... [Extraits]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. Background to the case

8. The applicant is a German national who was born in 1945 and lives in Munich.

9. She owns a freight-traffic control company (*Frachtenprüfstelle*) and was a tariff supervisor (*Tarifeur*) for thirty years until 1 January 1994.

10. The activities of freight-traffic control bodies used to be governed by the Goods Transport Act (*Güterkraftverkehrsgesetz*) of 10 March 1983, as amended on 21 February 1992. That Act applied until 31 December 1993. It laid down compulsory rates for the transportation of goods which were fixed by tariff commissions before being approved by the Federal Minister for Transport and published in the form of a decree (*Rechtsverordnung*). The Federal Agency for Longhaul Freight Traffic (*Bundesanstalt für den Güterfernverkehr*) was responsible for checking that the prescribed freight tariffs were complied with. Transport operators were required to submit documents to the federal agency monthly for the purpose of tariff controls. They could either submit them to the federal agency directly or retain the services of an approved freight-tariff control body. The institution of such bodies, while not obligatory, had been provided for by statute with the aim of easing the federal agency's workload. Most of the approved bodies were road-traffic cooperatives (*Verkehrsgenossenschaften*). However, in order to prevent these cooperatives from acquiring a monopoly, other private-law entities could also legally become approved bodies. Thus, among the approved control bodies, seven – one of which was the applicant's company – were not road-traffic cooperatives.

11. On 1 January 1994 the Goods Traffic (Abolition of Tariffs) Act of 13 August 1993 (*Gesetz zur Aufhebung der Tarife im Güterverkehr – Tarifaufhebungsgesetz* – hereafter the "Tariff Abolition Act") came into force. It was passed as part of the process, started in 1993, of achieving the European internal market of the European Economic Community. Article 13 of the Single European Act of 28 February 1986 had made provision for the abolition of quantitative restrictions on traffic. Being designed to further relax the controls on internal goods traffic (*Binnenverkehr*), the Act did away with compulsory tariffs and tariff controls and converted the federal agency into a Federal Office for Goods Traffic (*Bundesamt für*

Güterverkehr) which was no longer responsible for tariff control but was given other functions, such as transport-market observation and statistics.

12. After tariffs were abolished there was no further call for the job of tariff supervisor. The applicant was therefore forced to close down her business and lay off her eleven members of staff.

2. The proceedings in the Federal Constitutional Court

13. On 15 December 1993 the applicant lodged an application with the Federal Constitutional Court (*Bundesverfassungsgericht*) submitting that the Tariff Abolition Act was unconstitutional.

14. Her main request was for the Federal Constitutional Court to declare the Act unconstitutional on the ground that it breached her fundamental rights guaranteed by Articles 12 § 1 (right to freely practise one's profession) and 14 § 1 (right of property) of the Basic Law (*Grundgesetz*), in that freight-tariff control companies, and consequently the job of tariff supervisor, had been abolished without any transitional provisions. In the alternative, she asked the court to order the legislature to supplement the Act with transitional provisions in order to mitigate the consequences for her of the abolition of tariffs.

15. Pointing out that the Act in question, which had not been the subject of any implementing decree, threatened her survival and that of all tariff supervisors throughout Germany, the applicant stressed the importance of the Federal Constitutional Court's decision. She stated that she was obliged to apply directly to the Constitutional Court, whose decision would be decisive in the determination of any damages, because the issue of the constitutionality of the Act in question could not be determined by the ordinary courts.

16. The Federal Constitutional Court communicated the constitutional appeal to the Government and the Working Party on freight-tariff control companies (*Arbeitsgemeinschaft Frachtenprüfstellen e.V.*).

17. On 14 June 1994 the Federal Constitutional Court, sitting as a panel of three judges, refused to grant the applicant's request for implementation of the Tariff Abolition Act to be temporarily suspended on the ground that the requisite conditions were not satisfied. In its nine-page decision the Constitutional Court added, however, that – as to the merits – the constitutional appeal was neither manifestly inadmissible nor manifestly ill-founded and that it raised serious issues regarding the scope and extent of freedom of occupation where measures taken by the State which did not amount to a "classic" interference with the exercise of that right were concerned.

18. In a letter of 24 February 1997 the registry of the Federal Constitutional Court informed the applicant that on account of the Constitutional Court's heavy workload it had not yet been possible to fix a date for delivering a decision.

