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Subject : Proposal for a Directive of the European Parliament and of the Council on
services in the internal market
- Explanatory note on the activities covered by the proposal

I. Activities covered by the definition of ‘services’

Article 2, which defines the scope of the Proposal ("*services supplied by providers established in a Member State*") has to be read together with Article 4(1) of the Proposal which defines a ‘service’ ("*any self-employed economic activity, as referred to in Article 50 of the Treaty, consisting in the provision of a service for consideration*"). Recital 14 gives examples of services covered by this definition.

In order to ensure legal certainty and coherence with the existing *acquis communautaire*, the definition of ‘service’ in this Proposal is based on well established case-law of the Court of Justice of the European Communities (hereinafter “the Court”). By contrast, trying to establish a new autonomous definition would inevitably result in legal uncertainty and complexity. Equally, trying to establish a precise list of services covered by the Proposal would, in practice, be impossible and counterproductive given that the services economy is subject to constant evolution with new services developing all the time.

However, the case law of the Court provides for sufficient guidance to determine in case of doubt whether a certain activity can be considered as a service within the meaning of this definition. According to the Court a certain number of criteria or requirements must be met in order to determine whether a given activity qualifies as a ‘service’. These criteria are outlined below.

1. The activity must be of an *economic* nature

According to the case law of the Court, in order for an activity to fall within the scope of Articles 43 and 49 EC, it must constitute an economic activity¹. In assessing the economic nature of an activity, the Court has underlined that:

- the scope of Article 43 and 49 EC must not be interpreted restrictively: “As regards, next, the concepts of economic activities and the provision of services within the meaning of Articles 2 and 59 of the Treaty respectively, it must be pointed out that those concepts define the field of application of one of the fundamental freedoms guaranteed by the Treaty and, as such, may not be interpreted restrictively”²;
- the economic nature of the activity does not depend on the legal status at national level of the provider or the service in question. The Court has thus, for example, considered that activities performed by members of a religious or philosophic community³ could constitute an economic activity as could activities carried out by an amateur sports association⁴.

2. The service must be provided for consideration

Article 50 EC provides that services shall be considered to be ‘services’ within the meaning of the Treaty where they are normally provided for remuneration. According to the case law of the Court “the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question”⁵, which means that there must be an economic counterpart.

It is important to note that the service must not necessarily be paid by those for whom it is performed. It is well established case law, in particular in the field of health services, audiovisual services and sport services, that “Article 60 of the Treaty does not require that the service be paid for by those for whom it is performed”⁶. The essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question irrespective of how and by whom this consideration is financed.

3. The special nature of certain activities does not prevent them from being of an economic nature

The Court has already held that the special nature of certain activities, such as health services (see below), does not prevent them from being of an economic nature within the meaning of the Treaty. Their special nature does not remove them from the ambit of the fundamental freedoms. In line with this, the Court has also held that Article 49 EC applies whatever the field or the branch of law concerned: *“the effectiveness of Community law cannot vary according to the various branches of national law which it may affect”*⁷.

4. The assessment must be made on a case by case basis

It is inherent to the approach adopted by the Court, which consists of examining the actual characteristics of the activity concerned that the qualification of an activity as a ‘service’ requires a case by case assessment in the light of all the circumstances of the case, in particular the way the service is provided, organised and financed in the Member State concerned⁸.

Conclusion

In order to explain further the scope of the definition of ‘service’ in the Proposal, Recital 15 and 16 could be expanded by including additional references to the case law of the Court.

II. Specific examples of activities covered or not covered

In most cases, in particular when a service is provided by a private operator, the qualification of a given activity as a ‘service’ will cause no difficulty given that no question will arise concerning the application of the above criteria. However, certain specific activities may require a more in depth assessment on a case by case basis in the light of their particular characteristics. Indeed, it is not possible to establish in a systematic way distinctions between economic and non economic activities without having regard to the specific circumstances in each Member State. As a result the following explanations concerning certain specific activities aim only at offering some general clarification.

