Information on the Court of Justice of the European Communities

1981 – II

I N F O R M A T I O N

on

THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

II

1981

Information Office, Court of Justice of the European Communities,
L - 2920

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

L - 2920 Luxembourg

Telephone	:	430 31
Telex (Registry)	:	2510 CURIA LU
Telex (Press and Legal Information Service)	:	2771 CJINFO LU
Telegrams	:	CURIA Luxembourg

C O N T E N T S

COMPOSITION OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

for the judicial year 1981

(from 18 March 1981 to 3 June 1981)

*

Order of precedence

*

J. MERTENS DE WILMARS, President of the Court
P. PESCATORE, President of the Second Chamber
Lord A.J. MACKENZIE STUART, President of the Third Chamber
G. REISCHL, First Advocate General
T. KOOPMANS, President of the First Chamber
A. O'KEEFFE, Judge
F. CAPOTORTI, Advocate General
G. BOSCO, Judge
A. TOUFFAIT, Judge
O. DUE, Judge
U. EVERLING, Judge
A. CHLOROS, Judge
Sir Gordon SLYNN, Advocate General
S. ROZES, Advocate General
A. VAN HOUTTE, Registrar.

First Chamber	Second Chamber	Third Chamber
T. KOOPMANS, President	P. PESCATORE, President	Lord A.J. MACKENZIE STUART, President
A. O'KEEFFE, Judge	O. DUE, Judge	A. TOUFFAIT, Judge
G. BOSCO, Judge	A. CHLOROS, Judge	U. EVERLING, Judge

COMPOSITION OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

for the judicial year 1981

(from 4 June 1981 to 30 June 1981)

*

Order of precedence

*

J. MERTENS DE WILMARS, President of the Court
P. PESCATORE, President of the Second Chamber
Lord A.J. MACKENZIE STUART, President of the Third Chamber
G. REISCHL, First Advocate General
T. KOOPMANS, President of the First Chamber
A. O'KEEFFE, Judge
F. CAPOTORTI, Advocate General
G. BOSCO, Judge
A. TOUFFAIT, Judge
O. DUE, Judge
U. EVERLING, Judge
A. CHLOROS, Judge
Sir Gordon SLYNN, Advocate General
S. ROZES, Advocate General
P. VERLOREN VAN THEMAAT, Advocate General
F. GREVISSE, Judge
A. VAN HOUTTE, Registrar.

First Chamber	Second Chamber	Third Chamber
T. KOOPMANS, President	P. PESCATORE, President	Lord A.J. MACKENZIE STUART, President
A. O'KEEFFE, Judge	O. Due, Judge	A. TOUFFAIT, Judge
G. BOSCO, Judge	A. CHLOROS, Judge	U. EVERLING, Judge
	F. GREVISSE, Judge	

J U D G M E N T S

of the

C O U R T O F J U S T I C E

of the

E U R O P E A N C O M M U N I T I E S

Judgment of 7 April 1981

Case 132/80

United Foods NV and S.à.r.l. Van den Abeele v Belgian State

(Opinion delivered by Mr Advocate General Capotorti on 25 February 1981)

1. Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Prohibition - Scope

   (EEC Treaty, Article 30)

2. Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Health inspections - Permissibility - Conditions - Detailed implementing rules exceeding requirements of controls - Double-check - Prohibition - Assessment by national court

   (EEC Treaty, Articles 30 and 36)

3. Free movement of goods - Customs duties - Charges having equivalent effect - Concept - Health inspection charge levied on imported products in accordance with particular criteria

   (EEC Treaty, Articles 9, 12 and 13)

1. Article 30 of the EEC Treaty has as its objective to remove, as between Member States, all barriers to the free movement of goods and, in particular, those which are specifically aimed at imported products or which apply to imported products and to domestic products under different conditions so as to render the marketing of imported goods more difficult or more expensive.

2. In the absence of common or harmonized rules on health inspections of a product, the measures of control applied by the Member States may not be considered, in principle, as a restriction prohibited under the EEC Treaty. Nevertheless all detailed implementing rules which exceed

the requirements of the controls and are capable as such of hindering or restricting intra-Community trade must, by virtue of Articles 30 and 36, be considered as measures having an effect equivalent to quantitative restrictions.

Thus the requirement of a double-check in the exporting country and in the importing country may, depending on the circumstances, be more than Article 36 of the Treaty permits if health requirements may be satisfied as effectively by measures which are not so restrictive of intra-Community trade.

It is for the national court to examine whether and to what extent the detailed measures of control applied by the national authorities are capable of constituting an impermissible restriction on intra-Community trade.

3. An inspection levy for health inspection of imported fish determined and imposed without objective justification, in accordance with particular criteria concerning the nature or condition of the goods, which are not comparable to the criteria used in fixing the pecuniary charges on domestic products of the same kind, must be considered as a charge having an effect equivalent to a customs duty, prohibited by Articles 9, 12 and 13 of the EEC Treaty.

***

NOTE

The Rechtbank van Eerste Aanleg /Court of First Instance/, Bruges, submitted a series of questions on the interpretation of Articles 9, 12, 13, 30, 36 and 95 of the EEC Treaty so that it might decide whether Belgian legislation concerning hygiene controls on the importation of fish was compatible with Community law.

The file shows that the undertakings which are plaintiffs in the main action in 1978 lodged applications with the court claiming the repayment of sums paid by them to the customs administration for inspection levies for the hygiene control of fish imported by them.

In Belgium various royal decrees govern the procedure for hygiene controls and their attendant costs.

The plaintiffs in the main action challenged the compatibility of these provisions with the provisions of the EEC Treaty on two grounds:

On the one hand, they consider that that control constitutes a measure having an effect equivalent to quantitative restrictions on imports prohibited by Article 30 of the Treaty and that accordingly it cannot justify the charging of the inspection levy. The hygiene control in Belgium is ineffective, troublesome and time-consuming and is not as such justified by Article 36 of the Treaty.

On the other, with regard to the inspection levy, the plaintiffs consider that, in accordance with the settled case-law of the Court, the imposition of charges for health inspections must be considered as a charge having an effect equivalent to customs duties prohibited by Articles 9, 12 and 13 of the Treaty. Even if it were necessary to consider the inspection levy as internal taxation within the meaning of Article 95 of the Treaty the imposition of that tax would still be contrary to the rule against discrimination laid down in that article.

The compatibility of the hygiene control with Articles 30 and 36 of the Treaty (Questions 1 and 2)

In the first two questions the court asks in substance whether a hygiene control on imported fish is in principle compatible with the provisions of Community law and, if so, whether the procedures for the control set out in the first paragraph are justified with regard to the requirements of Article 36.

It must be recalled first that there are no common or harmonized rules of Community law concerning hygiene controls on fish.

It is accordingly for the Member States to organize hygiene controls in this sphere and to apply them at the various stages of the marketing of fish.

Likewise it is not contested that the measures at issue before the national court are in the nature of a hygiene control and that accordingly in principle they are covered by the derogation laid down in Article 36. The national court must however verify whether and to what extent the procedures for the hygiene control followed by the Belgian authorities are of such a nature as to constitute an improper restriction on intra-Community trade.

The Court replies to these first two questions by ruling that in the absence of common or harmonized rules on hygiene controls on fish the controls carried out by the Member States may not be considered in principle as a restriction prohibited by the EEC Treaty.

Nevertheless all regulations which exceed the requirements of the control and which are capable as such of hindering or restricting intra-Community trade must be considered measures having an effect equivalent to quantitative restrictions under Articles 30 and 36 of the Treaty.

The compatibility with Community law of the inspection levy (third and fourth questions)

The national court asks the Court of Justice to specify the criteria in accordance with which a levy such as the inspection levy may be classified either as a charge having an effect equivalent to a customs duty for the purposes of Articles 9, 12 and 13 of the Treaty or as internal taxation within the meaning of Article 95, pointing out certain ways in which the arrangements for the control in question differ.

In reply to those questions the Court ruled that an inspection levy for hygiene controls on imported fish, determined and imposed without objective justification in accordance with particular criteria concerning the nature or condition of the goods which are not comparable to those employed in fixing the pecuniary charges on domestic products of the same kind, must be considered a charge having an effect equivalent to a customs duty prohibited by Articles 9, 12 and 13 of the EEC Treaty.

Judgment of 5 May 1981

Case 804|79

Commission of the European Communities v
United Kingdom of Great Britain and Northern Ireland

(Opinion delivered by Mr Advocate General Reischl on 12 February 1981)

1. Fisheries - Conservation of the resources of the sea - Period laid down by Article 102 of the Act of Accession - Expiration - Sole power of the Community - Failure to exercise - Effects - Restoration of power to the Member States - Not permissible
(Act of Accession, Art. 102)

2. Fisheries - Conservation of the resources of the sea - Powers of the EEC - Failure to exercise - Effects - Conservation measures as they existed at the end of the period prescribed in Article 102 of the Act of Accession - Maintenance - Amendment by the Member States - Conditions - Available elements of law - Structural principles of the Community

3. Member States - Obligations - Initiative of the Commission - Duties of Member States - Duties of action and abstention
(EEC Treaty, Art. 5)

4. Fisheries - Fish stocks coming within the jurisdiction of the Member States - Equality of access for fishermen of the Community - Implementation - Sole power of the Council - Unilateral action by Member States - Not permissible
(EEC Treaty, Art. 7, and third subparagraph of Art. 43 (2); Act of Accession, Art. 102)

5. Fisheries - Conservation of the resources of the sea - Conservation measures as they existed at the end of the period prescribed in Article 102 of the Act of Accession - Amendment by the Member States - Obligation to consult the Commission and abide by its views
(Act of Accession, Art. 102; Council Decision of 25 June 1979)

6. Fisheries - Conservation of the resources of the sea - Conservation measures as they existed at the end of the period prescribed in Article 102 of the Act of Accession - Amendment by the Member States - Obligation to consult the Commission - Procedure
(EEC Treaty, Art. 155; Resolution of the Council of 3 November 1976, Annex VI; Council Decision of 25 June 1979).

1. Since the expiration on 1 January 1979 of the transitional period laid down by Article 102 of the Act of Accession, power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Community. Member States are therefore no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction. The adoption of such measures, with the restrictions which they imply as regards fishing activities, is a matter, as from that date, of Community law.

   The transfer to the Community of powers in this matter being total and definitive, the fact that the Council has not adopted, within the required period, the conservation measures referred to by Article 102 of the Act of Accession could not in any case restore to the Member States the power and freedom to act unilaterally in this field.

2. In the absence of provisions adopted by the Council in accordance with the forms and procedures prescribed by the EEC Treaty the conservation measures as they existed at the end of the period referred to in Article 102 of the Act of Accession are maintained in the state in which they were at the time of the expiration of the transitional period laid down by that provision. However, it is not possible to extend that idea to the point of making it entirely impossible for the Member States to amend the existing conservation measures in case of need owing to the development of the relevant biological and technological facts in this sphere. Such amendments, of a limited scope, could not involve a new conservation policy on the part of a Member State since the power to lay down such a policy belongs henceforth to the Community institutions. Having regard to the situation created by the inaction of the Council, the conditions in which such measures may be adopted must be defined by means of all the available elements of law and by having regard to the structural principles on which the Community is founded. These principles require the Community to retain in all circumstances its capacity to comply with its responsibilities, subject to the observance of the essential balances intended by the Treaty.

3. Article 5 of the EEC Treaty inposes on Member States special duties of action and abstention in a situation in which the Commission, in order to meet urgent needs of conservation of resources in fish, submitted to the Council proposals which, although they were not adopted by the Council, represent the point of departure for concerted Community action.

4. In pursuance of Article 7 of the EEC Treaty Community fishermen must have, subject to exceptions duly prescribed, equal access to the fish stocks coming within the jurisdiction of the Member States. The Council alone has the power to determine the detailed conditions of such access in accordance with the procedures laid down by the third subparagraph of Article 43 (2) of the Treaty and Article 102 of the Act of Accession. This legal situation cannot be modified by measures adopted unilaterally by the Member States.

5. In a situation characterized by the inaction of the Council and by the maintenance, in principle, of the conservation measures in force at the expiration of the period laid down in Article 102 of the Act of Accession, the Council decision of 25 June 1979 and the parallel decisions, as well as the requirements inherent in the safeguard by the Community of the common interest and the integrity of its own powers, imposes upon Member States not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission.

6. In order to meet the requirements of the decisions of the Council and of the procedure fixed by The Hague Resolution the consultation to be engaged in by the government of a Member State must, prior to the adoption of conservation measures, allow the Commission to weigh up all the implications of the provisions proposed and to exercise properly the duty of supervision devolving upon it in pursuance of Article 155 of the EEC Treaty.

***

NOTE

The Commission of the European Communities brought an action for a declaration that, by applying in the matter of sea fisheries unilateral measures comprising on the one hand five Statutory Instruments relating to the mesh of nets and the minimum landing sizes for certain species and on the other hand a licensing system for fishing in the Irish Sea and the waters round the Isle of Man, the United Kingdom has failed to fulfil its obligations under the Treaty.

History of the dispute

It is common ground that at the beginning of 1979 the Council, to which the Commission, in pursuance of Article 102 of the Act of Accession, had proposed the adoption of a series of measures for the conservation of fishery resources in the waters under the jurisdiction of the Member States, failed to adopt the necessary provisions. The Council adopted interim measures.

By a letter of 21 March 1979 the Government of the United Kingdom informed the Commission of its intention to bring into force on 1 June 1979 a series of measures for the conservation of fishery resources concerning the mesh of nets, minimum landing sizes and by-catches and sought the approval of the Commission in this matter.