19. On 29 November 2000 the Federal Constitutional Court, sitting as a panel of three judges, decided not to allow the applicant's constitutional appeal. In a twelve-page decision, five of which concerned the law part, it held, among other things, that since the Act in question contained no provision designed to regulate the applicant's occupation it did not concern freedom of occupation. The abolition of tariffs was part of the process of relaxing tariff controls with a view to establishing the internal market of the European Economic Community and the legislature had adopted the measure within the margin of appreciation available to it in determining the new objectives regarding its economic policy. It had to be regarded as the transition from an interventionist system, in which freight tariffs were fixed, to a free market system. The subject of the Act in question was not the position of tariff-control bodies; the purpose was to relieve goods transport companies of the duty to comply with tariffs that had hitherto been compulsory. Admittedly, a consequence of that was that there was no further call for the applicant's professional occupation, but the legislature was not obliged to take account of the position of tariff-control companies as these were not entitled to assert a right to have the former tariff system maintained in order to guarantee the survival of their professional occupation.

20. Nor did the Federal Constitutional Court find a breach of the right of property within the meaning of Article 14 of the Basic Law. It pointed out that the expectation of future earnings was not protected by that provision. The applicant's licence enabling her to practise her profession could only confer a right on her (*Rechtsposition*) as long as a licence was necessary. With the abolition of freight tariffs there was no longer any point in maintaining the licence system and the applicant was therefore not entitled to claim that it should be maintained.

21. The Federal Constitutional Court also held that, as there had not been a breach of the fundamental rights guaranteed by the Basic Law, the applicant could not rely on the protection of legitimate expectation (*Vertrauensschutz*) which might have made it necessary to enact transitional provisions. It observed that the contract between the applicant and the federal agency which entitled the former to charge for tariff-control costs on the latter's behalf, in consideration of a commission, could be rescinded on six months' notice. The applicant's expectation of pursuing her professional occupation could not therefore exceed that period. The Federal Constitutional Court added that the changes in the tariff system had been foreseeable, given that the legislative process culminating in the Act being passed had lasted several years. Accordingly, the legislature was not required to provide the applicant with an alternative professional occupation in the federal office.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. The Basic Law

22. Article 12 of the Basic Law (*Grundgesetz*) guarantees everyone the right to freely practise his or her profession and Article 14 guarantees the right of property.

Article 93(1) provides:

> "The Federal Constitutional Court shall rule:
>
> ...
>
> 4. (a) on constitutional appeals which may be lodged by anyone who considers that the public authorities have infringed one of his or her fundamental rights or one of his or her rights guaranteed under Articles 20(4), 33, 38, 101, 103 and 104 [of the Basic Law]."

Article 100 § 1 provides as follows:

> "Where a court considers unconstitutional a law whose validity is relevant to its decision, the proceedings shall be stayed and the question submitted ... to the Federal Constitutional Court if the present Basic Law is considered to have been breached..."

2. The Federal Constitutional Court Act

23. Section 31(1) of the Federal Constitutional Act of 11 August 1993 (*Gesetz über das Bundesverfassungsgericht)* provides that the decisions of the Federal Constitutional Court shall bind the constitutional bodies of the Federal State and the federated States (*Länder*) and all the national courts and authorities. Section 31(2) confers statutory force on any decision of the Federal Constitutional Court declaring a law unconstitutional following a constitutional appeal lodged by an individual.

Section 32(1) empowers the Federal Constitutional Court to order interim measures if there is a particular reason for doing so in the interests of the general good.

The relevant provisions relating to the lodging of a constitutional appeal are worded as follows:

Section 90

> "1. Anyone who claims that one of his basic rights or one of his rights under Articles 20(4), 33, 38, 101, 103 or 104 of the Basic Law has been violated by a public authority may lodge a complaint of unconstitutionality with the Federal Constitutional Court.
>
> 2. If legal action against the violation is admissible (*zulässig),* the complaint of unconstitutionality may not be lodged until all remedies have been exhausted.

However, the Federal Constitutional Court may decide immediately on a complaint of unconstitutionality lodged before all remedies have been exhausted if it is of general relevance or if recourse to other courts first would entail a serious and unavoidable disadvantage for the complainant.

..."

Section 93(3)

"If the constitutional appeal is lodged against a law or any other measure taken by a public authority in respect of which no remedy is available it can only be lodged during the year following the entry into force of the law in question or the date on which the measure in question takes effect."