Educational services

Educational activities have been the subject of several cases relating to Articles 43 and 49 EC. In two cases, the Court concluded that Article 49 EC did not apply; the first⁹ concerned a technical institute forming part of the secondary education provided under the national education system, and the second¹⁰, concerned courses given in an establishment of higher education which were financed essentially out of the public purse. In the latter case, the Court stated: *“As the Court has already emphasized in Case 263/86 Belgian State v Humbel [1988] ECR 5365, at paragraphs 17, 18 and 19, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service. In the same judgment the Court considered that such a characteristic is absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity, but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents. The Court added that the nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system”*¹¹.

By contrast, in a case concerning a company organising university courses for students against remuneration, the Court stated *“The organisation for remuneration of university courses is an economic activity falling within the chapter of the Treaty dealing with the right of establishment when that activity is carried on by a national of one Member State in another Member State on a stable and continuous basis from a principal or secondary establishment in the latter Member State”*¹².

Social security services

As regards the activity consisting of the management of a social security scheme, the Court has already examined whether the provision of benefits by a public body under a compulsory insurance scheme against natural risks fall within the scope of Article 49 EC¹³. The Court stated that *“In the present case, it is clear that the payment of the contribution by the Greek farmers does not constitute economic consideration for the benefits provided by ELGA under the compulsory insurance scheme.”*¹⁴ Similarly, in other cases concerning the application of Community

competition rules the Court stated that, *“in the field of social security, the Court has held that certain bodies entrusted with the management of statutory health insurance and old-age insurance schemes pursue an exclusively social objective and do not engage in economic activity. The Court has found that to be so in the case of sickness funds which merely apply the law and cannot influence the amount of the contributions, the use of assets and the fixing of the level of benefits. Their activity, based on the principle of national solidarity, is entirely non-profit-making and the benefits paid are statutory benefits bearing no relation to the amount of the contributions”*¹⁵.

However, as stated by the Court, the possibility remains that, besides their function of an exclusively social nature within the framework of management of a social security system, the sickness funds and the entities that represent them engage in operations which have a purpose that is not social and is economic in nature¹⁶. Moreover, as regards voluntary pension insurance¹⁷ or occupational endowment pensions¹⁸ the Court clearly considers that these activities are covered by Article 49 EC. However, it is important to keep in mind that insurance services are not covered by the Proposal since financial services are excluded from the scope of application of the Proposal.

Health services

The case-law of the Court relating to medical activities is clear: *“according to settled case-law, medical activities fall within the scope of Article 50 EC, there being no need to distinguish in that regard between care provided in a hospital environment and care provided outside such an environment”*¹⁹. In its case law the Court responded to a number of arguments raised by some Member States in order to exclude health services from the scope of the freedom to provide services in Article 50 EC:

- As regards the argument that certain medical services would not constitute a service within the meaning of the Treaty, given that they are not paid for by the patient himself, the Court held that: *“the fact that hospital medical treatment is financed directly by the sickness insurance funds on the basis of agreements and pre-set scales of fees is not in any event such as to remove such treatment from the sphere of services within the meaning of Article 60 of the Treaty”*²⁰. More precisely, the Court stated that *“a medical service does not cease to be a provision of services because it is paid for by a national health service or by a system providing benefits in kind”*²¹ and that *“There is thus no need, from the perspective of freedom to provide services, to draw a distinction by reference to whether the patient pays the costs incurred and subsequently applies for reimbursement thereof or whether the sickness fund or the national budget pays the provider directly.”*²².

- As regards the argument relating to the special nature of these services, the Court held that: “ *It is also settled case-law that the special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement (Case 279/80 Webb [1981] ECR 3305, paragraph 10, and Kohll, paragraph 20), so that the fact that the national rules at issue in the main proceedings are social security rules cannot exclude application of Articles 59 and 60 of the Treaty*”²³.
- As regards the argument that organisation of social security systems is a matter of Member State competence, the Court held that “*although it is not disputed that Community law does not detract from the power of the Member States to organise their social security systems and that, in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions on which social security benefits are granted, it is nevertheless the case that, when exercising that power, the Member States must comply with Community law*”²⁴.

