, p. 513, 526 et seq.; *Schmidt-Assmann*, Gefährdungen der Rechts- und Gesetzesbindung der Exekutive, Festschrift für Klaus Stern zum 65. Geburtstag, Munich 1997, p. 745, 760 et seq.

139 See *Schmidt*, „Liberalisierung" des Glücksspielmarktes durch Rechtsbruch, [2005] WRP, p. 721, 728; *Brenner*, Der Gestaltungsauftrag der Verwaltung in der EU, Tübingen 1996, p. 268 et seq.; cf. also *Di Fabio*, Richtlinienkonformität als ranghöchstes Normauslegungsprinzip, [1990] NJW, p. 947, 949; *Classen*, in: von Mangoldt/Klein (eds.), (fn. 107), Art. 24, para. 40.

140 *Jarass/Beljin*, Die Bedeutung von Vorrang und Durchführung des EG-Rechts für die nationale Rechtsetzung und Rechtsanwendung, [2004] NVwZ, p. 1 et seq.

141 In this sense: *Kahl*, in: Calliess/Ruffert (eds.), (fn. 19), Art. 10 EGV, para. 43; similar *Streinz/Herrmann*, Rechtsgutachten, (fn. 16), p. 59 et seq.; *Streinz/Herrmann* (fn. 16), [2006] EuZW, p. 455, 458.

142 See *Hutka*, Gemeinschaftsrechtsbezogene Prüfungs- und Verwerfungskompetenz der deutschen Verwaltung gegenüber Rechtsnormen nach europäischem Gemeinschaftsrecht und nach deutschem Recht, Würzburg 1997, p. 406 et seq.; see also *Streinz/Herrmann*, Rechtsgutachten, (fn. 16), p. 60 et seq.

a) Arguments Derived from National Law

In case of national statutory law inconsistent with constitutional law, in German doctrine most scolars reserve the competence to invalidate statutory law passed after the adoption of the German Grundgesetz exclusively to the Bundesverfassungsgericht.[143] Some of them further drawing parallels with the conflict between national and Community law even plead for an analogous application of Art. 100 German Grundgesetz providing the competence of the Bundesverfassungsgericht to declare unconstitutional statutory law inconsistent with constitutional law.[144] However, some scolars even concede a competence of non-application through public authorities in the case of inner-state conflicts of law. Among the latter, there are different views on the necessary degree of the conviction of unconstitutionality,[145] on whether there has to be an additional balancing of the risks resulting from an application of the rule on the one hand and its non-application on the other[146] and on whether an urgency for a public authority not to apply a statutory law is to be suppositional.[147] Only few of the arguments brought forward in this debate merit to be examined closer in this context because of their potential relevance for the question discussed in this context.

If one assumes, in favour of a competence of non-application, that public authorities are bound to respect the constitution,[148] this *mutatis mutandis* may have some parallel in the above-mentioned respect to Community law claimed by the European Court of Justice. However, the argument is not beyond any doubt, as public authorities are also bound to obey statutory law resulting from the parlamentary competence. So they find themselves in the conflict to disobey one of the two conflicting but binding rules. It therefore leads to nothing if some say that the separation of powers and the principle of democracy would exempt the non-appli-

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143 *von Münch*, Staatsrecht I, 6th ed., Stuttgart 2000, para. 344; *Pietzker*, Vorrang und Vorbehalt des Gesetze, [1979] JuS, p. 710, 711; *Gril*, Normprüfungs- und Normverwerfungskompetenz der Verwaltung, [2000] JuS, p. 1080 et seq.

144 See for the control on behalf of courts *Schmidt*, (fn. 139), [2005] WRP, p. 721, 728 et seq.

145 According to some, the public administration must be convinced of unconstitutionality; according to *Kopp*, Das Gesetzes- und Verordnungsprüfungsrecht der Behörden, [1983] DVBl, p. 828, doubts are sufficient.

146 See *Bachof*, Die Prüfungs- und Verwerfungskompetenz der Verwaltung gegenüber dem verfassungswidrigen und dem bundesrechtswidrigen Gesetz, [1962] AöR, p. 1, 47.

147 See *Ossenbühl*, Verfahren der Gesetzgebung, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, vol. 3, 2nd ed., Heidelberg 1996, § 64, para. 74.

