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OPINION OF THE LEGAL SERVICE[1]

From:	Legal Service
To:	Working Party on Land Transport
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL discontinuing seasonal changes of time and repealing Directive 2000/84/EC - legal basis - obligation to state reasons - proportionality principle - subsidiarity principle

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I. INTRODUCTION

1. At the meeting of the Permanent Representatives Committee on 3 April 2019, several members asked the Legal Service to provide a written opinion on the proposal for a Directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC (hereinafter 'the proposal'). The request to the Legal Service was made formally at the 4 April 2019 meeting of the Working Party on Land Transport. The request concerns whether the legal basis, Article 114 of the Treaty on the Functioning of the European Union (TFEU), is appropriate and whether the proposal complies with the principles of proportionality and subsidiarity. This opinion is in response to those questions.

II. ANALYSIS OF THE PROPOSAL

2. Before analysing the proposal, we will briefly recapitulate the relevant aspects of EU law. Seasonal changes of time are at present governed by Directive 2000/84/EC on summer-time arrangements, which the present proposal repeals rather than amends. The basis of that Directive is Article 95 TEC, which became Article 114 TFEU, and it laid down common rules on the beginning and end of the summer-time period, in which clocks are put forward by 60 minutes compared with the rest of the year. The recitals of the Directive state that fixing a common date and time for these changes is important for the functioning of the internal market, and more particularly for the proper functioning of certain sectors, namely '*not only transport and communications, but also other sectors of industry, [which] requires stable, long-term planning*'[2].

3. Directive 2000/84/EC therefore effects full harmonisation as regards the beginning and end of the summer-time period throughout the territory of the EU[3].

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[2] Recital 4 of Directive 2000/84/EC.

[3] Article 6 of Directive 2000/84/EC excludes overseas territories from the arrangements. That provision is not retained in the present proposal.

4. It should be made clear that non-seasonal changes to standard time are not governed by EU law and that Member States are free to act as they wish.

5. The essence of the proposal's content is set out in Articles 1 and 2.

6. Article 1(1) of the proposal provides that the Member States must not apply seasonal changes to their standard time or times. Article 1(2) states that Member States may still apply one last seasonal change, provided that they do so before 27 October 2019 and that they notify the Commission in accordance with Article 2.

7. Article 2 of the proposal establishes an obligation on Member States to notify the Commission of any standard time changes. The Member States must notify the Commission of the envisaged change at least six months before it takes effect. Once such a notification has been made, the Member States must apply the change if they have not withdrawn their notification at least six months before it takes effect. Within one month of receipt of the notification, the Commission must inform the other Member States of it and publish the information in the Official Journal.

8. Article 3 of the proposal contains provisions relating to the report which the Commission has to submit to the European Parliament and the Council on the implementation of the Directive by the end of 2024 at the latest. Article 4 has provisions on Member States' obligations as regards the transposition of the Directive. Article 5 provides for the repeal of Directive 2000/84/EC. Finally, Articles 6 and 7 concern the entry into force of the Directive and its addressees.

9. The content of the proposal is twofold: it abolishes the current summer-time system, and it establishes a new system prohibiting Member States from making seasonal changes. However, before the complete cessation of changes to summer time, one final optional change is possible, to allow Member States to decide to establish their standard time on the basis of summer time or winter time. In addition, a notification requirement is established for changes to standard time, which applies to the final optional change too. Thus, for the first time, EU legislation lays down the conditions for changes to standard time by Member States.

10. The aim of the proposal is to abolish the existing summer-time arrangements and replace them with new arrangements in which seasonal changes are prohibited. As with the current Directive, the objective is to establish a harmonised system of seasonal changes in the EU to ensure the smooth functioning of the internal market. As for the notification requirement, it is designed to prevent circumvention of the new time arrangements and to ensure predictability for operators with respect to time changes.