The Commission did not obtain the complete text of the proposed measures until 19 June 1979 whereas the measures in question were to be brought into force on 1 July 1979.

On 6 July the Commission made a protest. It considered that the measures in question could not be introduced otherwise than by its authority.

The state of the law at the time in question

Since 1 January 1979, the date on which the transitional period laid down by Article 102 of the Act of Accession expired, power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Community.

Member States are therefore no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction.

Under Article 7 of the Treaty Community fishermen must have, subject to the exceptions mentioned above, equal access to the fish stocks coming within the jurisdiction of the Member States.

As this is a field reserved to the powers of the Community, within which Member States may henceforth act only as trustees of the common interest, a Member State cannot therefore, in the absence of appropriate action on the part of the Council, bring into force any interim conservation measures which may be required by the situation except as part of a process of collaboration with the Commission and with due regard to the general task of supervision which Article 155, in conjunction, in this case, with the decision of 25 June 1979 and the parallel decisions, gives to the Commission.

Thus, in a situation characterized by the inaction of the Council and by the maintenance, in principle, of the conservation measures in force at the expiration of the period laid down in Article 102 of the Act of Accession, the decision of 25 June 1979 and the parallel decisions, as well as the requirements inherent in the safeguard by the Community of the common interest and the integrity of its own powers, imposed upon Member States not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith, but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission.

It is in the light of the state of law as thus defined that the two groups of measures which are the subject of the dispute must be considered.

The Statutory Instruments contested by the Commission

The Government of the United Kingdom claims that the five Statutory Instruments contested by the Commission were the subject of prior consultation on its part in accordance with the decisions of the Council and the procedure laid down by The Hague Resolution.

In this respect it must be stated that the consultation carried out by the Government of the United Kingdom was unsatisfactory and cannot be considered as being in accordance with the requirements of the Council decisions.

Although it is true that the Commission was informed on 21 March 1979 of the Government's intentions it was only on 19 June that it was able to acquaint itself with the text of the proposed measures. Having regard to the technical complexity of the matter it is clear that this way of handling the matter did not allow the Commission to weigh up all the implications of the provisions proposed and to exercise its duty of supervision properly.

Furthermore it is worth noting that the Commission put forward its reservations at the very beginning of the consultation procedures.

The measures applicable to the Irish Sea and the waters round the Isle of Man

The Government of Ireland, which attaches special importance to this aspect of the dispute, has asked the Court to clarify the legal situation as regards the application of the relevant rules of Community law in the territorial waters round the Isle of Man. The Court can only adopt once more the terms of its judgment of 10 July 1980. The system of fishing licences applied in the Irish Sea and the waters round the Isle of Man did not form the subject-matter of any consultation or consequently of any authorization on the part of the Commission, and the detailed rules for its implementation were reserved wholly to the discretion of the United Kingdom authorities without its being possible for the Community authorities, the other Member States and those

concerned to be legally certain how the system would actually be applied.

This system, as such, has infringed one of the fundamental rules in this matter, in the sense that it has prevented the fishermen of other Member States and particularly those of Ireland from having access to fishery zones which ought to be open to them on an equal footing with the fishermen of the United Kingdom.

The Court declared that the United Kingdom has failed to fulfil its obligations under the EEC Treaty:

(a) by having brought into force on 1 July 1979 without appropriate prior consultation and in spite of the Commission's objections, the following Statutory Instruments:

The Fishing Nets (North-East Atlantic) (Variation) Order 1979, SI No. 744;

The Immature Sea Fish Order 1979, SI No. 741;

The Immature Nephrops Order 1979, SI No. 742;

The Nephrops Tails (Restrictions on Landing) Order 1979, SI No. 235;

The Sea Fish (Minimum Size) (Amendment) Order (Northern Ireland) 1979, SI No. 235;

(b) By having maintained in force in the Irish Sea and the waters round the Isle of Man in pursuance of the Herring (Irish Sea) Licensing Order 1977, SI No. 1388, and the Herring (Isle of Man) Licensing Order 1977, SI No. 1389, a system of fishing licences which had not been the subject of appropriate consultation with or an authorization from the Commission, the detailed rules for the implementation of which were reserved wholly to the discretion of the United Kingdom authorities, without its being possible for the Community authorities, the other Member States and those concerned to be legally certain how the system would actually be applied and which, as a result, had the effect of preventing fishermen from other Member States from having access to fishery zones which ought to be open to them on an equal footing with the fishermen of the United Kingdom;

The Court ordered the United Kingdom to pay the costs including those of the interveners.

Judgment of 5 May 1981

Case 112/80

Firma Anton Dürbeck v Hauptzollamt Frankfurt am Main-Flughafen

(Opinion delivered by Mr Advocate General Reischl on 24 February 1981)

1. Common commercial policy - Trade with non-member countries - Community protective measures - Permissibility - Conditions

   (EEC Treaty, Art. 110)

2. Agriculture - Common organization of markets - Amendment of rules - Principle of protection of legitimate expectation - Application - Limits

1. Article 110 of the EEC Treaty, which states that Member States "aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers", cannot be interpreted as prohibiting the Community from enacting, upon pain of committing an infringement of the Treaty, any measure liable to affect trade with non-member countries even where the adoption of such a measure is required by the risk of a serious disturbance which might endanger the objectives set out in Article 39 of the Treaty and where the measure is legally justified by the provisions of Community law.

2. Although the principle of the protection of legitimate expectation is one of the fundamental principles of the Community, nevertheless the field of application of this principle cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules in the absence of obligations entered into with the public authorities. This is particularly true in a field such as the common organization of markets, the purpose of which necessarily involves constant adjustment to the variations of the economic situation in the various agricultural sectors.

The Hessisches Finanzgericht referred to the Court of Justice for a preliminary ruling a question as to the validity of Regulation No. 687/79 as well as amending regulations providing for the temporary suspension of the release into free circulation in the Community of dessert apples originating in Chile.

That question was raised in the course of a dispute between a German importer of fresh fruit originating in non-member countries and the German customs authorities over the refusal by the authorities to allow certain quantities of dessert apples originating from Chile to be released into free circulation in the Federal Republic of Germany on the ground that the entry into free circulation of those quantities was prohibited by the regulations in issue.

I - Preliminary considerations

It is apparent from the order making a reference for a preliminary ruling that the prohibition in question comes under the Community regulations on the common organization of the market for fruit and vegetables provided for by a Council regulation of 1972.

In the Spring of 1979 the Commission saw that the situation on the dessert apple market in the Community at that time was particularly critical and might be aggravated by the foreseeable imports of dessert apples originating in non-member countries, in particular in countries in the southern hemisphere, estimated at 380 000 tonnes.

An agreement was reached with South Africa, Argentina, Australia and New Zealand. However, Chile insisted on being able to export 55 000 tonnes instead of the 42 000 tonnes proposed.

The plaintiff in the main action, the undertaking Anton Dürbeck, had made contracts for the importation of about 300 000 boxes of Chilean apples. Of that quantity 180 000 boxes had been imported before the adoption of the regulation on 5 April 1979. The ship transporting the remaining quantities was due to leave Chile towards 20 April and the plaintiff in the main action cancelled the purchase contract and contract of affreightment for those quantities.

On 25 July 1979 it imported by air into the Federal Republic of Germany two boxes of dessert apples originating in Chile and applied to the German authorities for the release into free circulation of those goods. The customs office rejected that application on the ground of the protective measures taken by the Community.

In order to resolve the issue the Finanzgericht referred to the Court a question as to the validity of Commission Regulation No. 687/79 of 5 April 1979 and of the amending regulations.

II - Consideration of the question submitted

Before ruling on the validity of those regulations the Court feels compelled to consider a number of points.

(a) The reasons on which Regulations Nos. 687/79, 797/79 and 1152/79 are based

The Court's conclusion is that the reasons on which those regulations are based are sufficient in as much as they enable those concerned to identify the factors which the Commission took into account when adopting the protective measures in issue.

(b) Infringement of Article 29 (1) of Regulation No. 1035/72 and of Articles 1 to 3 of Regulation No. 2707/72

It is common ground that the protective measures adopted by the Commission come within those which may be taken pursuant to Article 29 of Regulation No. 1035/72.

From its consideration of the facts and the law the Court is able to declare that it does not appear that the Commission wrongly assessed the reality of the situation on the market in question in believing that a volume of imports coming from countries in the southern hemisphere and estimated to be 380 000 tonnes might substantially aggravate the difficulties of that market and were likely to create a serious disturbance, within the meaning of Article 29 of Regulation No. 1035/72, on that market capable of jeopardizing the aims of Article 39 of the Treaty.

The fact that the protective measures in issue were amended twice may not be taken as signifying that the Commission's assessment of the situation on the market during the Spring of 1979 was incomplete or mistaken. The explanation for those amendments is that more detailed knowledge was acquired of the total quantities in the course of transit.

(c) Infringement of Article 110 of the Treaty and of the provisions of the General Agreement on Tariffs and Trade (GATT)

Uncontested information supplied by the Commission reveals that the GATT special group charged with examining the conformity of Community acts with that Agreement found that in adopting the protective measures in issue the Commission had not infringed Article I or Article II of that Agreement.

(d) Breach of the principle of the protection of legitimate expectation

The Court has recently confirmed in a judgment of 16 May 1979, Tomadini, that although the principle of the protection of legitimate expectation is one of the fundamental principles of the Community nevertheless "the field of application of that principle cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules in the absence of obligations entered into with the public authorities".

(e) Breach of the principle of non-discrimination

The issue has been raised whether Regulation No. 797/79 and Regulation No. 1152/79 do not offend against the principle of non-discrimination enunciated in the field of common policy by Article 40 of the Treaty in so far as those regulations made no provision for the imports, in respect of which the plaintiff in the main action had applied for a derogation from the application of the aforesaid measures.

The fact that the Commission took into consideration only the goods which were already in the course of being shipped on 12 April 1979 and excluded those which, on that date, had not left a Chilean port is in keeping with the requirements of Article 3 (2) of Regulation No. 2707/72.

The Court ruled that consideration of the question raised had disclosed no factor of such a kind as to affect the validity of Commission Regulations Nos. 687/79, 797/79 and 1152/79.

Judgment of 7 May 1981

Case 153/80

Rumhaus Hansen GmbH & Co. v Hauptzollamt Flensburg

(Opinion delivered by Mr Advocate General Reischl on 2 April 1981)

Tax provisions - Internal taxation - Granting of tax advantages in favour of domestic products - Extension to products imported from other Member States - Criteria - Advantages reserved to small producers of spirits - Rate of taxation reduced in terms of quantities produced - Application to imported products originating with undertakings having the same production capacity

(EEC Treaty, Art. 95)

Article 95 of the EEC Treaty must be interpreted as meaning that tax advantages granted under the legislation of a Member State in favour of certain alcoholic products must be extended to similar products originating in other Member States which fulfil both the criterion of similarity which forms the basis of Article 95 and the conditions laid down under its national legislation for qualifying for the tax advantage in question.

If the tax advantage for domestic products is granted in terms of the quantities produced in each production undertaking the same advantage must be granted in favour of products from production units situated in other Member States which fulfil the same quantitative criteria. If that condition is fulfilled a Member State may not refuse that tax advantage on the basis of supplementary conditions derived from its legislation which a production unit situated in another Member State cannot fulfil by reason of its geographical situation or of the legislation on the production of spirits in force in that State.

NOTE

The Finanzgericht Hamburg referred to the Court for a preliminary ruling a question as to the interpretation of Article 95 of the EEC Treaty in order to be able to determine the conditions upon which the provisions of the German law on the monopoly in spirits, which makes provision for the charging of reduced rates of tax on various categories of products, must be extended to certain types of spirits originating in other Member States. In 1973 the applicant in the main action had imported and released on to the market various consignments of light rum originating in Guadeloupe and on that occasion it had paid by way of "Monopolausgleich" /monopoly equalization duty/ the normal rate of duty in force at that time, DM 1 500 per hectolitre of wine-spirit.

The plaintiff brought an action against the decision of the customs administration. It contended that the imported spirits were being discriminated against contrary to Article 95 of the Treaty because certain categories of home-produced spirits were taxed at a lower rate. The plaintiff's case is based on the fact that the national legislation has exceptions to that general rate. Those exceptions are for various categories of spirits manufactured by small-scale producers which enjoy a reduced rate of tax. The applicant claims that the most favourable rate of tax charged on home-produced spirits made from fruit should be applied to the products which it imported.

The Finanzgericht has expressed its doubt as to whether the application of a criterion based on the comparable nature of the methods of production is compatible with the scheme of Article 95 which it believes is based on the similar nature of the goods and not on the methods by which they are manufactured.

The only criterion for drawing a distinction which the case-law of the Court of Justice has allowed hitherto depends on the quantities produced.

That uncertainty brought the Finanzgericht to frame the following question:

"Must the first and second paragraphs of Article 95 of the EEC Treaty be understood to apply only where the similar (first paragraph) domestic goods or domestic goods otherwise competing (second paragraph) with imported goods are subject to similar conditions of production to those which apply to the imported goods or is the determining factor solely the similarity of the goods or the fact that they are in competition or may the extension of the tax advantages for domestic goods to imported goods be made additionally dependent upon the volume of production of each manufacturing concern recognized as a legal or economic unit?"

The Court replied by ruling that:

Article 95 of the EEC Treaty must be interpreted as meaning that tax advantages granted under the legislation of a Member State in favour of certain alcoholic products must be extended to similar products originating in other Member States which fulfil both the criterion of similarity which forms the basis of Article 95 and the conditions laid down under its national legislation for qualifying for the tax advantage in question.