Section 95(3)

"If a complaint of unconstitutionality against a law is upheld, the law shall be declared null and void. The same shall apply if a complaint of unconstitutionality pursuant to sub-section 2 above is upheld because the quashed decision is based on an unconstitutional law ..."

3. The Goods Traffic Act

24. Section 58 of the Goods Traffic Act (*Güterkraftverkehrsgesetz*) of 10 March 1983, amended on 21 February 1992, provided *inter alia*:

"1. Every month operators shall submit to the Federal Agency for Longhaul Freight Traffic [*Bundesanstalt für den Güterfernverkehr*] the necessary tariff-control documents. ...

2. If the operator instructs a freight-tariff control company to submit the documents [referred to in sub-section 1], it shall inform the Federal Agency for Longhaul Freight Traffic accordingly. Freight-tariff control bodies must be in possession of a licence issued by the federal agency.

3. The Federal Minister for Transport shall fix, by decree, the terms and conditions of freight-tariff control..."

Section 59(1) provided, *inter alia,* that freight-tariff control bodies within the meaning of section 58 could not be approved unless a guarantee was provided that the controllers had the necessary professional and personal qualifications and the federal agency's instructions were complied with. It also provided that the licence would be revoked if one of the above-mentioned conditions was no longer satisfied.

4. Goods Traffic (Abolition of Tariffs) Act

25. Section 1 of the Tariff Abolition Act (*Gesetz zur Aufhebung der Tarife im Güterverkehr – Tarifaufhebungsgesetz*) of 13 August 1993 concerned the amendment of the Goods Traffic Act. Paragraph 15 of that

provision empowered the Federal Transport Minister to modify the decrees on freight tariffs following abolition of the tariffs. Paragraph 16 repealed paragraphs 20a to 23 of the Goods Traffic Act which dealt with the fixing of tariffs. Paragraphs 38 and 39, which amended sections 58 and 59 of the Goods Traffic Act, set forth the new functions of the new Federal Office for Goods Traffic, among which were transport-market observation and statistics.

5. The State's civil liability

26. Although the State's liability is enshrined in Article 34 of the Basic Law read in conjunction with Article 839 of the Civil Code, it cannot be engaged, according to the relevant settled case-law of the Federal Court of Justice, in respect of a legislative measure (see, for example, the judgments of 29 March 1971 (no. III ZR 110/68), Reports of Judgments and Decisions (*Entscheidungssammlung des Bundesgerichtshofs in Zivilsachen* – BGHZ), volume 56, pp. 40 et seq., and of 24 October 1996 (no. III ZR 127/91), Reports, volume 134, pp. 30 et seq.). In its judgment of 12 March 1987 (no. III ZR 216/85), Reports, volume 100, pp. 136 et seq.) the Federal Court of Justice held that that line of authority applied even where the law giving rise to the alleged violation was unconstitutional. That judgment was upheld by the Federal Constitutional Court in a decision of 13 November 1987 (no. 1 BvR 739/87).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

27. The applicant claimed that the length of the proceedings in the Federal Constitutional Court had exceeded the reasonable time-limit provided for in Article 6 § 1 of the Convention, the relevant part of which provides:

> "In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

...

2. The Court's assessment

30. The Court reiterates that in order for Article 6 to apply there must have been a dispute over a right which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the existence of a right but also to its

scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play. Lastly, the right must be a civil one (see, for example, *Le Compte, Van Leuven and De Meyere v. Belgium* of 23 June 1981, Series A no. 43, pp. 21-22, § 47; *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 87, ECHR 2001-V; and, lastly, *Gutfreund v. France*, no. 45681/99, § 38, ECHR 2003-VII).

31. The Court reiterates also that, in accordance with its established case-law, proceedings can come within the scope of Article 6 § 1 even if they take place before a Constitutional Court (see *Kraska v. Switzerland*, judgment of 19 April 1993, Series A no. 254-B, pp. 48-49, § 26; *Pauger v. Austria*, judgment of 28 May 1997, *Reports of Judgments and Decisions* 1997-III, p. 894, § 46; *Pierre-Bloch v. France*, judgment of 21 October 1997, *Reports of Judgments and Decisions* 1997-VI, pp. 2222-23, § 48; *Krčmář and Others v. Czech Republic*, no. 35376/97, § 36, 3 March 2000; *Klein v. Germany*, no. 33379/96, § 26, 27 July 2000; *Janković v. Croatia* (dec.), no. 43440/98, ECHR 2000-X; *Tričković v. Slovenia*, no. 39914/98, §§ 36-41, 12 June 2001; and *Diaz Aparicio v. Spain*, no. 49468/99, 11 October 2001).