11. The third recital of the proposal states that the available evidence examined by the Commission '*points to the importance of having harmonised Union rules in this area to ensure the proper functioning of the internal market and avoid, inter alia, disruptions to the scheduling of transport operations and the functioning of information and communication systems, higher costs to cross-border trade, or lower productivity for goods and services*.' The fourth recital affirms that it is '*necessary to continue safeguarding the proper functioning of the internal market and to avoid any significant disruptions thereto caused by divergences between Member States in this area*' and that therefore '*it is appropriate to put an end in a coordinated way to summer-time arrangements*.' Lastly, the sixth recital explains that it is '*necessary to put an end to the harmonisation of the period covered by summer-time arrangements as laid down in Directive 2000/84/EC and to introduce common rules preventing Member States from applying different seasonal time arrangements by changing their standard time more than once during the year and establishing the obligation to notify envisaged changes of the standard time.*' The same recital goes on to say that this '*Directive aims at contributing in a determined manner to the smooth functioning of the internal market and should, consequently, be based on Article 114 of the Treaty on the Functioning of the European Union, as interpreted in accordance with the consistent case-law of the Court of Justice of the European Union*.'

12. As regards the change to the time arrangements, i.e. the abolition of the current system, the third recital specifies that the available evidence examined by the Commission '*is not conclusive as to whether the benefits of summer-time arrangements outweigh the inconveniences linked to a biannual change of time*.' The fifth recital adds that a '*lively public debate is taking place on summer-time arrangements and some Member States have already expressed their preference to discontinue the application of such arrangements*.'

13. It is apparent from the foregoing that both the abolition of the current system and the introduction of the new one are justified in the proposal by the unpopularity of the current system and the lack of evidence as to its benefits as compared to its disadvantages.

III. LEGAL BASIS: ARTICLE 114 TFEU

14. The proposal is based on Article 114 TFEU. Before considering whether this article is an appropriate legal basis for the proposal, it will be helpful to review the case-law on this article.

15. According to settled case-law, the choice of the legal basis for a Union measure must be based on objective factors which are amenable to judicial review and which include, in particular, the aim and content of the measure.

16. Article 114(1) TFEU allows for the adoption of the '*measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market*.' According to well established case-law, the mere finding of disparities between national rules is not sufficient to justify recourse to Article 114 TFEU; rather, divergences between the legislative, regulatory or administrative provisions of the Member States must be of a kind that would restrict fundamental freedoms and thus have a direct impact on the functioning of the internal market[4]. It is also settled case-law that, although recourse to Article 114 TFEU as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them[5].

[4] In this regard, see judgment of 5 October 2000, *Germany v Parliament and Council*, C- 376/98, EU:C:2000:544, paragraphs 84 and 85; judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 59 and 60; judgment of 14 December 2004, *Arnold André*, C- 434/02, EU:C:2004:800, paragraph 30; judgment of 14 December 2004, *Swedish Match*, C- 210/03, EU:C:2004:802, paragraph 29; judgment of 12 December 2006, *Germany v Council and Parliament*, C-380/03, EU:C:2006:772, paragraph 37; and judgment of 8 June 2010, *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 32.

[5] See judgment of 10 December 2010, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 61; judgment of 14 December 2004, *Arnold André*, C- 434/02, EU:C:2004:800, paragraph 31; judgment of 14 December 2004, *Swedish Match*, C- 210/03, EU:C:2004:802, paragraph 30; judgment of 12 December 2006, *Germany v Council and Parliament*, C-380/03, EU:C:2006:772, paragraph 38; and judgment of 8 June 2010, *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 33.

17. The Court has also held that, where the conditions for recourse to Article 114 TFEU as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection[6], consumer protection[7] or animal welfare[8] is a decisive factor in the choices to be made.

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6 See judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 62; judgment of 14 December 2004, *Arnold André*, C- 434/02, EU:C:2004:800, paragraph 32; judgment of 14 December 2004, *Swedish Match*, C- 210/03, EU:C:2004:802, paragraph 31, and judgment of 12 December 2006, *Germany v Council and Parliament*, C-380/03, EU:C:2006:772, paragraph 39.