Other services activities in the social domain

The Court assessed the compatibility, with Article 43 EC, of national legislation making the admission of private operators of homes for the elderly to a social welfare system subject to the condition that the relevant operators were non-profit making. The Court considered that this activity constitutes an economic activity within the meaning of the Treaty. However, the Court also held that the condition in question is compatible with Article 43 EC²⁵. The Court also held that the provision of emergency transport services and patient transport services by entities such as medical aid organisations constitutes an economic activity for the purposes of application of the competition rules²⁶. However, it should be noted that these services are excluded from the scope of application of the Proposal because of the exclusion of transport services.

Services of general interest

More general questions have also been raised relating to how far the Proposal concerns and has implications for services of general interest. In that respect, it is important to remember that the Proposal covers only services of general economic interest, i.e. services that correspond to an economic activity.

For those services of general economic interest not excluded by the Proposal (note, transport is excluded (see below) as are electronic communications services with respect to certain matters), the Proposal does not affect the freedom of the Member States to define what they consider to be services of general economic interest, how those services should be organised and financed and what specific obligations they should be subject to. In particular the Proposal does not require Member States to liberalise or to privatise those activities which are considered as services of general economic interest, nor to open them up to competition, and does not require the abolition of monopolies.

The Proposal is fully in line with the recently adopted White Paper on Services of General Interest²⁷ and does not prejudge the work on and the outcome of specific Community initiatives, in particular the follow-up to the White Paper including public consultations concerning the application of state aid rules in this field²⁸. As has been highlighted in the recently adopted White Paper on Services of General Interest, work at Community level will continue to be based on the recognition of the crucial importance of well-functioning, accessible, affordable and high-quality services of general interest for the quality of life of European citizens, the environment and the competitiveness of European enterprises.

As regards the impact of the provisions of the Proposal concerning freedom of establishment on services of general economic interest, in particular on health services, it is important to underline that:

- (i) Recital 35 already explains that these provisions should apply only to the extent that the activities in question are open to competition, so that they do not oblige Member States to abolish existing monopolies or to privatise certain sectors. For example, for services of general economic interest which are not open to competition in some Member States – e.g. water distribution, basic postal services or services provided at local level such as waste water treatment or waste collection - the Proposal does not require Member States to open them up to competition or to allow the establishment of operators from other Member States. By contrast, with respect to gas and electricity distribution and those postal services which have been opened up to competition (such as express delivery), the Proposal would facilitate the establishment of operators, for example, due to provisions concerning single contact points or electronic procedures and provisions guaranteeing that authorisation regimes are transparent and not discriminatory. The provision of services by such operators would be subject to any specific obligations applicable to them in the Member State concerned.

(ii) the mutual evaluation process foreseen in Article 9 and 15 concerns only a limited number of legal requirements (listed in those Articles) existing in national legal systems applicable to activities already open to competition. The aim of this process is not to evaluate whether certain services of general economic interest should be opened to competition and whether existing monopolies should be abolished. The process does not interfere with the right of Member States to define their public service mission. The aim is only to facilitate the exercise of the freedom of establishment in areas already open to competition. For these areas, legal requirements currently hampering the creation of new establishments would have to be evaluated against the three conditions laid down by the settled case-law of the Court relating to Article 43 EC: non discrimination, justification by an overriding reason relating to the general interest and proportionality.

As regards the impact of the provisions concerning freedom to provide services on services of general economic interest, it should be noted that those activities which can be provided across national borders like postal services and electricity, gas and water distribution services are not subject to the country of origin principle given their specific nature. Thus the Proposal does not in any way affect the possibility for the host Member States to impose on such services specific obligations concerning the accessibility, affordability, availability or quality of such services.