32. In that connection it matters little that the Constitutional Court considered the case on a referral of a question for a preliminary ruling (see *Ruiz-Mateos v. Spain*, judgment of 23 June 1993, Series A no. 262, pp. 19-20, §§ 35-38; *Pammel* and *Probstmeier v. Germany*, judgments of 1 July 1997, *Reports* 1997-IV, pp. 1109-10, §§ 53-58, and pp. 1135-36, §§ 48-53, respectively) or on a constitutional appeal lodged against judicial decisions (see *Becker v. Germany*, no. 45448/99, 26 September 2002, and *Soto Sanchez v. Spain,* no. 66990/01, 25 November 2003).

33. The same is true, in theory, where the Constitutional Court examines an appeal lodged directly against a law if the domestic legislation provides for such a remedy (see *Hesse-Anger and Anger v. Germany* (dec.), no. 45835/99, pp. 362-64, ECHR 2001-VI, and, *mutatis mutandis*, *Wendenburg and Others v. Germany* (dec.), no. 71630/01, 6 February 2003, *sub* 3; see also *Süßmann v. Germany,* judgment of 16 September 1996, *Reports* 1996-IV, p. 1171, § 40).

(a) Recognised right

34. The Court notes that under German law the State's liability cannot be engaged in respect of a law passed by the legislature. That is clear from the settled case-law of the Federal Court of Justice (see paragraph 27 above). The present case is therefore distinguishable from the *Baraona* judgment in which the Court had pointed out that "the applicant could claim on arguable grounds to have a right that is recognised under Portuguese law as he underst[ood] it", given that "the Lisbon Administrative Court had

given ... a preliminary decision ... declaring the case to be admissible ... and that State Counsel did not appeal" (see *Baraona*, cited above, p. 17, § 41).

35. In the instant case the applicant complained that her professional occupation had ceased as a result of the Act in question and relied in that connection on Articles 12 and 14 of the Basic Law which guaranteed the right to freely practise one's profession and the right of property respectively. The dispute therefore concerned the very existence of rights which could be said, on arguable grounds, to be recognised under domestic law (see *Kraska,* cited above, p. 48, § 24). The Court reiterates that the right being determined within the meaning of Article 6 § 1 of the Convention does not necessarily have to attract the protection of the Convention (see *Editions Périscope v. France*, judgment of 26 March 1992, Series A no. 234-B, p. 64, § 35, and *H. v. Belgium* of 30 November 1987, Series A no. 127-B, p. 31, § 40).

36. The fact that the proceedings before the Federal Constitutional Court did not involve an individual right but concerned the review of an Act should not in theory alter that finding (see *Procola v. Luxembourg*, judgment of 28 September 1995, Series A no. 326, p. 14, §§ 36-37), particularly as the applicant in the present case had alleged that the Act in question infringed her fundamental rights guaranteed by the Basic Law (see, by converse implication, *Giesinger und Kopf GmbH & Co. KG and Alfons Giesinger v. Austria*, no. 13062/87, Commission decision of 29 May 1991, Decisions and Reports 70, p. 152). The Court also notes that the Federal Constitutional Court found it necessary to communicate the appeal to the Government and the Working Party on freight-tariff control companies, before giving a twelve-page ruling on the merits. Moreover, in its decision of 14 June 1994 refusing to order the temporary suspension of the Tariff Abolition Act, the Federal Constitutional Court held that the appeal was neither manifestly inadmissible nor manifestly ill-founded on the merits and that it raised serious issues regarding the scope and extent of freedom of occupation where measures taken by the State which did not amount to a "classic" interference with the exercise of that right were concerned. Furthermore, in accordance with Article 93 § 1, paragraph 4 (a) of the Basic Law (see paragraph 22 above), a constitutional appeal can only be lodged where the party concerned considers that the public authorities have infringed one of his or her fundamental rights.

37. In conclusion, it can hardly be claimed that the proceedings concerned neither the existence nor the extent or manner of exercise of a right recognised by domestic law. Accordingly, the Court considers that the proceedings concerned a right recognised under domestic law.