7 Judgment *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 36.

8 Judgment of 25 April 2013, *Inuit Tapiriit Kanatami and Others v Commission*, T-526/10, EU:T:2013:215, paragraph 41. See also paragraph 97 of the conclusions of Advocate General Y. Bot of 14 October 2008, *Ireland v Parliament and Council*, C-301/06, EU:C:2008:558.

18. Furthermore, according to the Court, '*by the expression "measures for the approximation", the authors of the TFEU intended to confer on the Union legislator, depending on the general context and the specific circumstances of the matter to be harmonised, discretion as regards the most appropriate method of harmonisation for achieving the desired result, especially in fields with complex technical features*'[9]. The Court has held in that regard that '*such discretion may be used in particular to choose the most appropriate method of harmonisation where the proposed approximation requires highly technical and specialist analyses to be made and developments in a specific field to be taken into account*'[10]. Depending on the circumstances, those measures may consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products[11].

19. Lastly, as regards measures adopted on the basis of Article 114 TFEU, the Court will also have to verify whether those measures have complied with the legal principles mentioned in TFEU or identified in the case-law, in particular the proportionality principle[12].

20. It is in the light of the foregoing that the question of whether the conditions governing recourse to Article 114 TFEU for the present proposal have been met must be examined.

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9 See judgment of 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, paragraph 102. See also judgment of 6 December 2005, *United Kingdom v Parliament and Council*, Case C-66/04, EU: C:2005:743, paragraph 45, and judgment of 12 December 2006, *Germany v Parliament and Council*, Case C-380/03, EU:C:2006:772, paragraph 42.

10 See judgment of 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, paragraph 103.

11 See judgment of 14 December 2004, *Arnold André*, C- 434/02, EU:C:2004:800, paragraph 35; judgment of 14 December 2004, *Swedish Match*, C- 210/03, EU:C:2004:802, paragraph 34; judgment of 12 July 2005, *Alliance for Natural Health and Others*, C- 154/04 et C- 155/04, EU:C:2005:449, paragraph 33, and judgment of 12 December 2006, *Germany v Parliament and Council*, Case C-380/03, EU: C: 2006: 772, paragraph 43.

12 See judgment of 14 December 2004, *Arnold André*, C- 434/02, EU:C:2004:800, paragraph 34; judgment of 14 December 2004, *Swedish Match*, C- 210/03, EU:C:2004:802, paragraph 33, and judgment of 12 December 2006, *Germany v Council and Parliament*, C-380/03, EU:C:2006:772, paragraph 41.

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IV. OBLIGATION TO STATE REASONS

29. Article 296 TFEU provides that '*[l]egal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties*'.

30. According to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue. It must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the EU judicature to exercise its power of review. While the statement of reasons for a measure must be clear and unequivocal, it is not required to go into every relevant point of fact and law.

31. Furthermore, the question whether a statement of reasons satisfies the requirements must be assessed with reference not only to the wording of the measure but also to its context and the whole body of legal rules governing the matter in question[13]. According to the Court, in the case of a measure intended to have general application, as here, the statement of reasons may be limited to indicating, first, the general situation which led to its adoption and, second, the general objectives which it is intended to achieve[14]. Furthermore, the Court has repeatedly held that if a measure of general application clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for the various technical choices made[15].

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13 See in this regard, *inter alia*, judgment in *Alliance for Natural Health and Others*, C-154/04 and C-155/04, EU:C:2004:848, paragraphs 133 and 134.

14 See, *inter alia*, judgment of 7 September 2006, *Spain* v *Council*, C-310/04, EU:C:2006:521, paragraph 58 and case-law cited.

15 See, *inter alia*: judgment of 19 November 1998, *Spain* v *Council*, C-284/94, EU:C:1998:548, paragraph 30; judgment of 7 September 2006, *Spain* v *Council*, C-310/04, EU:C:2006:521, paragraph 59; and judgment of 18 June 2015, *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 60.