Conclusion

The following clarifications could be provided:

- **Recital 16 could explain that the characteristic of remuneration is absent in the case of certain activities such as courses provided under the national education system and that therefore these activities are not covered by the Proposal; similarly the Recital could explain that the management of social security schemes which do not engage in economic activity is not covered;**
- **a new Recital could recall that the Proposal covers only services of general economic interest and explain that the Proposal neither requires Member States to open up to competition services of general economic interest nor interferes with the way they are financed or organised. The Recital could also recall that work on services of general economic interest is continuing at Community level and that the Proposal does not pre-empt possible future initiatives at Community level in this field.**

III. Services and issues excluded from the scope of application of the Proposal

Services covered by Article 45 EC

Articles 45 EC provides that the chapter in the Treaty on the right of establishment and that on services (by virtue of Article 55 of the Treaty) “*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*”. Consequently, and as stated in the explanatory memorandum²⁹, the Proposal does not apply to activities covered by Article 45 EC.

As regards the scope of Article 45 EC, the Court has held that “*According to established case-law, that derogation must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority*”³⁰. It is important to note that in its case law the Court examines the characteristics of each specific activity concerned and not the services provided by a given profession as a whole. Furthermore, the Court has added that “*as a derogation from the fundamental rule of freedom of establishment, it [Art. 45 EC] must be interpreted in a manner which limits its scope to what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect*”³¹.

A number of activities have already been brought before the Court in order to assess whether they fall within the scope of Article 45 EC, such as, the activity of ‘avocat’³²; those of a security undertaking³³; those of approved commissioner in insurance undertakings³⁴; design, programming and operation of data-processing systems³⁵; premises, supplies, installations, maintenance, operation and transmission of data necessary for the conduct of lottery³⁶. In all these cases the Court has stated that these activities do not fall within the scope of the derogation at Article 45 EC.

Financial services

The exclusion from the scope of application provided in Article 2 paragraph 2 (a) is intended to exclude all financial services. However, given that the wording of the exclusion makes reference to the definition of a ‘financial service’ in Directive 2002/65/EC and that this definition refers only to “personal pensions”, this could be interpreted as meaning that the exclusion does not cover occupational pensions. Consequently, in the interests of legal certainty, it seems necessary to clarify this point by including an explicit reference to occupational pension in the exclusion provided for by Article 2 paragraph 2(a).

Transport

The intention of the Proposal was to exclude from its scope of application all transport services which are within the scope of the Common Transport Policy, including urban transport and port services. The Proposal intended to cover only some residual transport services such as cash-in-transit (i.e. transport of cash by security companies) and transport of deceased persons. The latter is subject to an increasing number of complaints from citizens who have suffered from the difficulties concerning the repatriation of a deceased member of their family. However, since there are many questions concerning the precise scope of the exclusion there is a need for a modification of the wording of Article 2 paragraph 2(c).

Taxation

The Proposal does not provide for fiscal harmonisation within the meaning of Article 93 of the Treaty. Its intention is to remove fiscal discrimination creating obstacles to the freedom of establishment and to the free movement of services which, according to the jurisprudence of the Court, are already prohibited by Article 43 EC³⁷ and 49 EC³⁸. Given that Article 14 of the Proposal requires the removal of all discriminatory rules in national legal systems, it is consistent that fiscal discrimination should also be abolished.

Furthermore, it is important to recall that according to settled case law discrimination arises through the application of different rules to comparable situations or the application of one and the same rule to different situations. In this respect, the Court has clarified that in the field of taxation, the situation of residents and non-residents in a given State are not generally comparable and that a difference in treatment between these two categories of taxpayers is in itself not sufficient to constitute a discrimination within the meaning of the Treaty. It might constitute discrimination where there is no objective difference which could justify such a difference in treatment³⁹. It is therefore necessary to examine whether and to what extent a difference in treatment is justified by the difference in residence.

Similarly, the difference of treatment between companies having their seat in a particular Member State and companies who have only a secondary establishment in that State (whilst having their seat in another Member State), cannot in itself be categorized as discrimination within the meaning of the Treaty but might constitute discrimination where there is no objective difference which could

justify a difference in treatment between the two categories of companies⁴⁰. Again, it is necessary to examine whether and to what extent such a difference in treatment is justified.