148 See about this argument *Kopp*, (fn. 145), [1983] DVBl, p. 823; In Germany, the principle of binding constitutional law results from Art. 1 para. 3, Art. 20 para. 3 German Grundgesetz.

cation of a law from the public authority's competence since it was the reverse of parliamentary souvereignty.[149]

Another argument is drawn from the existence of a concrete mechanism of norm control by the Bundesverfassungsgericht in the German Grundgesetz. It has been stated that because Art. 100 German Grundgesetz admits such a norm control upon a court's submission only under strict prerequisites, public authorities could not apply statutory law even without meeting these requirements.[150] This does not convince: Article 100 German Grundgesetz is to concentrate the competence of non-application in order to safeguard uniformity in the application of law and to guarantee legal certainty.[151] This purpose reasonably cannot be confined to the application of law by courts. Therefore it is much more plausible to assume that Art. 100 German Grundgesetz conclusively reserves the competence of annulment to the German Bundesverfassungsgericht.[152] This result has been doubted with the statement that the parliaments' authority was not equally endangered by a public authority since its decision could be supervised by court.[153] But the argument here is not to protect parliamentary authority as a purpose of its own. It is rather to discern the attribution of competences by the constitution. In this context, the argument of separation of powers has its significance: The question discussed here is to know how the legal order attributes competences to the powers.[154] In German constitutional law, though competences are not strictly separated but partly crossed over,[155] the different powers are assigned to specific competences. The administration is basically related to the competence of statutory application, being characterised by heteronomy.[156] Taking this concept into account, the explicit attribution of Art. 100 German Grundgesetz supports the exclusion of the competence of annulment in national law.

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149 See for references concerning this argument *Bachof*, (fn. 146), [1962] AöR, p. 1, 14; critical on this for instance *Schwerdtfeger*, Öffentliches Recht in der Fallbearbeitung, 12th ed., Munich 2004, para. 606.

150 See for references *Bachof*, (fn. 146), [1962] AöR, p. 1, 26.

151 See German Bundesverfassungsgericht, 20.3.1952 – 1 BvL 12, 15, 16, 24, 18/51, BVerfGE 1, 184, 197; *Schlaich*, Das Bundesverfassungsgericht, 6th ed., Munich 2004, para. 128; *Löwer*, Zuständigkeiten und Verfahren des Bundesverfassungsgerichts, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, vol. 2, Heidelberg 1987, p. 782.

152 As well *Herzog*, in: Maunz /Dürig (eds.), Grundgesetz, Munich 1999, Art. 20 VI, para. 30.

153 *Bachof*, (fn. 146), [1962] AöR, p. 1, 27 et seq.; *Gril*, (fn. 143), [2000] JuS, p. 1080, 1083.

154 About this approach see also Oberverwaltungsgericht Saarlouis, 20.2.1989 – 1 R 102/87, [1990] NVwZ, p. 172 et seq.; *Bachof*, (fn. 146), [1962] AöR, p. 1, 40.

155 So-called "*Gewaltenverschränkung*", see *Hesse*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20th ed., Heidelberg 1999, para. 475 et seq.; *Maurer*, Staatsrecht, 4th ed., Munich 2005, § 12, para. 1 et seq.

156 See *Bachof*, (fn. 146), [1962] AöR, p. 1, 44 et seq.; *Gril*, (fn. 143), [2000] JuS, p. 1080, 1084.

But what can be drawn from this argument when applying it to Community law? It would be too imprudent to support an analogous application of Art. 100 German Grundgesetz, a provision which has no correspondence in all Member States and which was not susceptible to take the specifities of European law into account. The essential to be drawn from the above-mentioned argument is that the competence of annulment depends upon the concrete attribution of powers provided for by the legal system. This consists of a combination of both national and European legal order. Therefore, the question discussed here can only be answered by interpreting the interaction of both.

German National law provides a good example for the interaction of two legal orders. In the Federal Republic of Germany, the *Länder* are considered to be States.[157] Article 31 German Grundgesetz provides that federal law overrules the law of a *Land* ("*Bundesrecht bricht Landesrecht*"). The German Grundgesetz does not explicitly state who decides whether there is such a conflict. Therefore it is – for all we can see – unanimously agreed that all public authorities may not apply any Land statutes contrary to federal law.[158] There is some parallel to the problem discussed here, since this rule also concerns the conflict of laws resulting from legislating authorities on different scales. Admittedly, there is also a difference: Article 31 German Grundgesetz stipulates nullity *eo ipso* in case of a conflict, whilst Community law only provides inapplicability. But the decisive criterion here lies in the attribution of the competence to decide on the solution of a conflict, as provided for in the legal system of separated powers and not in the absolute nullity or relative inapplicability.