(b) Genuine and serious dispute directly decisive for the right in question

38. The Government submitted that, even in the event of a decision of the Federal Constitutional Court declaring the law in question to be

unconstitutional, the applicant could not have engaged the civil liability of the State. The proceedings had not therefore been decisive for the right on which the applicant had relied, namely the right to obtain damages.

39. The Court notes that, according to the case-law of the Federal Court of Justice, which was upheld by the Federal Constitutional Court, the State's civil liability cannot be engaged if the measure giving rise to the alleged violation is a law, albeit an unconstitutional one (see paragraph 26 above). In this respect the present case may be distinguished from the above-mentioned *Procola* case (p. 15, § 39), where the annulment of the impugned orders would have enabled the applicant association to bring proceedings in the civil courts to recover the sums claimed.

40. It also notes that the Constitutional Court has power to judge whether a law is compatible with the Basic Law either on the application of a domestic court for a preliminary ruling or on a constitutional appeal lodged directly against the law within one year of its enactment. An issue arises as to the consequences that the annulment of the Act in question by the Federal Constitutional Court might have had. The Court notes that, in concluding that a law is unconstitutional, the Federal Constitutional Court usually confines itself to ordering the legislature to modify the impugned provision or provision, possibly within a specified period. The Federal Constitutional Court also has power, under section 32 of the Federal Constitutional Court Act (see paragraph 23 above), to order interim measures not only suspending implementation of a provision but also having the effect of a temporary law pending the entry into force of a new law.

41. The Court considers that an assessment of the consequences of a decision "favourable" to the applicant would be purely speculative even if it seems unlikely that the Constitutional Court, several years later, would have simply repealed the Act in question and ordered the reintroduction of the tariff system, especially as the abolition of the tariffs was part of the process of establishing the internal market of the European Economic Community.

42. The Court considers, however, that the Government have not shown that a decision declaring the Act in question unconstitutional would have had no effect on the applicant's occupational status. In her constitutional appeal she complained of the lack of a transitional period which would have helped her to adjust to the changes and relied on the principle of the protection of legitimate expectation. It can hardly be claimed that had the Federal Constitutional Court given a decision within a reasonable time allowing the applicant's appeal, it would not have had any means at its disposal to improve her position. It does not immediately appear to be beyond the bounds of possibility that it might have ordered the legislature to insert into the Act in question a provision for compensation in some cases or for a transitional period. Moreover, the Federal Constitutional Court could have ordered interim measures. Although, in its decision of 14 June 1994, it

refused to do so, it nevertheless found that the applicant's constitutional appeal was neither manifestly inadmissible nor manifestly ill-founded and that it raised serious issues regarding the scope and extent of freedom of occupation.

43. The Court accordingly holds that the proceedings before the Federal Constitutional Court were directly decisive for the right asserted by the applicant.

(c) Determination of a civil right

44. The Court reiterates that in ascertaining whether a case concerns the determination of a civil right, only the character of the right at issue is relevant (see *König v. Germany*, judgment of 28 June 1978, Series A no. 27, p. 30, § 90). It notes that in the present case the applicant relied both on the right of property and the right to freely practise one's profession, guaranteed by Articles 14 and 12 of the Basic Law respectively. Although the right of property is in theory a civil right, the present case is different. Indeed, like the Federal Constitutional Court, the Court noted that this case concerned the expectation of future gains which could not be regarded as a possession within the meaning of Article 1 of Protocol No. 1 (see *Voggenreiter v. Germany* (dec.), no. 7538/02, 28 November 2002). However, the right to freely practise one's profession and to continue to practise it does constitute a civil right (see *König*, cited above, pp. 31-32, §§ 91-95; *Le Compte, Van Leuven and De Meyere*, cited above, pp. 21-22, §§ 46-48; *H. v. Belgium*, cited above, pp. 32-34, §§ 44-48; and *Kraska*, cited above, p. 48, §§ 23-25; see also *Ferrazzini v. Italy* [GC], no. 44759/98, § §§ 25-28, ECHR 2001-VII, CEDH 2001-VII). Accordingly, the proceedings in question concerned a civil right.

45. In conclusion, Article 6 § 1 of the Convention is applicable in the instant case.

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that Article 6 of the Convention is applicable in the instant case;

...

Done in French, and notified in writing on 8 January 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO,
President