Conclusion

The following clarification could be provided:

- a new Recital could explain that the Proposal does not apply to activities referred to in Article 45 EC;
- at Article 2 paragraph 2(a), it could be explicitly stated that occupational pension funds are also excluded from the scope of application of the Proposal;
- the wording of Article 2 paragraph 2(c) could be modified to explicitly state that all activities which fall within the scope of the Common Transport Policy, with the exception of cash in transit and transport of mortal remains, are excluded from the scope of application of the Proposal;
- a recital could explain that the proposal applies only to fiscal discrimination which is incompatible with the freedom of establishment and the free movement of services and in the wording of Article 2 paragraph 3 the term ‘restriction’ could be replaced by the term ‘discrimination’.

¹ See for example joined cases C-51/96 and C-191/97, *Deliège*, paragraph 49 : “*it is important to verify whether an activity of the kind engaged in by Ms Deliège is capable of constituting an economic activity within the meaning of Article 2 of the Treaty and more particularly, the provision of services within the meaning of Article 59 of that Treaty*”.

² *Deliège*, paragraph 52; see also case 53/81, *Levin*, paragraph 13.

³ “*It must be observed in limine that, in view of the objectives of the European Economic Community, participation in a community based on religion or another form of philosophy falls within the field of application of Community law only in so far as it can be regarded as an economic activity within the meaning of Article 2 of the Treaty .*” (case C-196/87, *Steymann*, paragraph 9). In the same case, the Court concludes “*In a case such as the one before the national court it is impossible to rule out a priori the possibility that work carried out by members of the community in question constitutes an economic activity within the meaning of Article 2 of the Treaty*” (paragraph 12).

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- ⁴ See for example, in *Deliège* : “*In that regard, it is important to note that the mere fact that a sports association or federation unilaterally classifies its members as amateur athletes does not in itself mean that those members do not engage in economic activities within the meaning of Article 2 of the Treaty*”. (paragraph 46). It should also be noted that the Court stated that “*the work performed must be genuine and effective and not such as to be regarded as purely marginal and ancillary*.” *Deliège*, paragraph 54; see also Cases C-268/99, *Jany*, paragraph 33; C-53/81, *Levin*, paragraph 17; C-196/87, *Steymann*, paragraph 13.
- ⁵ Case C-422/01, *Ramstedt*, paragraph 23. See also Cases C-263/86, *Humbel*, paragraph 17, C-157/99; *Smits and Peerbooms*, paragraph 58; C-136/00, *Danner*, paragraph 26; C-355/00, *Freskot*, paragraph 55.
- ⁶ Case *Smits and Peerbooms* paragraph 57; see also cases C-352/85, *Bond van Adverteerders and Others*, paragraph 16; *Deliège*, paragraph 56; *Ramstedt*, paragraph 24.
- ⁷ Case C-20/92, *Hubbard*, paragraph 19.
- ⁸ See for example, *Deliège*, paragraph 49.
- ⁹ Case C-263/86, *Humble*.
- ¹⁰ Case C-109/92, *Wirth*.
- ¹¹ *Wirth*, Paragraph 15. The Court added :” 16 *Those considerations are equally applicable to courses given in an institute of higher education which is financed, essentially, out of public funds. 17 However, as the United Kingdom has observed, whilst most establishments of higher education are financed in this way, some are nevertheless financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit. When courses are given in such establishments, they become services within the meaning of Article 60 of the Treaty. Their aim is to offer a service for remuneration. 18 However, the wording of the question submitted by the national court refers solely to the case where an educational institution is financed out of public funds and only receives tuition fees (Gebuehren) from the students*”
- ¹² Case C-153/02, *Neri*, paragraph 39. This case concerns the compatibility with Article 43 EC of an administrative practice under which university degrees awarded by a university of one Member State are not recognised by another Member State when the courses of preparation for those degrees were provided in the latter Member State by another educational establishment in accordance with an agreement made between the two establishments
- ¹³ Case C-355/00, *Freskot*.
- ¹⁴ Paragraph 56. The Court pursues by arguing that “57. *The contribution is essentially in the nature of a charge imposed by the legislature and it is levied by the tax authority. The characteristics of that charge, including its rate, are also determined by the legislature. It is for the competent ministers to decide any variation of the rate. 58. Similarly, the rate and detailed rules governing the benefits provided by ELGA under the compulsory insurance scheme are framed by the national legislature in such a way as to apply equally to all operators*”.
- ¹⁵ Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK*, paragraphs 47; see also joined Cases C-159/91 and C-160/91 *Poucet and Pistre*, paragraphs 15 and 18; case C-218/00 *Cisal*, paragraphs 43 to 46;
- ¹⁶ See *AOK*, paragraph 58.
- ¹⁷ Case C-136/00 *Danner*.
- ¹⁸ Case C-422/01 *Ramstedt*.
- ¹⁹ Case C-8/02, *Leichtle*, paragraph 28; see, among others, *Case C-368/98, Vanbraekel*, paragraph 41; *Smits and Peerbooms*, paragraph 53; C-385/99 *Müller-Fauré*, paragraph 38.