b) The Analysis of Community Law

In Community law, there is no specific attribution of a competence of annulment comparable to Art. 100 German Grundgesetz. Article 234 para. 1 EC Treaty only concerns the interpretation of Community law, but the European Court of Justice is not competent to invalidate national statutes because of their inconsistency with Community law.[159] In case a national court requests a ruling on the interpretation of Community law, it is this court and not the European Court of Justice that finally lets national law unapplied if necessary. However, it cannot be said that the competence order of the legal system would exclusively attribute this right to national

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157 See *Kimmenich*, Der Bundesstaat, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, vol. I, Heidelberg 1987, § 26; *Degenhart*, Staatsrecht I – Staatszielbestimmungen, Staatsorgane, Staatsfunktionen, 21st ed., Heidelberg 2005, para. 461 et seq.

158 See *Gubelt*, in: von Münch/Kunig (eds.), (fn. 66), vol. 2, 5th ed., Munich 2001, Art. 31, para. 20; *Dreier*, in: Dreier (ed.), (fn. 126), Art. 31, para. 43 et seq.; *Pieroth*, in: Jarass/Pieroth (eds.), (fn. 137), Art. 31, para. 6. A Reservation must be made however for the above-discussed conflict with federal constitutional law.

159 ECJ, case C-292/92, *Hünermund*, [1993] ECR, I-6787, para. 8.

courts. When a court lets a national law unapplied because of prevailing Community law unfolding direct effect, this is a simple act of application of Community law derived from an interpretation of the latter. The court in this case does not make use of a specific competence. In so far, the case is comparable to the non-application of statutes deriving from the competence of a German *Bundesland* because of inconsistency with federal law. In both cases, the analysis of inconsistency with prevailing law is an act of realization and interpretation, the specific consequences of nullity or inapplicability make no differences in so far.

Neither is a competence of non-application on behalf of public authorities precluded by an obligation to refer the case to a national court. The German Bundesverfassungsgericht refuted the idea of such a request on behalf of a court by the reasoning that due to the relation between legislation and jurisdiction as provided by the constitution, a court had the obligation to examine the validity of a provision and to leave it unapplied if necessary except in the specific case if the competence is reserved to the Bundesverfassungsgericht. Then the regulation remains valid even where inconsistency with European law is in question.[160]

But the lack of a specific clause of competence does not mean that the legal system of the Community was silent on the question of competence at stake. The contracting States deliberately attributed specific competences to the European Court of Justice. By excluding other competences, they intentionally discarded a scheme of an exclusive and concentrated control of national measures by a specific court or public authority. Abstaining from such concentration, the general mechanisms of application of the law remained in force. Its application however, does not fall into the exclusive competence of the courts but is the first and foremost duty of any public authority as well, as the European Court of Justice correctly points out.

One more argument strongly supporting this view derives from the particular importance of teleology, generally accepted in interpreting the synopsis of Community law, meaning that one has to adopt the interpretation that serves best the purposes of the EC Treaty.[161] Seen in this light, it results from Art. 10 EC Treaty that Member States have to take effective measures in order to ensure a uniform and prompt execution of Community law. As pointed out above,[162] Community law requires to be applied with direct effect and notwithstanding inconsistent national law. If, however, public authorities were not allowed to let national law unapplied because of inconsistency with Community law, this would lead to a considerably reduced effectiveness of Community law, as Community law would oth-

160 German Bundesverfassungsgericht, 9.6.1971 – 2 BvR 225/69, BVerfGE 31, 145, 174 et seq.

161 This is called the *effet utile* by the European Court of Justice, see for instance ECJ, case C-6/90, C-9/90, *Andrea Francovich and others/Italy*, [1991] ECR, I-5357; see also *Truchot*, in: Chavrier (ed.), (fn. 107), Art. 220, para. 28.

162 See C.II., III.

erwise only come into effect after national courts have decided – if necessary after request to the European Court of Justice. This procedure, not unusually lasting for years, is hardly consistent with the imperative of prompt application.

Nothing else results from the interaction of national and Community law. In Germany, the above-presented attribution of competences due to its specific shaping in the Grundgesetz concerns the specific relationship between national and constitutional law and cannot be transferred. It is likewise in most other Member States. But even if a Member State should categorically exclude any competence of annulment to its public authorities, this could not endure when applying Community law. Here again, the reason is the opening of the national legal orders for the intrusion of European law accepted by the adoption of the EC Treaty. If this principle is acknowledged with regard to direct effect and supremacy, nothing else is true for the competence of non-application.