If the tax advantage for domestic products is granted in terms of the quantities produced in each production undertaking the same advantage must be granted in favour of products from production units situated in other Member States which fulfil the same quantitative criteria. If that condition is fulfilled a Member State may not refuse that tax advantage on the basis of supplementary conditions drawn from its legal system which a production unit situated in another Member State cannot fulfil by reason of its geographical situation or of the legislation on the production of spirits in force in that State.

Judgment of 13 May 1981

Case 66/80

International Chemical Corporation S.p.A. v
Amministrazione delle Finanze dello Stato

(Opinion delivered by Mr Advocate General Reischl on 21 January 1981)

1. References for a preliminary ruling - Determination of validity - Declaration that a regulation is void - Effect - Non-application of the act by any national court - Fresh reference to the Court - Permissibility

   (EEC Treaty, Art. 177)

2. European Communities - Own resources - Amounts collected by the Member States - Disputes relating to the recovery of payments not legally due - Jurisdiction of the national courts - Application of the national law - Conditions

   (Council Decision of 21 April 1970, Art. 6)

3. European Communities - Own resources - Amounts collected by the Member States - Securities provided and declared forfeit under Regulation No. 563/76 - Passing on of the charge authorized by the Community regulation - Action for recovery of payment not legally due - No basis

   (Council Regulation No. 563/76, Art. 5)

4. Agriculture - Common organization of the markets - Export refunds - Compound products - Conditions for grant

   (Regulation No. 192/75 of the Commission, Art. 8 (1), first and third subparagraphs)

1. Although a judgment of the Court given under Article 177 of the Treaty declaring an act of an institution, in particular a Council or Commission regulation, to be void is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give. That assertion does not however mean that national courts are deprived of the power given to them by Article 177 of the Treaty and it rests with those courts to decide whether there is a need to raise once again a question which has already been settled by the Court where the Court has previously declared an act of a Community institution to be void. There may be such a need especially if questions arise as to the grounds, the scope and possibly the consequences of the nullity established earlier.

2. To the extent to which Community law has not provided otherwise, disputes relating to the refund of amounts collected on behalf of the Community fall within the jurisdiction of national courts and should be settled by those courts by applying their own national law, both procedural and substantive.

3. The existence during the period in which Council Regulation No. 563/76 was applied of a scheme specially designed with a view to spreading the economic effects of the obligations which it imposed destroys the basis of an action for the recovery of securities which have been provided and declared forfeit even if a similar action could be successfully brought under national law alone. In this regard it does not matter whether the operator has actually passed on the charge or whether he has decided not to do so for reasons connected with the financial policy of his undertaking. Recovery is in itself ruled out a fortiori if the operator was not himself bound to pay the charge in question which he advanced voluntarily or refunded to his suppliers.

4. The third subparagraph of Article 8 (1) of Regulation No. 192/75 covers only the case of a compound product which, as such, is not capable of attracting export refunds but contains certain components which are so capable. That provision does not therefore relate to the case of a compound product which as such, that is to say in its entirety, attacts an export refund. In that case it is the first subparagraph of Article 8 (1) which governs the conditions for the grant of the refund; consequently all components of a product must have originated in the Community or have been released into free circulation there.

NOTE

The regulations of the Council or of the Commission on the compulsory purchase of skimmed-milk powder held by intervention agencies and export refunds for compound feeding-stuffs are once more the subject of questions as to their interpretation or validity.

The dispute in the main action is between the Italian Finance Administration and International Chemical Corporation S.p.A., a manufacturer of compound feeding-stuffs. That undertaking seeks from the Finance Administration on the one hand the refund of securities which it has provided or at any rate paid on behalf of its suppliers and which the Administration has declared forfeit and, on the other hand, the payment of export refunds which were refused at the time of the exportation of certain compound feeding-stuffs. It will be remembered that in order to reduce stocks of skimmed-milk powder by increasing the use of that product in animal feeding-stuffs Council Regulation No. 563/76 made the grant of certain Community aids in respect of the use of protein products and the release into free circulation in the Community of certain products used in the manufacture of compound feeding-stuffs dependent on the obligation to purchase certain quantities of skimmed-milk powder held by the intervention agencies. The grant of aids and release into free circulation was made subject either to proof of purchase of skimmed-milk powder or the prior provision of a security which was forfeited in the event of non-performance of the purchasing obligation.

The plaintiff in the main action first of all provided securities and paid for those provided by certain of its suppliers. But as it did not purchase skimmed-milk powder those securities have not been released by the Italian Administration.
Secondly it imported products from non-member countries under the temporary importation procedure rather than under the procedure for release into free circulation with the result that when those feeding-stuffs came to be exported to non-member countries the refunds for which it applied were refused on the ground that those feeding-stuffs contained products which had never been in free circulation in the Community.

By various judgments given on 5 July 1977 the Court held that Council Regulation No. 563/76 was null and void on the ground that the price at which the milk powder had to be purchased was set at a level so disproportionate by comparison to the conditions on the market that it was equivalent to a discriminatory distribution of the burden of costs between the various agricultural sectors and that moreover such an obligation was not necessary to dispose of the stocks of skimmed-milk powder.

The plaintiff in the main action, who was not a party to the previous disputes, accordingly took the view that the securities could not be required or forfeited since they served only to ensure the performance of an obligation which had been unlawfully imposed. It further believes that it should be entitled to export refunds for the compound feeding-stuffs as if those constituents were in free circulation in the Community since by importing them under the temporary importation procedure it has avoided the provision of securities.

The dispute brought the Tribunale Civile, Rome, to submit a number of questions to the Court for a preliminary ruling.

Those questions basically raise three issues:

The first concerns the effect of preliminary rulings given by the Court in 1977 in regard to third parties, be they private individuals, institutions or national courts.

The second concerns the consequences in the legal systems of both the Community and the Member States of a judgment declaring a regulation to be void as regards what happens to charges previously imposed on traders by that regulation.

The third, put in the alternative and more specific in nature, concerns particular features of the export refund rules for certain agricultural products.

1. The main object of the powers accorded to the Court by Article 177, which sets out the procedure for a preliminary ruling, is to ensure that Community law is applied uniformly by national courts. Uniform application of Community law is imperative not only when a national court is faced with a rule of Community law whose meaning and scope need to be defined, it is just as imperative when the court is confronted by a dispute as to the validity of measures adopted by the institutions.

When the Court is compelled to declare a measure of the institutions to be void it follows that a national court may not apply the measure declared to be void without once more creating serious uncertainty as to the Community law applicable.
Although the Court's judgment is directly addressed only to the national court which submitted the matter to the Court it is sufficient reason for any other national court to regard that measure as void for the purposes of a judgment which it has to give. However, it always rests with national courts to decide whether there is an interest in raising once again a question which has already been settled by the Court where the Court has previously declared a measure of a Community institution to be void.

The Court therefore answered the first point by ruling that:

(a) Although a judgment of the Court given under Article 177 of the Treaty declaring a measure of an institution, in particular a Council or Commission regulation, to be void is directly addressed only to the national court which submitted the matter to the Court, it is sufficient reason for any other national court to regard that measure as void for the purposes of a judgment which it has to give. That having been said, it does not however result in depriving national courts of the power given to them by Article 177 of the Treaty; it rests with those courts to decide whether there is an interest in raising once again a question which has already been settled by the Court where the Court has previously declared a measure of a Community institution to be void. There may be such an interest especially if questions arise as to the grounds, the scope and possibly the consequences of the invalidity established earlier.

(b) Council Regulation No. 563/76 of 15 March 1976 is void for the reasons already stated in the judgments of 5 July 1977 in Cases 114, 116 and 119 and 120/76.

2. The second point is basically whether rules of Community law govern legal actions brought by traders before a national court to obtain repayment of Community charges due and paid pursuant to a Council or Community regulation even though that national court is bound to refrain from applying that regulation as a result of a judgment of the Court declaring it to be void.

Regulation No. 563/76, as applied before it was declared to be void, should be examined to ascertain whether it contained provisions affecting the recovery of sums received by national authorities acting on behalf of the Community authorities on the basis of that regulation.

It should be observed that Article 5 of the regulation establishes a scheme designed to spread out the effects of a measure of economic policy. The fact that the scheme made provision for traders actually to be able to pass on the charge imposed on them to subsequent stages of the economic process leads to the conclusion that in a situation such as that at the heart of the dispute in the main proceedings an action for the recovery of an undue payment has no legal foundation.

The Court replies by ruling that the existence during the period in which Council Regulation No. 563/76 was applied of a specially designed scheme the aim of which was to spread out the economic effects of the obligation which it imposed destroys the basis of an action for the recovery of securities which have been provided and forfeited even if a similar action could be successfully brought under national law alone. In this regard it does not matter whether the trader has actually passed on the charge or whether he has decided not to do so owing to his undertaking's financial policy. Recovery is in itself ruled out a fortiori if the trader was not himself bound to pay the charge in question which he advanced voluntarily or refunded to his suppliers.

3. The answer to the last question should help to resolve the issue of whether the plaintiff in the main action is entitled to export refunds in respect of compound feeding-stuffs constituted in part of products from non-member countries referred in Article 3 (1) of Regulation No. 563/76 which have been imported and processed into compound feeding-stuffs under a system of customs control, that is to say without having been released into free circulation in the Community.

The first part of the question raised seeks to determine whether, in view of the fact that the plaintiff opted for the system of importation under customs control simply in order to escape the purchasing obligation since declared to be illegal, the conclusion must be drawn that the plaintiff is still entitled to export refunds.

That question calls for a negative answer.

The second part of that question seeks to determine whether, regardless of any considerations as to the consequences of the invalidity of Regulation No. 563/76, the plaintiff in the main action was not entitled to export refunds on the basis of Article 8 of Regulation No. 192/75 which states that when compound products qualifying for a refund fixed on the basis of one or more of their components are exported, that refund shall be paid only in so far as the component or components in respect of which the refund is claimed are in free circulation.

The Court replies to that question by ruling that the fact that Regulation No. 563/76 has been declared void does not justify either an individual or a general derogation from the rule stated in the first subparagraph of Article 8 (1) of Regulation No. 192/75.

The third subparagraph of Article 8 (1) of Regulation No. 192/75 covers only the case of a compound product which, as such, is not capable of attracting export refunds but which contains certain constituents which do. It does not cover the case of a compound product which as such attracts a refund and to which the condition stipulated in the first subparagraph of Article 8 (1) applies.

Judgment of 14 May 1981

Case 98/80

Romano v Institut National d'Assurance Maladie-Invalidité

(Opinion delivered by Mr Advocate General Warner on 20 November 1980)

1. Social security for migrant workers - Administrative Commission - Authorization by the Council to enact measures having the force of law - Incompatibility with the EEC Treaty - Decisions of the Administrative Commission - Not binding on national authorities

   (EEC Treaty, Arts. 155, 173 and 177; Regulation No. 1408/71 of the Council, Art. 81)

2. Social security for migrant workers - Benefits - National rules against overlapping - Pension due under the legislation of a single Member State - Reduction on account of a pension granted by another Member State - Recovery of provisional advances - Exchange rate applicable for the purpose of calculating the amount to be recovered

   (EEC Treaty, Art. 51)

1. It follows both from Article 155 of the Treaty and the judicial system created by the Treaty, and in particular by Articles 173 and 177 thereof, that a body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of law. Whilst a decision of the Administrative Commission may provide an aid to social security institutions responsible for applying Community law in this field, it is not of such a nature as to require those institutions to use certain methods or adopt certain interpretations when they come to apply the Community rules. A decision of the Administrative Commission does not therefore bind national courts.

2. When a full pension is granted to a worker under the national legislation of a Member State A alone and, in implementation of Community rules, he is also awarded a pension in Member State B which is reduced by the amount of the full pension granted by the competent institution in Member State A, it is not compatible with Article 51 of the Treaty for that legislation to be applied in a way which in any given period would allow the amount of the advance payments made to the recipient recovered by the competent institution in Member State A to exceed the amount of pension or arrears of pension transferred to that institution by the social security institution in Member State B and converted into Member State A's national currency on the date of transfer.

***

NOTE

The Tribunal du Travail, Brussels, submitted to the Court for a preliminary ruling a question as to the interpretation of Decision No. 101 of the Administrative Commission of the European Communities on Social Security for Migrant Workers of 29 May 1975 concerning the date to be taken into consideration for the determination of the rates of conversion to be applied upon the calculation of certain benefits, having regard to the provisions to be found in Article 7 of Regulation No. 574/71 on the application of social security schemes.

The basic issue in the dispute before the Tribunal du Travail, Brussels, turned upon the plaintiff's right to be paid by the Institut the amount transferred by the Italian National Social Welfare Institution corresponding to the Italian benefits in respect of the period from 1 January 1976 to 30 June 1977. The plaintiff challenged the validity of the calculation made by the Institut. He maintained that whichever exchange rate has to be used for conversion purposes the recovery of provisional advance payments may never exceed the amount of arrears of pension due under the foreign scheme in respect of the period in which overlapping occurred.

For its part the Institut states that the amount to be recovered was calculated by applying the exchange rate referred to in Article 107 of Regulation No. 574/72 of the Council and in Decision No. 101 of the Administrative Commission.

The Court replied by ruling that, whilst a decision of the Administrative Commission of the European Communities on Social Security for Migrant Workers may act as an aid for social security institutions charged with applying Community law in this field, it is not of such a nature as to require those institutions to follow certain methods or adopt certain interpretations when they come to apply Community rules. Decision No. 101 of the Administrative Commission does not therefore bind national courts.