32. It must be borne in mind that the EU judicature considers that the reasons on which a measure is based must be logical and contain no internal inconsistency that would prevent a proper understanding of the reasons underlying the measure. According to the Court, a contradiction in the statement of reasons for a decision constitutes a breach of the obligation to state reasons such as to affect the validity of the measure in question if it is established that, as a result of that contradiction, the addressee of the measure is not in a position to ascertain, wholly or in part, the real reasons for the decision and, as a result, the operative part of the decision is, wholly or in part, devoid of any legal justification[16].

33. The obligation to state reasons for measures is an essential procedural requirement which must be distinguished from the question whether the reasoning is well founded, which is concerned with the substantive legality of the measure at issue. The reasoning of a decision consists in a formal statement of the grounds on which that decision is based. If those grounds are vitiated by errors, those errors will vitiate the substantive legality of the decision, but not the statement of reasons in it, which may be adequate even though it sets out reasons which are incorrect[17].

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[16] See judgment of 14 March 2013, *Fresh Del Monte Produce* v *Commission*, T-587/08, EU:T:2013:129, paragraphs 278 and 279; see also, in this sense, judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 151. See also judgment of 24 January 1995, *Tremblay and Others* v *Commission*, T-5/93, EU:T:1995:12, paragraph 42, and judgment of 30 March 2000, *Kish Glass* v *Commission*, T-65/96, EU:T:2000:93, paragraph 85.

[17] See judgment of the Court of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C- 413/06 P, EU:C:2008:392, paragraphs 166 and 181, and case-law cited.

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V. PROPORTIONALITY AND SUBSIDIARITY PRINCIPLES

39. The Legal Service has also been asked to examine whether the proposal in question respects the principles of proportionality and subsidiarity[18].

A. THE PRINCIPLE OF PROPORTIONALITY

40. Article 5(4) TEU provides that '*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*.'

[18] Article 5(1) of the Treaty on European Union (TEU) provides that '*The use of Union competences is governed by the principles of subsidiarity and proportionality.*' Article 1 of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality provides that *'Each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union.*' Article 5 of the same Protocol provides that '*Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.*'

41. According to settled case-law of the Court, the principle of proportionality requires that acts of the EU institutions be suitable for achieving the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse should be had to the least onerous, and the disadvantages caused should not be disproportionate to the aims pursued[19]. However, it is not a matter of knowing whether an adopted measure was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate for the objective which the competent institution is seeking to pursue[20].

42. In fact, with regard to judicial review of the principle of proportionality, the Court has confirmed that the EU legislator must be allowed broad discretion in areas entailing political, economic and social choices, and in which it is called upon to undertake complex assessments. Consequently, only the manifestly inappropriate nature of a measure, having regard to the objective which the institutions are seeking to pursue, can affect that measure's legality[21] and the review by the EU Courts is limited to examining whether the exercise of that discretion has been vitiated by a manifest error or misuse of powers, or whether the EU legislator has manifestly exceeded the limits of its discretion.

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19 See judgment of 13 March 2019, *Poland v Parliament and Council*, C-128/17, EU:C:2019:194, paragraph 94; see also judgment of 4 May 2016, *Poland v Parliament and Council*, C- 358/14, EU:C:2016:323, paragraph 78, and judgment of 6 September 2017, *Slovakia and Hungary v Council*, C- 643/15 and C- 647/15, EU:C:2017:631, paragraph 206.

20 Judgment *Vodafone and Others*, C-58/08, EU:C:2010:321. In this regard, see also judgment of 12 July 2001, *Jippes and Others*, C-189/01, EU:C:2001:420, paragraphs 82 and 83; judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 123; judgment of 12 July 2005, *Alliance for Natural Health and Others*, C- 154/04 and C- 155/04, EU:C:2005:449, paragraph 52, and judgment of 7 July 2009, *S.P.C.M. and Others*, C-558/07, EU:C:2009:430, paragraph 42.

21 Judgment of 4 May 2016, *Poland v Parliament and Council*, C-358/14, EU:C:2016:323, paragraph 79. In this regard, see also judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 123.

43. In this context, the EU Courts cannot substitute their assessment of scientific and technical facts for that of the EU legislator to which the Treaty has assigned that task[22].