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- ²⁰ *Smits and Peerbooms*, paragraph 56. The Court added “57. First, it should be borne in mind that Article 60 of the Treaty does not require that the service be paid for by those for whom it is performed [...] 58. Second, Article 60 of the Treaty states that it applies to services normally provided for remuneration and it has been held that, for the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question (*Humbel*, paragraph 17). In the present cases, the payments made by the sickness insurance funds under the contractual arrangements provided for by the ZFW, albeit set at a flat rate, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character.”
- ²¹ *Muller Fauré*, paragraph 103.
- ²² *Ibidem*
- ²³ *Smits and Peerbooms*, paragraph 54.
- ²⁴ see, in particular, Case C-158/96 *Kohll*, paragraphs 35 and 36, *Smits and Peerbooms*, paragraphs 69 to 75; *Müller-Fauré*, paragraphs 44, 67 and 68.
- ²⁵ Case C-70/95, *Sodemare*.
- ²⁶ Case C-475/99, *Ambulanz Glöckner*, paragraphs 19 to 22.
- ²⁷ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. COM 2004 (374)
- ²⁸ The White Paper on services of general interest announced that the Commission will (i) adopt a Decision on the application of Article 86 of the Treaty to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest by July 2005, (ii) adopt a Community framework for state aid in the form of public service compensation by July 2005, (iii) adopt an amendment of Proposal 80/723/EEC on the transparency of financial relations between Member States and public undertakings by July 2005, (iv) further clarify under which conditions public service compensation may constitute state aid within the meaning of Article 87 (1) by July 2005.
- ²⁹ Paragraph 7 (b).
- ³⁰ Case C-355/98, *Commission v Belgium*, paragraph 25; see also cases C-114/97, *Commission v Spain*, paragraph 35, C-42/92 *Thijssen*, paragraph 8, C-2/74, *Reyners*, paragraph 45.
- ³¹ *Thijssen*, paragraph 34; Case 147/86 *Commission v Greece*, paragraph 7.
- ³² *Reyners*.
- ³³ Case C-283/99, *Commission v Italy*; *Commission v Belgium*; *Commission v Spain*.
- ³⁴ *Thijssen*
- ³⁵ Case C-3/88, *Commission v Italy*.
- ³⁶ Case C-272/91, *Commission v Italy*.
- ³⁷ See for example, case C-107/94, *Asscher*, paragraph 36. See for example, C-17/00, *de Coster*, paragraphs 25 and 23
- ³⁸ See for example, C-17/00, *de Coster*, paragraphs 25 and 23
- ³⁹ See for example, case C-80/94, *Wielockx*, paragraphs 17 to 19
- ⁴⁰ See for example, case C-311/97, *Royal Bank of Scotland*, paragraphs 27 and 28.