When a full pension is granted to a worker under the national legislation of Member State A alone and pursuant to the provisions of Community regulations he is also awarded a pension in Member State B which is reduced by the amount of the full pension granted by the competent institution in Member State A, it is not compatible with Article 51 of the Treaty for that legislation to be applied in a way which in any given period would allow the provisional advance payments paid to the recipient and recovered by the competent institution in Member State A to exceed the amount of pension or arrears of pension transferred to the recipient by the social security institution in Member State B and converted into Member State A's national currency on the date of transfer.

Judgment of 14 May 1981

Case 111/80

Fanara v Institut National d'Assurance Maladie-Invalidité

(Opinion delivered by Mr Advocate General Warner on 15 January 1981)

Social security for migrant workers - Recovery of payments not due - Provisional payment of benefits - Article 111 of Regulation No. 574/72 - Exhaustive nature - National legislation limiting the payment to the recipient of the difference between benefits paid on a provisional basis and arrears received from a foreign institution - Not permissible

(Regulation (EEC) No. 574/72 of the Council, Arts. 45 (1) and 111)

Article 111 of Regulation No. 574/72 deals exhaustively with the question of the recovery of the amount overpaid as regards social security benefits due to a worker to whom benefits have been paid on a provisional basis pursuant to Article 45 (1) of that regulation. It leaves the Member States no freedom to legislate on the matter, or in particular to provide that where the arrears received from a foreign institution, when converted into national currency, exceed the amount of the advance payments or allowances paid on a provisional basis, the balance is not to be paid over if the difference is due either to the difference in the exchange rates used to calculate the amount of the sums due from the foreign institution and to arrive at the figure expressed in foreign currency, or to the adjustment of the allowances to the cost of living.

***

NOTE

The dispute in the main action is between Mr Fanara and the Institut and is over the compatibility with Community law of Article 24ter of the Royal Decree of 4 November 1963 on the compulsory sickness insurance scheme.

From 1 November 1976 to 28 February 1979 the plaintiff in the main action received full Belgian invalidity allowance granted to him on a provisional basis pursuant to Article 45 of Regulation No. 574/72.

In 1979 the Belgian institution made its definitive calculation of the Belgian benefit subtracting from the full Belgian allowance the daily amount of the Italian pension corresponding to that same date.
For the purposes of the calculation the amount of the Italian pension was converted into Belgian francs.
That currency conversion created a difference which led to the dispute pending before the national court which is over the plaintiff's right to be paid that sum by the Belgian institution.

The Court, in answer to the question submitted to it by the Tribunal du Travail, Mons, ruled that a provision of national law which, in the case of social security benefits due to a worker to whom benefits have been paid on a provisional basis pursuant to Article 45 (1) of Regulation No. 574/72 of the Council of 21 March 1972, provides that when the arrears received from a foreign institution converted into national currency exceed the amount of advance payments or benefits paid on a provisional basis, the balance is not to be paid over if the difference is due either to a difference in the exchange rates respectively applied to calculate the amount of the sums due from the foreign institution and to realize the value of a credit expressed in foreign currency, or to the adjustment of benefits to the cost of living, is incompatible with Regulation No. 574/72.

Judgment of 20 May 1981

Case 152/80

Debayser SA and Others v Fonds d'Intervention et de Régularisation du Marché du Sucre

(Opinion delivered by Mr Advocate General Reischl on 9 April 1981)

1. Agriculture - Monetary compensatory amounts - Relief - Clause providing for discretionary relief - Aim - Application restricted to transactions carried out on the basis of binding contracts concluded prior to the monetary measure - Validity

   (Regulation No. 1608/74 of the Commission, Arts. 1 and 2 (1))

2. Agriculture - Common organization of the markets - Export licences - Purpose - Rights of holder to carry out the transaction without being subjected to the consequences of a fall in the value of a currency occurring after delivery of the licence - None

3. Agriculture - Monetary compensatory amounts - Relief - Clause providing for discretionary relief - Restricted application - Breach of the principle of proportionality - None

   (Regulation No. 1608/74 of the Commission, Arts. 1 and 2 (1))

1. The purpose which the provisions of Regulation No. 1608/74 were designed to fulfil was not to provide traders engaged in the performance of contracts containing pre-fixed conditions with full protection against the application of monetary compensatory amounts following the monetary event described in the first recital and in Article 1 but solely to introduce in respect of contracts concluded prior to such event, a "certain flexibility" into the monetary rules by giving the Member States the opportunity to apply a clause conferring discretionary relief permitting" each individual case to be examined by them in the light of the loss suffered whilst maintaining measures to assure a co-ordinated application thereof."

By restricting the ambit of the relief clause to imports or exports effected under binding contracts which were concluded before the monetary measure referred to in Article 1, Article 2 (1) of Regulation No. 1608/74 does not thwart the aims of that regulation but confines itself within their bounds as defined by all that is stated in the preamble to that regulation, which is designed to ensure that the true function of the monetary compensatory amounts is preserved.

2. The sole purpose of issue of an export licence is to authorize export of the goods concerned and not to guarantee the conditions under which the goods will in fact be exported. It cannot therefore in itself confer on the exporter a right not to be subjected to the consequences on trade of a fall in the value of a national currency.

3. Regulation No. 1608/74, being a provision for discretionary relief, is designed to mitigate in the appropriate circumstances of fact and of law the hardship which may result for traders from the application of the monetary compensatory amounts and helps to prevent the introduction of the amounts from proving excessively burdensome for some of them. In the circumstances it cannot be held that such a regulation breaches the principle of proportionality by not affording traders more ample opportunity to benefit from a clause providing for discretionary relief.

***

NOTE

The Tribunal Administratif [Administrative Court], Paris, referred to the Court of Justice for a preliminary ruling a question concerning the validity of certain provisions relating to Monetary compensatory amounts.

That question was raised in the course of an action brought by the applicant companies against the Fonds d'Intervention et de Régularisation du Marché du Sucre (hereinafter referred to as the "Fund") concerning the refusal by that body to apply the discretionary relief provision contained in Regulation (EEC) No. 1608/74 of the Commission in favour of the applicants so as to exempt them from those parts of the monetary compensatory amounts which constitute the difference between the monetary compensatory amounts applicable on the date on which they concluded the contracts for the export of sugar and the amounts in force on the date on which those exports were carried out.

When the French Government decided on 15 March 1976 to allow the franc to float, monetary compensatory amounts were introduced as from 25 March 1976. They rose progressively from FF 4.46 on 25 March 1976 to FF 32.67 on 27 December 1976.

Faced with the introduction of that system, the applicants requested the Fund to apply Regulation No. 1608/74 in favour of binding contracts concluded after 15 March 1976 and performed after 23 July 1976; the Fund informed them that the exemption could not be granted.

The applicants asked the national court to request the Court of Justice to give its interpretation of the term "monetary measures" contained in the regulation cited above and, if that term must be construed as applying solely to the French Government's decision of 15 March 1976, on the validity of Article 2 (1) of Regulation No. 1608/74 in so far as it excludes from the application of the regulation binding contracts concluded after 15 March 1976.

The national court rightly took the view that the concept of "monetary measure" did indeed apply in the instant case to the decision adopted on 15 March 1976 by the French Government to allow the franc to float and as a result of that interpretation asked whether Article 2 (1) of the regulation could be regarded as valid in so far as it excluded from the application of the regulation imports and exports carried out on the basis of binding contracts concluded after the monetary measure referred to by Article 1 but before each increase in the monetary compensatory amounts involving an increased charge for the operator.

It is clear from the preamble to Regulation No. 1608/74 of the Commission that the objectives pursued by the provisions of the regulation do not consist in assuring operators committed to performing contracts containing pre-fixed conditions of generalized protection against the application of monetary compensatory amounts payable in the monetary event defined in the first recital and in Article 1, but are solely intended to introduce a certain flexibility into the monetary rules making it possible for Member States to apply a discretionary relief provision "permitting each individual case to be examined in the light of the loss suffered whilst maintaining measures to ensure a co-ordinated application thereof".

The Court rejected the arguments put forward by the applicants in the main proceedings that the restrictive criterion adopted by the regulation prevents the attainment of the objective pursued, that Article 2 (1) is contrary to the principle of legal certainty underlying the Community legal system and that there was a breach of the principle of the protection of legitimate expectation.

The Court ruled that a consideration of the question raised had not revealed any matter capable of affecting the validity of Article 2 (1) of Regulation No. 1608/74 of the Commission of 26 June 1974.

Judgment of 26 May 1981

Case 157/80

Criminal proceedings against S.E. Rinkau

(Opinion delivered by Mr Advocate General Reischl on 8 April 1981)

1. Convention on Jurisdiction and the Enforcement of Judgments - Special provisions as regards criminal proceedings - Right to be defended without appearing in person in criminal proceedings relating to an offence which was not intentionally committed - Concept of an "offence which was not intentionally committed" - Independent concept - Definition

   (Art. II of the Protocol annexed to the Convention of 27 September 1968)

2. Convention on Jurisdiction and the Enforcement of Judgments - Special provisions as regards criminal proceedings - Right to be defended without appearing in person in criminal proceedings relating to an offence which was not intentionally committed - Scope - Criminal proceedings relating to an offence which was not intentionally committed raising the issue of the accused's civil liability

   (Art. II of the Protocol annexed to the Convention of 27 September 1968)

1. The concept of an offence which was not intentionally committed appearing in Article II of the Protocol annexed to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be regarded as an independent concept which must be explained by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which the national legal systems have in common. It covers any offence the legal definition of which does not require, either expressly or as appears from the nature of the offence defined, the existence of intent on the part of the accused to commit the punishable act or omission.

2. The right to be defended without appearing in person, granted by Article II of the aforementioned Protocol, applies in all criminal proceedings concerning offences which were not intentionally committed, in which the accused's liability at civil law, arising from the elements of the offence for which he is being prosecuted, is in question or on which such liability might subsequently be based.

NOTE

The Hoge Raad [Supreme Court] of the Netherlands asked the Court of Justice two questions on the interpretation of Article II of the Protocol annexed to the Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

The main proceedings concern the following: Summoned to appear before the Magistrate of the Arrondissementsrechtbank [District Court], Zutphen, (Netherlands) on a charge of having driven a vehicle equipped with a radio-electrical transmitting device in the Netherlands without holding the licence required for that purpose, Mr Rinkau, who resides in the Federal Republic of Germany, did not appear at the sitting. His counsel requested permission to defend him. The Magistrate, contrary to the opinion of the Officier van Justitie [Public Prosecutor], took the view that there were grounds to grant the accused the right recognized in the first paragraph of Article II of the Protocol and permitted his counsel to defend him. Mr Rinkau was sentenced in his absence to a fine or, alternatively, to one day's imprisonment in the event of non-payment thereof and to the confiscation of the radio-electrical device.

On appeal by the Officier van Justitie, the Gerechtshof [Regional Court of Appeal], Arnhem, took the view in an interlocutory judgment of 28 August 1979 that Article II of the Protocol applied to all criminal cases involving prosecution for an offence which was not intentionally committed but that the offence alleged against the accused did not constitute an offence which was not intentionally committed.

Consequently, it decided not to permit counsel for the accused to defend him in his absence and on 11 September 1979 in substance upheld the judgment of first instance.

Mr Rinkau brought an appeal in cassation against both judgments. He claimed the infringement of Article II of the Protocol. Before giving judgment in full the Hoge Raad decided to refer to the Court of Justice the following questions of interpretation:

1. Must "an offence which was not intentionally committed" in the first paragraph of Article II of the said Protocol be understood as including any offence for which, under the statutory definition, a certain intent in regard to any element of the offence is not required, or should the phrase be understood in a narrower sense, particularly as relating only to offences in the definition of which some element of guilt (culpa) on the part of the offender appears?

2. If the conditions set out in Article II of the said Protocol are fulfilled, does the right given to "the accused" in that article apply without restriction, or does an accused person have that right only where he has to defend himself against a civil action brought in the relevant criminal proceedings, or at any rate where the interests of the accused under civil law are affected by the outcome of the criminal proceedings?

With regard to the term "an offence which was not intentionally committed", the Court ruled in reply to the first question:

> An offence which was not intentionally committed within the meaning of Article II of the Protocol annexed to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be construed as meaning any offence the statutory definition of which does not require, expressly or by the very nature of the crime which it defines, the existence on the part of the accused of intent to commit the act or omission which is criminally punishable.

In reply to the last question asked, the Court ruled that the right of the accused under Article II of the Protocol annexed to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters to be defended without appearing in person extends to any criminal proceedings in respect of an offence which was not intentionally committed in so far as the civil liability of the accused arising from the facts constituting the offence for which he is prosecuted is established or likely to be subsequently claimed.

Judgment of 27 May 1981

Joined Cases 142 and 143/80

Amministrazione delle Finanze dello Stato v
Essevi S.p.A. and Salengo

(Opinion delivered by Mr Advocate General Capotorti on 1 April 1981)

1. Action for failure of a State to fulfil its obligations under the Treaty - Stage preceding commencement of proceedings - Reasoned opinion - Effect restricted to commencement of proceedings before Court - Exemption of Member State from compliance with its obligations - Not permissible

(EEC Treaty, Article 169)

2. Tax provisions - Internal taxation - System of differential taxation of a discriminatory nature - Grant of tax advantages subject to conditions which can be satisfied only by domestic products - Prohibition

(EEC Treaty, Art. 95)

3. Tax provisions - Internal taxation - Rule against discrimination - Direct effect - Date on which rule took effect

(EEC Treaty, Art. 95)

4. Aids granted by Member States - Aid in form of tax discrimination - Authorization - Not permissible

(EEC Treaty, Arts. 92, 93 and 95)

5. Community law - Direct effect - National taxes incompatible with Community law - Refund - Detailed rules - Application of national law - Taking into account of any passing-on of tax - Whether permissible

1. Opinions delivered by the Commission pursuant to Article 169 of the EEC Treaty have legal effect only in relation to the commencement of proceedings before the Court against a State alleged to have failed to fulfil its obligations under the Treaty. The Commission may not, in the attitude which it adopts and in the opinions which it is obliged to deliver under Article 169, exempt a Member State from compliance with its obligations under the Treaty or prevent individuals from relying, in legal proceedings, on the rights conferred upon them by the Treaty in order to contest any legislative or administrative measures of a Member State which may be incompatible with Community law.