This interpretation is the only one consistent with European rules of state liability. In terms of the *Francovich* jurisdiction, state liability is suitable to be incurred when Member States fail to comply with a Community obligation capable of conferring individual rights identifiable from the content of the provision and when this failure causes the loss suffered by the private individual.[163] If, for instance, an applicant were refuted because of national law – such as the German ban on joint-stock pharmacies – leading to a loss of income resulting from the market entering barrier, the inconsistency of this national law with Community law was likely to induce state liability. Denying a competence of refutation therefore would mean to force a public authority to engage state liability with open eyes. And it is still doubtful whether this liability really can be shifted to the omitting legislator: In Germany liability for normative wrong is still largely rejected because the legislator's duties are not in favour of the individual's sake.[164]

We finally have to consider whether there is room for additional reservations as they are made by the above-mentioned critics.[165] These tendencies aim at excluding any (arbitrary) disregard of parliamentary order and providing uniformity of legal application. Indeed these are legitimate and important concerns. However, they can only influence the concrete application of law in so far as these concerns have found their way into the arranging of the legal order. The specific way to interpret the law can not be derived from abstract principles of separation of powers or legal cer-

163 ECJ, case C-6/90, 9/90, *Andrea Francovich/Italy*, [1991] ECR, I-5357; for further details on the required qualification of seriousness of violation see ECJ, case 46/93, 48/93, *Brasserie du Pêcheur*, [1996] ECR, I-1029 et seq.

164 See German Bundesgerichtshof, 10.12.1987 – III ZR 220/86, BGHZ 102, 350. The consistency of this interpretation with Community law is not safe though, see ECJ, case C-221/89, *The Queen v. Secretary of State for Transports, ex parte Factortame*, [1991] ECR, I-3905; see on this *Hartley*, (fn. 113), p. 235 et seq.

165 See ECJ, case C-140/03, *Commission/Greece*, [2005] ECR, I-3177.

tainty but rather from their shaping in terms of constitutional or Community law. But beyond the presented interpretation of Community law no legal indication is being given for any further restriction. No criterion of evidence and no need for a weighing up of consequences can be drawn from Community law. The European Court of Justice therefore consistently does not make use of any such restriction; and the German Bundesverfassungsgericht held that the disregard of a parliamentary act because of a correct interpretation of European law were the logical and acceptable consequence of the act adopting the EC Treaty.[166] This can be transferred to the competence on behalf of public authorities.[167] It seems that this result is being more and more accepted by public authorities.[168]

In the *DocMorris* case however, the question did not have to be answered with regard to most of the restrictions discussed, as they were fulfilled: The parallelism with the *opticians* case[169] was so clear that the Ministry's permission – passed by a superior authority – could be based on an evident position of the European Court of Justice.

4. Practical Consequences of the Competence of Non-Application

One might doubt whether the solution found will cause unbridled disregard of parliamentary law by public authorities. But there are strong arguments against this view. Public authorities will have considerable reasons not to abuse their right to refuse the application of national law not in line with EC law.

The first reason is that they are subject to judicial control. Third parties may take legal action if – for instance – the administrative act is passed in a market ruled by state concessions. Admittedly, this control is not without any gaps. In case of a market principally ruled by free establishment – as it is in the German pharmacists market – any unlawful admission of a competitor would not give way to a competitor's legal action unless there were qualifying circumstances such as the admission of an exhausting or ousting competition.[170] Self-governing professional bodies do not

166 See German Bundesverfassungsgericht, 9.6.1971 – 2 BvR 225/69, BVerfGE 31, 145, 173 et seq.

167 *Streinz*, Der Vollzug des Europäischen Gemeinschaftsrechts durch deutsche Staatsorgane, in: Isensee/Kirchhof (eds.), (fn. 147), § 20, para. 64.

168 See for instance Bundeskartellamt, 23.8.2006 – B 10 – 92713 – Kc – 148/05, saying that all Member State authorities are obliged to let unapplied any legal provision contrary to Community law.