44. Even though the legislator benefits from broad discretion, it must nevertheless base its choice of measure on '*objective criteria*'[23] and must consider '*all the relevant factors and circumstances of the situation the act [is] intended to regulate.*'[24]

45. As part of their assessment of proportionality, the EU Courts also examine the decision-making process which led to the institutions' adoption of the act[25]. Whilst allowing the legislator a broad margin of discretion, the Courts examine whether the legislator has actually exercised that discretion and the institutions may be required to present to the Courts, clearly and unequivocally, the essential facts on the basis of which they decided to adopt the act[26].

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22 See judgment of 13 March 2019, *Poland v Parliament and Council*, C-128/17, EU:C:2019:194, paragraph 95 and also judgment of 21 June 2018, *Poland v Parliament and Council*, C- 5/16, EU:C:2018:483, paragraph 150.

23 Judgment *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 53.

24 Judgment of 7 September 2006, *Spain v Council*, C-310/04, EU:C:2006:521, paragraph 122.

25 See judgment of 7 September 2006, *Spain v Council*, C-310/04, EU:C:2006:521, paragraphs 122 and 123; judgment of 8 June 2010, *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 53; judgment of 12 May 2011, *Luxembourg v Parliament and Council*, C-176/09, EU:C:2011:290, paragraph 65 et seq.; judgment of 25 April 2013, *Inuit Tapiriit Kanatami and Others v Commission*, T-526/10, EU:T:2013:215, paragraph 96 et seq.; judgment of 13 March 2019, *Poland v Parliament and Council*, C-128/17, EU:C:2019:194, paragraphs 30-45 and 94-118.

26 In this regard see also the opinion of Advocate General Sharpston of 11 April 2019 in *Czech Republic v Parliament and Council*, C-482/17, EU:C:2019:321, paragraph 88.

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B. THE PRINCIPLE OF SUBSIDIARITY

58. As far as the principle of subsidiarity is concerned, Article 5 TEU provides that '*[u]nder the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*.'

59. Since the aim of the proposal is to ensure the proper functioning of the internal market, it falls under the shared competence of the Union and its Member States,[27] and is therefore subject to the principle of subsidiarity.

60. As the Council Legal Service has previously recalled, it follows from the use in Article 5(3) TEU of expressions such as '*in so far as*', '*sufficiently*' and '*better*', which presuppose a value judgment, that subsidiarity is essentially a political and subjective principle. In applying this principle, the institutions must, throughout their examination of a proposal for a legislative act, exercise their powers of discretion in weighing up the advantages and disadvantages of the measure.[28]

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27 Article 4 TFEU.

28 Contribution of the Legal Service on the Proposal for a Directive of the European Parliament and of the Council on energy efficiency, 12 October 2011, document 15452/11, paragraph 26.

61. The legislator therefore retains a margin of discretion regarding the level of intervention that it considers appropriate to the objective to be achieved, in line with the political responsibilities conferred on it by the legal basis of the proposal.

62. The Court of Justice has jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act[29]; however, the scrutiny exercised by the Court aims only at determining whether the EU legislature was entitled to consider, on the basis of the information in its possession, that the objective of the proposed action could be better achieved at Union level, and the Court does not substitute its own political analysis for that of the legislature.

63. As the Court of Justice noted in the *Philip Morris* case[30], '*As regards, in the first place, the judicial review of compliance with the substantive conditions laid down in Article 5(3) TEU, the Court must determine whether the EU legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at EU level*'.[31]

64. In addition, the Court of Justice confirmed in that case that this information must '*[enable] both the EU legislature and national parliaments to determine whether the proposal complied with the principle of subsidiarity, whilst also enabling individuals to understand the reasons relating to that principle and the Court to exercise its power of review.*'[32]

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29 Article 8 of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

30 See judgment of 4 May 2016, *Philip Morris Brands SARL and others* v *Secretary of State for Health,* C-547/14, EU:C:2016:325.

31 Paragraph 218.

32 Paragraph 227.

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