2. A system of differential taxation whereby the grant of a tax exemption or the enjoyment of a reduced rate of taxation is conditional upon the possibility of inspecting production on national territory is discriminatory in nature and as such comes within the prohibition laid down by Article 95. The effect of such a condition which by definition cannot be satisfied by similar products from other Member States is to preclude those products in advance from qualifying for the tax advantage in question and to confine that advantage to domestic production.

3. Under the third paragraph of Article 95 of the EEC Treaty, the rule against discrimination set out in the first two paragraphs of that article became fully effective as from 1 January 1962. After that date, a Member State could no longer be authorized to maintain in its tax law or fiscal practices any pre-existing discrimination in the system applicable to the importation of products originating in other Member States.

4. Under the system of the EEC Treaty an aid, within the meaning of Articles 92 and 93, cannot be introduced or authorized by a Member State in the form of fiscal discrimination against products originating in other Member States.

5. The protection of rights guaranteed by the Community legal order does not require an order for the recovery of taxes unduly levied to be granted in conditions which would involve an unjust enrichment of those entitled. There is nothing, from the point of view of Community law, to prevent national courts from taking account in accordance with their national law of the fact that it has been possible for taxes unduly levied to be incorporated in the prices of the undertaking liable for the tax and to be passed on to the purchasers.

NOTE

The Corte d'Appello [Court of Appeal], Milan, referred to the Court of Justice for a preliminary ruling questions on the interpretation of Articles 95 and 169 of the EEC Treaty in order to determine the compatibility with the Treaty of the retention in the Italian legislation of a system of differential taxation applicable to potable spirits distilled from wine.

The file on the case reveals that both companies imported cognac of French origin from 1 March 1962 to 1 December 1967, on which they paid the duty for "first category" ethyl alcohol, that is to say spirits which do not meet specified requirements relating to origin and manufacture or which are not capable of being inspected at the stage of manufacture.

The companies brought an action before the national court for the repayment of the duty paid, claiming infringement of Article 95 of the EEC Treaty.

They obtained judgments ordering the Italian Finance Administration to repay the duty wrongfully charged.

The Administration appealed against those judgments, relying on an authority of the Suprema Corte di Cassazione [Supreme Court of Cassation], which had upheld the legality of the contested taxation provisions with regard to Community law, and claimed that the Commission expressly recognized that the system was an "aid" compatible with Community rules so that the excise duty was lawfully charged on spirits imported from France.

The Corte d'Appello asked the Court of Justice to determine the effect to be given to the opinions referred to above expressed by the Commission under Article 169 of the EEC Treaty and, further, to rule whether by applying to potable spirits distilled from wine and imported from other Member States a system of taxation including the excise duty of Lit 60 000 per hectolitre of pure alcohol (Lit 90 000 as from March 1976), which is not provided for in the case of similar domestic products and is not charged thereon, Italy has infringed Article 95 of the Treaty; secondly, the Corte d'Appello asked the Court of Justice to rule whether, after the commencement of the second stage referred to in the third paragraph of Article 95 as being the final date for the abolition of national rules conflicting with the principle of equal tax treatment laid down in the first and second paragraphs of the said article, it was permissible by way of exception for Italy to continue a pre-existing discrimination in respect of the importation of spirits distilled from wine.

The effect of the views adopted and opinions delivered by the Commission under the procedure laid down by Article 169

The questions asked by the Corte d'Appello are concerned first to determine the legal effect and authority of the opinion delivered by the Commission under the procedure laid down by Article 169 of the Treaty for actions concerning the failure of a State to fulfil its obligations.

More precisely, the questions seek to ascertain the possible legal effect of an assurance of the kind given by the Commission in its letter giving formal notice and of its opinion delivered pursuant to Article 169 of the Treaty allowing Italy to temporarily maintain a so-called system of "differential taxation".

The purpose of the reasoned opinion under Article 169 is to define the terms of the dispute where the attempt to settle the matter does not achieve success.

On the other hand, the Commission is not empowered to define the rights and obligations of a Member State or to furnish it with assurances regarding the compatibility of particular conduct with the Treaty by means of such an opinion or by other observations made as part of that procedure. Only in a judgment of the Court can the rights and obligations of a Member State be determined and an appraisal of its conduct made.

The compatibility with Article 95 of a system of differential taxation applicable to spirits

The second part of the questions asked seeks to determine whether a Member State may impose a duty on spirits originating from other Member States from which similar domestic products are wholly or partially exempt.

The similarity between the imported product (French cognac) and the competing domestic product (potable spirits distilled from wine or marc) is not disputed. The difference in the tax rules applicable to the goods arises from the fact that the imported spirit, which is classed as "first category" spirit, as such is subject to a full charge to tax, whereas the corresponding spirits of domestic manufacture come under "second category" spirits which are exempt from the excise duty with the proviso that only spirits whose manufacture is capable of being inspected at the stage of manufacture on the territory of the Italian State may be placed in that category.

As the Court has stated in a series of cases, Community law does not at present restrict the freedom of Member States to set up a system of differential taxation for certain products on the basis of objective criteria. However, the requirements of the Treaty must nevertheless be observed and any form of discrimination as regards imports from other Member States or protection in favour of competing national products must be avoided. The fact that the grant of a tax exemption or the benefit of a reduced rate of tax is made subject to the possibility of inspecting the manufacture on national territory constitutes a condition which, by its very nature, cannot be fulfilled by similar products from other Member States. Such a system of taxation is of a discriminatory nature and as such falls under the prohibition of Article 95.

The temporal effect of Article 95 and its relationship with the system of aid

The third part of the question is concerned to ascertain whether on the expiry of the final date laid down by the third paragraph of Article 95 a Member State could be permitted, by way of exception, to continue pre-existing discrimination in the system of taxation applicable to imports of potable spirits distilled from wine.

The argument put forward by the Italian State that the exception set out in the reasoned opinion constituted the authority for an aid within the meaning of the Treaty cannot be sustained either in fact or law.

The Court, in reply to the questions put to it, ruled:

1. The legal effect of the opinions delivered by the Commission pursuant to Article 169 of the Treaty relates only to actions brought before the Court concerning the failure of a State to fulfil its obligations. The Commission cannot, by views expressed in the course of that procedure, free a Member State from its obligations or affect the rights enjoyed by individuals under the Treaty.

2. A system of taxation applicable to spirits which is so devised as to reserve exemptions or reductions in the rate of tax to domestic produce only constitutes a discrimination prohibited by Article 95 of the EEC Treaty.

3. Pursuant to the third paragraph of Article 95 of the EEC Treaty, the rule against discrimination provided for by the first two paragraphs of that article came into full force as from 1 January 1962. A Member State could no longer be permitted to continue after that date fiscal discrimination previously existing in the system applicable to imports of spirits originating from other Member States.

Judgment of 2 June 1981

Case 124/80

Officier van Justitie v Van Dam en Zonen

(Opinion delivered by Mr Advocate General Reischl on 12 February 1981)

Fisheries - Conservation of the resources of the sea - Powers of the EEC - Failure to act - Effects - Conservation measures as they existed at the end of the period prescribed in Article 102 of the Act of Accession - Amendment by the Member States - Obligation to consult the Commission and abide by its views

(EEC Treaty, Art. 155; Act of Accession, Art. 102; Council Decision of 25 June 1979)

As this is a field reserved to the powers of the Community, within which Member States may henceforth act only as trustees of the common interest, a Member State cannot therefore, in the absence of appropriate action on the part of the Council, bring into force any interim measures for the conservation of the resources of the sea which may be required by the situation except as part of a process of collaboration with the Commission and with due regard to the general task of supervision which Article 155 of the EEC Treaty, in conjunction with the interim decisions of the Council, gives to the Commission.

Thus, in a situation characterized by the inaction of the Council and by the maintenance, in principle, of the conservation measures in force at the expiration of the period laid down in Article 102 of the Act of Accession, the decision of 25 June 1979 and the parallel decisions, as well as the requirements inherent in the safeguard by the Community of the common interest and the integrity of its own powers, impose upon Member States not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith, but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission.

NOTE

In order to decide on the compatibility with Community law of measures adopted by the Netherlands Government which lay down restrictions on catches of sea-fish other than sole and plaice in 1979, a court in the Netherlands referred to the Court of Justice for a preliminary ruling a question concerning the interpretation of Community rules on the conservation of fishery resources for 1979.

By decision of 25 June 1979 the Council took interim measures for the conservation of the resources of the sea. For its part, the Government of the Netherlands, by Order of 27 August 1979 prohibited the fishing and landing of cod in a specified area.

The Commission declared that the interim measures taken by the Netherlands authorities were in conformity with the Council's decision.

In October 1979 one of Van Dam's boats fished and landed cod in contravention of the Netherlands Order. When prosecuted, Van Dam claimed that the Netherlands rules were contrary to Community law. This dispute prompted the national court to ask the following question:

> Are the measures adopted in 1979 by the Netherlands authorities, such as the regulations referred to in the summons, namely the Beschikking Voorlopige Regeling Vangstbeperking andere Zeevissoorten dan Tong en Schol /Order provisionally laying down restrictions on catches of sea-fish other than sole and plaice/ 1979 and the Order of 27 August 1979, No. J 3247, based on Community law?

According to the accused in the main proceedings, since the end of the transitional period provided for in Article 102 of the Accession Treaty there has been a legal vacuum in the field of the protection of the biological resources of the sea which the decisions of the Council could not fill.

The accused moreover disputed the procedure whereby the Council's decision was taken, that procedure being said not to be in conformity with Article 4 of Council Regulation No. 101/76. The Council's decisions were therefore null and void.

Although they interpreted the Council's decisions differently, the Commission, the Government of the Netherlands, and the Government of the United Kingdom did not cast doubt on their legality.

They considered that since the measures adopted by the Netherlands Government for 1979 had been formally approved by the Commission they were on any view in conformity with the Council's decision and hence with Community law.

The Court recalled that in its judgment of 5 May 1981 in Case 804/79 Commission v United Kingdom the Court, whilst stressing that there had been a complete transfer of powers to the Community since the end of the transition period, stated that, because of the Council's failure to act, it was not possible to extend that idea to the point of making it entirely impossible for the Member States to amend the existing conservation measures in case of need owing to the development of the relevant biological and technological facts.

The Court therefore replied by declaring that national measures concerning the conservation of the biological resources of the sea, such as those enacted by the Netherlands Government for the year 1979 concerning the limitation of catches of fish other than sole and plaice are in accordance with Community law inasmuch as, having been enacted by reason of a failure to act on the part of the Council, they have received, following consultation, the formal approval of the Commission.

Judgment of 3 June 1981

Case 107/80

Giacomo Cattaneo Adorno v Commission of the European Communities

(Opinion delivered by Mr Advocate General Capotorti on 8 April 1981)

1. Agriculture - Common Agricultural Policy - Structural reform - Common measures - Improvement of the conditions under which agricultural products are processed and marketed - Regulation No. 355/77 - Scope - Investment project submitted by the producer of a basic agricultural product.

   (Council Regulation No. 355/77)

2. Agriculture - Common Agricultural Policy - Structural reform - Common measures - Improvement of the conditions under which agricultural products are processed and marketed - Modernization of farms - Regulation No. 355/77 - Directive No. 72/159 - Scope of each.

   (Council Regulation No. 355/77; Council Directive No. 72/159)

1. The net result of the provisions of Regulation No. 355/77 on common measures to improve the conditions under which agricultural products are processed and marketed is that an investment project submitted by a farmer and designed to improve the processing and marketing of agricultural products from the same farm as that in which the investment is to be made is in no way excluded from the scope of the regulation if it is capable of making an effective contribution towards rationalizing processing and marketing structures.

2. Directive No. 72/159 on the modernization of farms has a special scope which does not as a rule coincide with that of Regulation No. 355/77. The aid provided for under the directive is designed to improve production conditions for basic agricultural products in order to raise the profitability of farms to a suitable level, whereas Regulation No. 355/77 is concerned with improving the processing and marketing of agricultural products.

NOTE

Mr Cattaneo Adorno brought an action for the annulment of the decision of the Commission of 24 January 1980 refusing aid from the European Agricultural Guidance and Guarantee Fund (EAGGF) for an investment project submitted by the applicant under Council Regulation No. 355/77 on common measures to improve the conditions under which agricultural products are processed and marketed.

The applicant carries on business as a farmer at Gabiano Monferrato in the region of Piedmont. The farm is made up of two holdings and comprises approximately 176 hectares of land traditionally used for wine-growing and suitable for the production of high-quality wines. Through the investment project in question the applicant wished to create a new wine-growing centre intended to improve wine-making from grapes grown on the farm, to rationalize the storage and preservation of the wine, to facilitate transport between the two farms and to shorten the distribution chain for the wine, whilst improving the quality, the presentation and the vatting, bottling and labelling of the product.