169 See ECJ, case C-140/03, *Commission/Greece*, [2005] ECR, I-3177.

170 See German Bundesverwaltungsgericht, 23.3.1982 – 1 C 157.79, BVerwGE 65, 167, 173; Oberverwaltungsgericht Munich, 10.4.1984 – 11 CE/CS, [1985] NJW, p. 758; German Bundessozialgericht, 15.5.1991 – 6 RKa 22/90, [1991] NJW, p. 2989 et seq.; *Schenke*, Verwaltungsprozessrecht, 10th ed., Heidelberg 2005, para. 523; *Stern*, Verwaltungsprozessuale Probleme in der öffentlich-rechtlichen Arbeit, 8th ed., 2000, para. 459; *Kopp/Schenke*, VwGO, 14th ed., Munich 2005, § 42, para. 146 et seq. The Verwaltungsgericht des Saarlandes, 12.9.2006 – 3 F 38/06, adopted an even stricter position.

carry grievance in such cases either, since their competence of surveillance remains untouched, the employed pharmacist being equally subject to their control as an independent pharmacist. At least some judicial control is provided by competition law for making use of a permission suffering a severe and evident mistake can be considered as contrary to competition rules.[171]

Moreover, there is a risk to engage state liability because of an erroneous application of Community law. Even if the administrative act is not immediately subject to judicial control, this risk can occur, if, for instance, at the occasion of a parallel application refused by another authority, the European Court of Justice interpreted Community law in a different manner and the public authority had to revoke their permission. In this case, the applicant might assert claims to reimburse futile expenses because of a failure to comply with the obligation of correct application of national law. In Germany such a claim deduced from § 839 German Bürgerliches Gesetzbuch in combination with Art. 34 German Grundgesetz would be excluded if the decision was drawn without a fault on behalf of the deciding person. At this point the above-mentioned reservations make sense: the deciding person will carefully provide for his decision to be consistent with the law in order to prevent liability. Adequate means to do so, may be the obtaining of independent expert opinion enabling a realistic risk evaluation and in clear cases entirely excusing the public authority if courts came to different results.

Finally, a reason not less efficient to prevent arbitrary disapproval of national law can be seen in public political control. As the lively reactions upon the Ministry's permission in the *DocMorris* case have shown, quite apart from any legal study, it would have been much easier to deny a permission and let the courts be blamed for the violation of the rule of law. Therefore, the fears of an arbitrary disapproval of national law are not founded.

D. Conlusions and Outlook

We have seen that national laws on pharmacies in several Member States are not in line with the European freedom of establishment as it is interpreted today. The EC Commission as well as some Member States authorities are now tackling the discrepancies. It is not unlikely that the issues at stake will sooner or later end up at the European Court of Justice and that the restrictions discussed will be held to violate EC law. National authorities and self-governing bodies would do a good turn to

171 See German Bundesgerichtshof, 23.6.2005 – I ZR 194/02, [2005] WRP, p. 1161, 1162; LG Saarbrücken, 9.8.2006 – 7 I O 77/06.

their domestic residents by timely making preparations for more liberal markets[172] rather than giving themselves up to a highly regulated past. In order not to discriminate against their own residents, it seems to be recommendable to abolish the restrictions in force so that Member State residents may profit from these liberties before foreign joint-stock companies have penetrated the market. Moreover, it is worth prognosticating the consequences of a more liberal market for both public authorities and pharmacists as well. DocMorris announced that they do not intend the opening up of chains of branch pharmacies, but others may do. In order to cope with the new situations, single pharmacists will have to sharpen their profile to remain competitive. An enhanced freedom to determine drug prices will bring about one opportunity to do so. Improved services such as bring-service, telephone advice or comprehensive schemes providing a full advising and offering service constitute other alternatives. If necessary, public authorities will have to consider means for steering a balanced pharmaceutical supply by alternative instruments without protectionist restrictions.

For the application of Community law by Member State public authorities, the sensational element of the *DocMorris* case is not the insight into the obligation to conform to the rules of direct effect and supremacy of Community law but rather the fact that a Member State public authority can and must – and therefore does! – obey to Community law without being sentenced to do so by a court. The government of the Saarland seems to be rewarded for its conformity to European law by the installation of a profitable enterprise. Not only this should serve as an incentive for other public authorities to be equally courageous in critically analyzing national provisions in the light of Community law.

172 In its current expertise, the "Monopolkommission" as well recommends to give up restrictions of the legal form to run pharmacies, see Monopolkommission, 16. Hauptgutachten (2004/2005), 2006, para. 1175. This corresponds to the expert opinion given by *Glaeske/Klauber/Lankers/Selke*, (fn. 87), p. 117 et seq.