The decision under challenge held that the project could not be considered for the grant of an aid from the Guidance Section of EAGGF. The Commission considered that the application for the aid in question fell within the scope of Council Directive No. 72/159 of 17 April 1972, on the modernization of farms; that the measures provided for by that directive constituted "common measures" within the meaning of Article 6 (1) of Regulation No. 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy and that pursuant to Article 15 of Regulation No. 355/77 projects which were eligible for Community aid under other common measures do not come within the scope of the said regulation.

The dispute mainly concerns the demarcation of the respective ambits of Regulation No. 355/77 and Directive No. 72/159.

The applicant submitted that Directive No. 72/159 could not apply to his case.* The scheme of incentives provided for by the directive was intended to allow farms suitable for development to adjust to economic progress within the framework of an appropriate development plan. The applicant ran a farm which had attained a level of earned income comparable to or even higher than that of non-agricultural work in the same region.

The applicant further submitted that Article 15 of Regulation No. 355/77 did not apply to him.

That provision, which stated that projects which are eligible for Community aid under other common measures within the meaning of Regulation No. 729/70 are not to come within the scope of Regulation No. 355/77, had the sole purpose of preventing an overlapping of Community aids for the execution of the same project.

According to the Commission the aids provided for by the directive were intended to finance farms whilst the assistance provided for by the regulation was intended for the non-agricultural activities or first stage processing and marketing, even if these were carried out by persons who also carried on the business of farming.

The Court stated that, read as a whole, the provisions showed that a project intended to improve the processing and marketing of agricultural products produced on the farm where the investment was to take place was not excluded from the scope of the regulation if that project could effectively contribute to the rationalization of the processing and marketing structures.

According to the papers which the applicant submitted to the Commission, the project in dispute was not concerned mainly with developing activities relating to the production of the basic product, namely grapes, but with rationalizing the storage and preservation of the wine, with improving the quality, the presentation and the vatting, bottling and labelling of the wine products and with shortening the chain of distribution. It was apparent from the foregoing that such efforts to achieve rationalization were precisely those covered by Regulation No. 355/77 and that the project submitted by the applicant had, in principle, to be considered an investment project within the meaning of Article 6 of that regulation.

The aids provided for by the directive were intended to improve the conditions of production of basic agricultural products with a view to raising the profitability of farms to an appropriate level.

Since the intention of the project submitted by the applicant was not the increasing of the profitability of the farm by improving the conditions of production of basic agricultural products but the improvement of the processing and marketing of those products, it did not fall within the scope of the directive. It followed that the decision in issue lacked a legal basis in that it decided that Mr Adorno's application for aid fell within the scope of Directive No. 72/159 and in that it refused to consider the application under Regulation No. 355/77 without examining whether the conditions set out in that regulation were fulfilled.

The Court therefore declared that the decision of the Commission of 24 January 1980 refusing an aid from the Guidance Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) for an investment project submitted by the applicant under Council Regulation No. 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed was void.

The Commission of the European Communities was ordered to pay the costs, excluding the costs incurred by the intervener.

Judgment of 16 June 1981

Case 126/80

Salonia v Poidomani

(Opinion delivered by Mr Advocate General Reischl on 25 March 1981)

1. References for a preliminary ruling - Jurisdiction of the Court - Limits - Assessment of relevance of questions raised - Conditions

   (EEC Treaty, Art. 177)

2. References for a preliminary ruling - Bringing a matter before the Court - Question raised by national court of its own motion - Permissibility

   (EEC Treaty, Art. 177)

3. Competition - Agreements, decisions and concerted practices - Prohibition - Conditions - Effect on trade between Member States - Adverse effect on competition

   (EEC Treaty, Art. 85 (1))

4. Competition - Agreements, decisions and concerted practices - Effect on trade between Member States - Exclusive distribution agreement extending throughout national territory - Agreement restricted to distribution of national products - Appreciable effect on trade

   (EEC Treaty, Art. 85 (1))

5. Competition - Agreements, decisions and concerted practices - Effect on the market - Exclusive distribution agreement extending throughout national territory - Agreement restricted to distribution of national newspapers and periodicals - Appreciable effect on the market - Criteria

   (EEC Treaty, Art. 85 (1))

6. Competition - Agreements, decisions and concerted practices - Dominant position - Selective distribution agreement - Permissibility - Conditions - Objective and uniform criteria

   (EEC Treaty, Arts. 85 (1) and 86)

7. Competition - Agreements, decisions and concerted practices - Prohibition - Exemption - Block exemption - Exclusive distribution agreement between trade union associations - Exemption precluded

   (EEC Treaty, Art. 85 (3); Regulation No. 19/65 of the Council, Art. 1; Regulation No. 67/67 of the Commission, Art. 1)

1. Article 177 of the EEC Treaty, which is based on a distinct separation of functions between national courts and the Court of Justice, does not allow the latter to criticize the reasons for the reference. Consequently, a request from a national court may be rejected only if it is quite obvious that the interpretation of Community law or the examination of the validity of a rule of Community law sought by that court bears no relation to the actual nature of the case or to the subject-matter of the main action.

2. In providing that a reference for a preliminary ruling may be submitted to the Court where "a question is raised before any court or tribunal of a Member State", the second and third paragraphs of Article 177 of the EEC Treaty are not intended to restrict this procedure exclusively to cases where one or other of the parties to the main action has taken the initiative of raising a point concerning the interpretation or the validity of Community law, but also extend to cases where a question of this kind is raised by the national court or tribunal itself which considers that a decision thereon by the Court of Justice is "necessary to enable it to give judgment".

3. An agreement which makes it possible to foresee, on the basis of all the objective factors of law or of fact, with a sufficient degree of probability that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between States and which has as its object or effect the restriction or distortion of competition within the Common Market, comes within the prohibition laid down by Article 85 (1) of the EEC Treaty.

4. An agreement providing for the exclusive distribution of national products on the territory of a Member State and involving, inter alia, the application of a selective distribution clause whereby only approved retailers have access to supplies may, by its very nature, have the effect of reinforcing the partitioning of the market on a national basis, thereby impeding the economic interpenetration which the Treaty is designed to bring about and protecting national production.

   Even if the sole subject-matter of the agreement in question is the distribution of national products and the agreement is not concerned with the distribution of similar products from other Member States, a closed-circuit distribution system applying to most of the sales outlets for national products on national territory may, when those outlets are at the same time those where products from other Member States are normally sold, also have repercussions on the distribution of those products.

   Such an agreement is therefore capable of affecting, as far as the products in question are concerned, trade between Member States. However, it escapes the prohibition laid down by Article 85 (1) of the EEC Treaty if it has no appreciable effect on such trade.

5. In the case of newspapers and periodicals, an assessment of the appreciability of the effects which a distribution agreement may have in the territory of a Member State on the market in such publications from other Member States is stricter than in the case of other products.

In order to determine whether an exclusive distribution agreement for national newspapers and periodicals is capable of having an appreciable effect on the market in such publications from other Member States, it is necessary to consider first whether that market may employ for the sale of newspapers in the area concerned, channels of distribution other than those governed by the agreement and, secondly, whether demand for the aforesaid products is rigid inasmuch as it shows no substantial variations as a result of the entry into force and the termination of the agreement in question.

6. A selective distribution clause restricting the supply of the products covered by the agreement in question to approved licence-holders alone does not infringe Article 85 (1) or the first paragraph of Article 86 of the EEC Treaty if it appears that the authorized retailers are selected on the basis of objective criteria relating to the capacity of the retailer and his staff and the suitability of his trading premises in connexion with the requirements for the distribution of the product and that such criteria are laid down uniformly for all potential retailers and are not applied in a discriminatory fashion.

7. An exclusive distribution agreement concluded between trade-union associations, each of which has a large membership, does not constitute an agreement "to which only two undertakings are party" within the meaning of Article 1 (1) of Regulations Nos. 19/65 and 67/67 and does not therefore come within the categories of agreements which, under the aforesaid regulations, may be exempted from the application of Article 85 (1) of the EEC Treaty.

***

NOTE

The Tribunale Civile di Ragusa referred to the Court of Justice for a preliminary ruling several questions concerning the interpretation of the competition rules in the Treaty, in particular Article 85, in order to enable it to decide on the compatibility with the requirements of the Treaty of certain clauses in the National Agreement and Rules Regulating the Resale of Daily Newspapers and Periodicals (referred to as the "National Agreement"). The questions had arisen in the course of a dispute between the holder of a licence for the general retail sale of newspapers and periodicals and the proprietors of the press distribution agencies in Ragusa concerning the refusal of the latter to supply the licence-holder with newspapers and periodicals in 1978. In support of their refusal the proprietors of the press distribution agencies contended that they were under no obligation to supply retail licence-holders with newspapers and periodicals. They maintained that the newspaper and periodical distribution system in Italy was subject at that time to the provisions of the above-mentioned National Agreement and that the plaintiff in the main action did not meet the requirements of the said Agreement, which included the possession of a trader's card. The Tribunale Civile di Ragusa considered that the said rules did not infringe Italian national law but did not rule out the possibility that the clauses in the National Agreement prohibiting publishers of newspapers and periodicals from supplying such products to vendors who had not obtained a trader's card might prove incompatible with the competition rules in the EEC Treaty, and in order to clarify the point they referred six questions to the Court.

In the first and third questions the national court wished to know whether clauses in an agreement with national effect restricting the supply of newspapers and periodicals exclusively to retailers who are approved by a trade committee including representatives of national associations of newspaper publishers and vendors constitute an infringement of the competition rules contained in Article 85 of the EEC Treaty. According to Article 85 an agreement which "may affect trade between Member States" and which has "as /its/ object or effect" the distortion of "competition within the Common Market" is prohibited as incompatible with the Common Market. The agreement in the present case provides for exclusive distribution in Italy of Italian newspapers and periodicals and application of a selective distribution clause whereby only approved vendors have access to supplies of newspapers and periodicals. An agreement of this type is capable, by its very nature, of having the effect of entrenching a partitioning of the market at the national level, obstructing the free play of national economic forces aimed at by the Treaty, and providing protection for national production.

Although the agreement in this case covers only the distribution of Italian newspapers and not that of newspapers from other Member States the fact remains that a closed distribution system may have repercussions on the distribution of newspapers and periodicals from other Member States.

It should be noted that an agreement of this kind falls outside the prohibition in Article 85 if it does not appreciably affect trade between Member States.

It is for the national court to determine, on the basis of all the relevant facts before it, whether the agreement fulfils, as a question of fact, the above-mentioned conditions, thereby falling within the prohibition in Article 85 (1).

In the second question the national court asks whether the clause in the disputed agreement to the effect that only retailers in possession of a trader's card issued by the Inter-Regional Joint Committees are allowed to sell Italian newspapers and periodicals gives rise to discrimination which is contrary to the Treaty. In the sixth question it asks further whether such rules are capable of constituting an abuse of a dominant position which is prohibited by Article 85 (1) of the Treaty.

The issue raised by those two questions is whether the agreement to which the national court refers is compatible with the Treaty's provisions on competition in so far as Article 2 of the Agreement contains a clause requiring the application of a selective distinguishing criterion.

Selective distribution systems form an element of competition which is compatible with Article 85 (1) provided that the selection of retailers is made on the basis of objective criteria of a qualitative kind and that such criteria are applied in a uniform manner.

In this case it is for the national court to decide in the light of those circumstances whether conditions exist which are capable of justifying the application, under the agreement before it, of the selective distribution criterion which is being challenged.

In its fourth question the national court asks whether the clauses in the disputed national agreement, and in particular those contained in the rules governing the functioning of the Inter-Regional Joint Committees, may be regarded as satisfying the conditions for exemption laid down in Article 85 (3) of the Treaty if it is found that their purpose is to contribute towards an improvement in distribution.

In that case, the Court noted, the Commission had not been notified of the agreement.

In the fifth question, finally, it was asked whether the disputed agreement might be granted the block exemption provided for by Regulations Nos. 19/65 and 67/67 of the Commission. According to those regulations an agreement may obtain a block exemption only if the undertakings participating in the agreement number no more than two. That is not so in this instance, where the agreement was made between trade-union associations each embracing numerous members.

The Court held that:

1. An exclusive distribution agreement for newspapers and periodicals such as that referred to by the national court is prohibited by Article 85 (1) of the Treaty only if it is capable of having an appreciable effect on trade between Member States.

2. A selective distribution clause such as that contained in the National Agreement referred to by the national court, and which restricts the supply of the products covered by that Agreement to approved vendors in possession of a trader's card infringes neither Article 85 (1) nor Article 86 (1) of the Treaty provided that the approved vendors are selected on the basis of objective criteria relating to the proficiency, staffing and facilities of the retailer considered in relation to the product's distribution requirements and that those criteria are fixed uniformly for all potential retailers and not applied in a discriminatory manner.

3. The agreement referred to by the national court could not, in the absence of notice to the Commission as required by Article 4 (1) of Regulation No. 17 of the Council of 6 February 1962, be the subject of a declaration of exemption under Article 85 (3) of the Treaty.

4. Since the agreement referred to by the national court is not an agreement "to which only two undertakings are party" within the meaning of Article 1 (1) of Regulation No. 19/65 of the Council of 2 March 1965 and Regulation No. 67/67 of the Commission of 22 March 1967, it does not fall within the class of agreements which may be exempted by virtue of those regulations from the application of the provisions in Article 85 (1) of the Treaty.

Judgment of 16 June 1981

Case 166/80

Peter Klomps v Karl Michel

(Opinion delivered by Mr Advocate General Reischl on 25 March 1981)

1. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Document which instituted the proceedings not served in due form and in sufficient time on defendant who fails to take appropriate action - Document which instituted the proceedings - Concept

(Convention of 27 September 1968, Art 27, point 2)

2. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Document which instituted the proceedings not served in due form and in sufficient time on defendant who fails to take appropriate action - Service in sufficient time - Appraisal of the court in which enforcement is sought - Period to be taken into consideration

(Convention of 27 September 1968, Art 27, point 2)

3. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Document which instituted the proceedings not served in due form and in sufficient time on a defendant who fails to take appropriate action - Effect where there is an objection against the judgment in default which is declared inadmissible by a court of the State in which the judgment was given

(Convention of 27 September 1968, Art 27, point 2)

4. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Document which instituted the proceedings not served in due form and in sufficient time on a defendant who fails to take appropriate action - Decision of a court of the State in which the judgment was given finding that service was duly effected - Duty of the court in which enforcement is sought to consider whether service was effected in sufficient time

(Convention of 27 September 1968, Art 27, point 2)

5. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Document which instituted the proceedings not served in due form and in sufficient time on defendant who fails to take appropriate action - Service in sufficient time - Appraisal of the court in which enforcement is sought - Beginning of time to be allowed the defendant

(Convention of 27 September 1968, Art 27, point 2)

1. The words "the document which instituted the proceedings" contained in Article 27, point 2, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters cover any document, such as the order for payment /Zahlungsbefehl/ in German law, service of which enables the plaintiff, under the law of the State of the court in which the judgment was given, to obtain in default of appropriate action taken by the defendant, a decision capable of being recognized and enforced under the provisions of the Convention.

A decision such as the enforcement order /Vollstreckungsbefehl/ in German law, which is issued after service of the order for payment has been effected and which is enforceable under the Convention, is not covered by the words "the document which instituted the proceedings".

2. In order to determine whether the defendant has been enabled to arrange for his defence as required by Article 27, point 2, the court in which enforcement is sought must take account only of the time, such as that allowed under German law for submitting an objection /Widerspruch/ to the order for payment, available to the defendant for the purposes of preventing the issue of a judgment in default which is enforceable under the Convention.

3. Article 27, point 2, of the Convention, which is addressed exclusively to the court before which proceedings are brought for recognition or enforcement in another Contracting State, remains applicable where the defendant has lodged an objection against the decision given in default and a court in the State in which the judgment was given has declared the objection inadmissible on the ground that the time for making such objection has expired.

4. Even if the court in which the judgment was given has held, in separate adversary proceedings, that service was duly effected, Article 27, point 2, of the Convention still requires the court in which enforcement is sought to examine whether service was effected in sufficient time to enable the defendant to arrange for his defence.

5. Article 27, point 2, of the Convention does not require proof that the document which instituted the proceedings was actually brought to the knowledge of the defendant. As a general rule the court in which enforcement is sought may accordingly confine its examination to ascertaining whether the period reckoned from the date on which service was duly effected allowed the defendant sufficient time to arrange for his defence. Nevertheless the court must consider whether, in a particular case, there are exceptional circumstances which warrant the conclusion that, although service was duly effected, it was, however, inadequate for the purpose of causing time to begin to run.

***

NOTE

The Hoge Raad /Supreme Court/ of the Netherlands referred to the Court of Justice for a preliminary ruling five questions, the first four of which concern the interpretation of paragraph (2) of Article 27 of that Convention, whilst the fifth refers to Article 52 thereof.

The questions arose in the course of an appeal in cassation against a decision of the Arrondissementsrechtbank /District Court/ Roermond dismissing an objection to an order made by the President of that court authorizing the enforcement in the Netherlands, under the provisions of the Convention, of an order for payment and the writ of execution issued by the German courts in the course of simplified proceedings for obtaining an injunction, known as the "Mahnverfahren".

The order for payment was not served on the defendant in person but lodged in his absence at the Post Office, and notice of the fact was sent by letter to the address in the Federal Republic of Germany indicated by the plaintiff, which constitutes valid service at that address under German law. The defendant had not less than three days within which to lodge an objection, but the period continued to run until a decision was given by the court authorizing execution of the judgment. In this instance that period was six days. The defendant allowed four months to elapse before raising an objection and claimed that at the time of the proceedings to obtain an order for payment he was domiciled in the Netherlands. The objection was dismissed as being out of time and it was held that under German law the defendant was in fact domiciled at the address to which notification had been made.

In the course of these proceedings before the Netherlands courts the defendant claimed that recognition of the decisions given against him by the German courts, and hence execution of them in the Netherlands, was contrary to the terms of Article 27 (2) of the Convention which provides that:

"A judgment shall not be recognized:

(2) Where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence;".

Those were the facts which led the Hoge Raad to ask the Court to give a reply to the following questions:

1. Must a "Zahlungsbefehl" /order for payment/, or respectively a "Vollstreckungsbefehl" /writ of execution/, under the German law in 1976, be regarded as "the document which instituted the proceedings" within the meaning of the opening words and paragraph (2) of Article 27 of the EEC Convention on Jurisdiction and Enforcement?

2. If it must be assumed that in a case such as the present one the "Zahlungsbefehl" is the document which instituted the proceedings within the meaning of the opening words and paragraph (2) of Article 27, is it necessary, with regard to the question whether that document was served on the defendant in sufficient time to enable him to arrange for his defence, to take account only of the period for lodging a "Widerspruch" /application for review by the same court/ against the "Zahlungsbefehl", or must account also be taken of the fact that after the expiry of that period the defendant still has a period for lodging an "Einspruch" /objection against judgments in default and writs of execution/ against the "Vollstreckungsbefehl"?

3. Are the opening words and paragraph (2) of Article 27 applicable if the defendant in the State of the court, the recognition or enforcement of whose judgment is sought (the first court) has lodged an objection against the judgment given in default of appearance and the first court rules that that objection is inadmissible because it was not lodged within the period laid down for lodging an objection?

4. If the first court has ruled that at the time of service of the document which instituted the proceedings the defendant was domiciled in the State of that court, with the result that in that respect service was duly carried out, do the provisions of the opening words and paragraph (2) of Article 27 require that a separate examination be carried out into the question whether the document was served in sufficient time to enable the defendant to arrange for his defence? If so, is that examination then confined to the question whether the document reached the defendant's domicile in good time or must, for example, the question also be examined whether service at that domicile was sufficient to ensure that the document would reach the defendant personally in good time?

5. In connexion with the questions set out under (4), is the position altered, having regard to Article 52, by the question whether the court of the State in which recognition or enforcement is sought rules that under the law of the latter State at the time of service of the document which instituted the proceedings the defendant was domiciled in that State?

In reply to those questions the Court held that Article 27 (2) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is to be interpreted as follows:

1. "The document which instituted the proceedings" is a concept embracing any document, such as the order for payment /Zahlungsbefehl/ to be found in German law, service of which enables the plaintiff, under the law applied by the court in which the judgment was given, to obtain in default of appearance by the defendant a decision capable of being recognized and enforced under the provisions in the Convention.

2. A decision such as the writ of execution /Vollstreckungsbefehl/ in German law, which is given after notice of the order for payment has been served and which is enforceable under the Convention, is not embraced by the concept of "the document which instituted the proceedings".

3. In order to determine whether the defendant has been given an opportunity to arrange for his defence as required by Article 27 (2) the court concerned must consider solely the time allowed the defendant, such as that within which an objection /Widerspruch/ must be lodged in German law, to take measures ensuring that a decision which is enforceable under the Convention will not be given against him in default.

4. Article 27 (2) remains applicable if the defendant has lodged an objection against the decision given in default and a court of the State in which the judgment was given has held the objection to be inadmissible on the ground that the time allowed for lodging an objection has expired.

5. Even if a court of the State in which the judgment was given has ruled, in separate adversary proceedings, that the service was duly effected Article 27 (2) requires the court seised of the case to examine nevertheless whether the service was effected in time to enable the defendant to arrange his defence.

6. The court seised of the case may, as a general rule, confine itself to consideration of whether the prescribed period, starting on the date on which service was duly effected, allowed the defendant sufficient time to arrange his defence; it must decide, however, whether in the individual case there were exceptional circumstances such that, although service was duly effected, it was inadequate to cause the period to start to run.

7. Article 52 of the Convention and the fact that the national court seised of the matter concluded that under the law of that State the defendant was domiciled on the territory of the latter on the date of service of the document which instituted the proceedings have no effect on the replies given above.

Judgment of 17 June 1981

Case 113/80

Commission of the European Communities v Ireland

(Opinion delivered by Mr Advocate General Capotorti on 5 May 1981)

1. Free movement of goods - Derogations - Article 36 of the Treaty - Narrowly construed - Consumer protection - Fair trading - No derogation

   (EEC Treaty, Art. 36)

2. Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Provisions requiring an indication of origin on imported articles of jewellery

   (EEC Treaty, Art. 30)

1. Since it constitutes a derogation from the basic rule that all obstacles to the free movement of goods between Member States are to be eliminated, Article 36 of the EEC Treaty must be construed narrowly; the exceptions listed therein cannot be extended to cases other than those specifically laid down. In view of the fact that neither the protection of consumers nor the fairness of commercial transactions is included amongst the exceptions set out in Article 36, those grounds cannot be relied upon as such in connexion with that article.

2. National legislation requiring all souvenirs and articles of jewellery imported from other Member States to bear an indication of origin or the word "Foreign" constitutes a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty.

NOTE

The Commission instituted proceedings for a declaration that Ireland had failed to fulfil its obligations under the EEC Treaty by making imported goods subject to the provisions of two Statutory Instruments. One of these prohibits the sale or exposure for sale of imported articles of jewellery depicting motifs or possessing characteristics which suggest that they are souvenirs of Ireland (Irish characters or landscapes, shamrock etc) whilst the other prohibits the importation of such articles, unless, in either case, they bear an indication of their country of origin or the word "foreign". The articles must be made of precious metal, rolled precious metal or base metal suitable for setting.

In the Commission's opinion, the restrictions on the free movement of the goods covered by the two orders constitute measures having an effect equivalent to quantitative restrictions on imports, contrary to the provisions of Article 30 of the EEC Treaty. It observes that "measures which lower the value of an imported product, in particular by causing a reduction in its intrinsic value, or which increase costs" must be regarded as measures having an effect equivalent to quantitative restrictions contrary to Article 30 of the EEC Treaty.

The Irish Government did not dispute the restrictive effects of the orders on the free movement of goods. However, it contended that the disputed measures were justified in the interests of consumer protection and fairness in commercial transactions between producers. In so doing it relied upon Article 36 of the Treaty which permits restrictions which are justified on grounds of public policy or the protection of industrial and commercial property.

The Court replied that the defendant was mistaken in placing reliance on Article 36 of the Treaty. In fact, the Court had already stated in an earlier decision that because Article 36 constituted a derogation from the basic rule that all obstacles to the free movement of goods must be eliminated it should be interpreted restrictively, and the exceptions listed therein could not be extended. Neither the protection of consumers nor the fairness of commercial transactions was included amongst the exceptions.

However, since the Irish Government had described the concepts as "the central issue", it was necessary to study that argument in connexion with Article 30 and to consider whether it was possible, in reliance on those concepts, to say that the Irish orders were not measures having an effect equivalent to quantitative restrictions on imports within the meaning of that Article.

The orders concerned applied only to imported products, a circumstance which was manifestly discriminatory.

The Court ruled that by requiring all articles imported from other Member States which are covered by S.I. Nos. 306 and 307 of 1971 to bear an indication of origin or the word "foreign", Ireland had failed to fulfil its obligations under Article 30 of the EEC Treaty.

Judgment of 24 June 1981

Case 150/80

Elefanten Schuh GmbH v P. Jacqmain

(Opinion delivered by Advocate General Sir Gordon Slynn on 20 May 1981)

1. Convention on Jurisdiction and the Enforcement of Judgments - Prorogation of jurisdiction - Appearance of the defendant before the court seised - Agreement conferring jurisdiction designating another court - Effect

   (Convention of 27 September 1968, Arts. 17 and 18)

2. Convention on Jurisdiction and the Enforcement of Judgments - Prorogation of jurisdiction - Appearnace of the defendant before the court seised - Challenge as to jurisdiction and defence on the substance - Appearance not conferring jurisdiction - Conditions

   (Convention of 27 September 1968, Art. 18)

3. Convention on Jurisdiction and the Enforcement of Judgments - Prorogation of jurisdiction - Agreements conferring jurisdiction - Formal requirements - Rules of the Convention - Stipulation by a Contracting State of other requirements - Not permissible - Application to provisions on languages

   (Convention of 27 September 1968, Art. 17)

1. Article 18 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters applies even where the parties have by agreement designated a court which is to have jurisdiction within the meaning of Article 17 of that Convention.

2. Article 18 of the Convention of 27 September 1968 must be interpreted as meaning that the rule on jurisdiction which that provision lays down does not apply where the defendant not only contests the court's jurisdiction but also makes submissions on the substance of the action, provided that if the challenge to jurisdiction is not preliminary to any defence as to the substance it does not occur after the making of the submissions which under national procedural law are considered to be the first defence addressed to the court seised.

3. Since the aim of Article 17 of the Convention is to lay down the formal requirements which agreements conferring jurisdiction must meet, Contracting States are not free to lay down formal requirements other than those contained in the Convention. When those rules are applied to provisions concerning the language to be used in an agreement conferring jurisdiction they imply that the legislation of a Contracting State may not allow the validity of such an agreement to be called in question solely on the ground that the language used is not that prescribed by that legislation.

***

NOTE

The Hof van Cassatie [Court of Cassation] referred to the Court of Justice several questions on the interpretation of Articles 17, 18 and 22 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

The questions were put in the course of an appeal in cassation brought against a judgment of the Arbeidshof [Labour Court] Antwerp ordering Elefanten Schuh GmbH, a company incorporated under German law, and Elefanten Schuh N.V., a company incorporated under Belgian law, to jointly pay the sum of Bfr. 3 120 597 together with interest to Pierre Jacqmain, in particular for having dismissed him without notice.

Mr Jacqmain was employed as a sales agent by the German company but in fact carried out his duties on instructions which he received from the Belgian subsidiary.

The main action arose as a result of the difficulties which occurred in 1975 between Mr Jacqmain and the two companies concerning the arrangements for an assignment of his contract of employment from the German company to the Belgian company.

Mr Jacqmain brought an action against the two companies before the Arbeidsrechtbank [Labour Tribunal] Antwerp, and the defendants, in their first conclusions, contested the basis of the actions brought against them. In their second conclusions, the Germany company contended that the Arbeidsrechtbank lacked jurisdiction on the ground that the contract of employment contained a clause which stated that any dispute relating to that contract was to fall within the exclusive jurisdiction of the court at Kleve in Germany.

On appeal the Arbeidshof Antwerp took the view that under Article 17 of the Convention, the parties to the contract of employment could confer territorial jurisdiction on the court at Kleve by derogating by a written clause of the contract from the rules on territorial jurisdiction contained in the Belgian Judicial Code.

However, the Arbeidshof considered that the German company could not rely on the prorogation clause because the contract of employment had to be drawn up in Dutch pursuant to the decree governing the use of languages in labour relations between employers and employees.

The first question

The first question reads as follows:

1 (a) Is Article 18 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters applicable if the parties have agreed to confer jurisdiction on a court within the meaning of Article 17?

(b) Is the rule on jurisdiction contained in Article 18 applicable if the defendant has not only contested jurisdiction but has in addition made submissions on the action itself?

(c) If it is, must jurisdiction then be contested in *limine litis*?

Article 17 is concerned with prorogation by agreement and Article 18 with implied prorogation as a result of the defendant's entering an appearance.

An examination of the provisions clearly shows that Article 18 of the Convention applies even where the parties have decided by agreement which court shall have jurisdiction within the meaning of Article 17. The second and third parts of the question are concerned with the case where the defendant has entered an appearance before the court within the meaning of Article 18 but challenges the jurisdiction of that court.

The Hof van Cassatie asks whether Article 18 applies where the defendant makes submissions both on the jurisdiction of the court seised and on the substance of the action.

The challenge to jurisdiction can have the effect attributed to it by Article 18 only if the plaintiff and the court seised are given formal notice in the defendant's first defence that the defence is to be understood as contesting the court's jurisdiction.

The second question

The second question is as follows:

2 (a) In application of Article 22 of the Convention can related actions which, had they been brought separately, would have had to be brought before courts of different Contracting States, be brought simultaneously before one of those courts, provided that the law of that court permits the consolidation of related actions and that court has jurisdiction over both actions?

(b) Is that also the case if the parties to one of the disputes which has given rise to the actions have agreed, in accordance with Article 17 of the Convention, that a court of another Contracting State is to have jurisdiction to settle that dispute?

Article 22 is intended to govern the outcome of related actions of which courts of different Member States are seised. It does not confer jurisdiction.

Question three

This question is worded as follows:

3. Does it conflict with Article 17 of the Convention to rule that an agreement conferring jurisdiction on a court is void if the document in which the agreement is contained is not drawn up in the language which is prescribed by the law of a Contracting State upon penalty or nullity and if the court of the State before which the agreement is relied upon is bound by that law to declare the document to be void of its own motion?

The Hof van Cassatie limited the question to the validity of an agreement conferring jurisdiction which the national law of the court seised renders void because it was written in a language other than that prescribed by that law.

In reply to the questions raised the Court of Justice ruled that:

1. Article 18 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters applies even where the parties have decided by agreement which court shall have jurisdiction within the meaning of Article 17 of that Convention.

2. Article 18 of the Convention of 27 September 1968 must be interpreted as meaning that the rule on jurisdiction which that provision lays down does not apply where the defendant not only challenges the court's jurisdiction but also makes submissions on the substance of the action, provided that the challenge to jurisdiction, if not preliminary to any defence of substance, is not made following the pleading which, under national procedural law, is considered to be the first defence addressed to the court seised.

3. Article 22 of the Convention of 27 September 1968 applies only where related actions are brought before courts of two or more Contracting States.

4. Article 17 of the Convention of 27 September 1968 must be interpreted as meaning that the law of a Contracting State cannot preclude the validity of an agreement conferring jurisdiction solely on the ground that the language used is not that which is prescribed by that law.

Judgment of 25 June 1981

Case 105/80

Desmedt v Commission of the European Communities

(Opinion delivered by Mr Advocate General Capotorti on 21 May 1981)

Officials - Staff Regulations - Conditions of Employment of Other Servants - Distinct fields of application - Appointment of member of the local staff as probationary official - End of previous employment relationships

The Staff Regulations and the Conditions of Employment of Other Servants each cover a clearly defined range of persons and it is not possible, except where there is an express derogation, for a servant to come simultaneously within the scope of both of those acts laid down by regulation.

It follows from those considerations that a member of the local staff who accepts an appointment as a probationary official is subject to the Staff Regulations alone, the application of which automatically terminates the relationship formerly governed by the Conditions of Employment of Other Servants without its being necessary for the employment relationships thereunder to be terminated expressly by the administration.

***

NOTE

The Tribunal du Travail [Labour Tribunal], Brussels, referred to the Court of Justice for a preliminary ruling a question seeking to determine the relationship between the Staff Regulations of Officials of the European Communities, and in particular Article 34 thereof, and the Conditions of Employment of Other Servants of the European Communities, in particular, Articles 79 to 81.

That question was raised in the course of proceedings pending before the Tribunal du Travail between the Commission of the European Communities and a former member of the local staff, who was appointed as a probationary official and dismissed at the end of his probationary period. The Court ruled that the status of a probationary official who is subject to the Staff Regulations of Officials of the European Communities and that of a member of the local staff who is subject to the Conditions of Employment of Other Servants of the European Communities are incompatible in the sense that the advancement of a member of the local staff to the status of probationary official automatically causes the provisions of the Conditions of Employment of Other Servants to cease to apply and, consequently, causes the contract of employment entered into on the basis thereof to cease to have effect.

ANALYTICAL TABLE

page

POWERS OF THE COURT

SOCIAL SECURITY FOR MIGRANT WORKERS

TAX PROVISIONS

GENERAL INFORMATION ON THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

A. TEXTS OF JUDGMENTS AND OPINIONS AND GENERAL INFORMATION

1. Judgments of the Court and opinions of Advocates General

Orders for offset copies, provided some are still available, may be made to the International Services Branch of the Court of Justice of the European Communities, Boîte Postale 1404, Luxembourg, on payment of a fixed charge of Bfr 100 for each document. Copies may no longer be available once the issue of the European Court Reports containing the required judgment or opinion of an Advocate General has been published.

Anyone showing he is already a subscriber to the Reports of Cases Before the Court may pay a subscription to receive offset copies in one or more of the Community languages.

The annual subscription will be the same as that for European Court Reports, namely Bfr 2 250 for each language.

Anyone who wishes to have a complete set of the Court's cases is invited to become a regular subscriber to the Reports of Cases Before the Court (see below).

2. Calendar of the sittings of the Court

The calendar of public sittings is drawn up each week. It may be altered and is therefore for information only.

This calendar may be obtained free of charge on request from the Court Registry.

B. OFFICIAL PUBLICATIONS

1. Reports of Cases Before the Court

The Reports of Cases Before the Court are the only authentic source for citations of judgments of the Court of Justice.

The volumes for 1954 to 1980 are published in Dutch, English, French, German and Italian.

The Danish edition of the volumes for 1954 to 1972 comprises a selection of judgments, opinions and summaries from the most important cases.

All judgments, opinions and summaries for the period 1973 to 1980 are published in their entirety in Danish.

The Reports of Cases Before the Court are on sale at the following addresses:

BELGIUM	Ets. Emile Bruylant, 67 Rue de la Régence, 1000 Bruxelles
DENMARK	J.H. Schultz - Boghandel, Møntergade 19, 1116 København K
FRANCE	Editions A. Pedone, 13 Rue Soufflot, 75005 Paris
:DERAL REPUBLIC OF GERMANY	Carl Heymann's Verlag, 18-32 Gereonstrasse, 5000 Köln 1
GREECE	
IRELAND	Stationery Office, Beggar's Bush, Dublin 4
ITALY	CEDAM - Casa Editrice Dott. A. Milani, 5 Via Jappelli, 35100 Padova (M 64194)
LUXEMBOURG	Office for Official Publications of the European Communities, 2985 Luxembourg
NETHERLANDS	N.V. Martinus Nijhoff, 9 Lange Voorhout, 's-Gravenhage
UNITED KINGDOM	Hammick, Sweet & Maxwell, 16 Newman Lane, Alton, Hants, GU 34 2PJ
OTHER COUNTRIES	Office for Official Publications of the European Communities, 2985 Luxembourg

2. Selected Instruments Relating to the Organization, Jurisdiction and Procedure of the Court

Orders, indicating the language required, should be addressed to the office for Official Publications of the European Communities, Boîte Postale 1003, Luxembourg.

C. GENERAL LEGAL INFORMATION AND DOCUMENTATION

I. Digest of case-law relating to the European Communities

The Court of Justice has commenced publication of the "Digest of case-law relating to the European Communities" which will present in systematic form all the case-law of the Court of Justice of the European Communities and also a sélection of decisions given by the courts of Member States. Its design follows that of the "Repertoire de la Jurisprudence relative aux Traités instituant les Communautés Européennes/Europäische Rechtsprechung" prepared by H.J. Eversen and H. Sperl until 1976 (English edition 1973 to 1976 by J. Usher). The Digest will be produced in all the languages of the Community. It will be published in loose-leaf binders and periodical supplements will be issued.

The Digest will be made up of four series, concerning the following fields, which will appear and may be purchased separately:

A Series : Cases before the Court of Justice of the European Communities, excluding matters dealt with in the C and D Series.

B Series : Cases before the courts of Member States, excluding matters dealt with in the D Series.

C Series: Cases before the Court of Justice of the European Communities concerning officials of the European Communities.

D Series : Cases before the Court of Justice of the European Communities and before the courts of Member States concerning the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. (This series replaces the "Synopsis of case-law" published in successive parts by the Documentation Branch of the Court which has now been discontinued).

The first part of the A Series will be published during 1982, starting with the French language edition. This part will contain the decisions of the Court of Justice of the European Communities given during the period 1977 to 1979. Periodical supplements will be published.

The first part of the D Series will appear in Autumn 1981.

It relates to the case-law of the Court of Justice of the European Communities from 1976 to 1979 and the case-law of courts of the Member States from 1973 to 1978. The first supplement will deal with the 1980 case-law of the Court of Justice and the 1979 case-law of national courts.

The price of the first part of the D Series (about 700 pages, binder included) is:

Bfr	2 000	Lit	63 000
Dkr	387	Hfl	136
FF	290	DM	123
Dr	3 000	£stg	26.60
£Ir	33.40	US$	55

The price of the subsequent parts will be fixed on the basis of the price of the first part.

Orders should be sent either to the Office for Official Publications of the European Communities, 5 Rue du Commerce, L-2985, Luxembourg, or to one of the addresses given under B1 above.

II. Publications by the Information Office of the Court of Justice of the European Communities

Applications to subscribe to the first three publications listed below may be sent to the Information Office, specifying the language required. They are supplied free of charge (Boîte Postale 1406, Luxembourg, Grand Duchy of Luxembourg).

1. Proceedings of the Court of Justice of the European Communities

Weekly information sheet on the legal proceedings of the Court containing a short summary of judgments delivered and a brief description of the opinions, the oral procedure and the cases brought during the previous week.

2. Information on the Court of Justice of the European Communities

Quarterly bulletin containing the summaries and a brief resume of the judgments delivered by the Court of Justice of the European Communities.

3. Annual Synopsis of the work of the Court of Justice of the European Communities

Annual publication giving a synopsis of the work of the Court of Justice of the European Communities in the area of case-law as well as of other activities (study courses for judges, visits, study groups, etc.). This publication contains much statistical information.

4. General information brochure on the Court of Justice of the European Communities

This brochure provides information on the organization, jurisdiction and composition of the Court of Justice of the European Communities. No Greek version is available.

The first three documents are published in all the official languages of the Community.

III. Publications by the Library of the Court of Justice

Bibliographical Bulletin of Community case-law

This Bulletin is the continuation of the Bibliography of European Case-law of which Supplement No. 6 appeared in 1976. The layout of the Bulletin is the same as that of the Bibliography. Footnotes therefore refer to the Bibliography.

The period of collection and compilation covered by the Bulletins which have already appeared is from February 1976 to June 1980 (multilingual).

No. / Currency	1977/1	1978/1	1978/2	1979/1	79/80
Bfr	100	100	100	100	100
FF	10	14	14.60	14.50	14.50
Lit	1 250	2 650	2 800	3 000	3 000
Hfl	7.25	7	6.90	6.85	6.80
DM	8	6.50	6.25	6.25	6.10
Dkr	16	17.25	18	19.50	20
£stg	1.10	1.70	1.60	1.50	1.30
£Ir	-	-	-	1.70	1.70

D. SUMMARY OF TYPES OF PROCEDURE BEFORE THE COURT OF JUSTICE

It will be remembered that under the Treaties a case may be brought before the Court of Justice either by a national court or tribunal with a view to determining the validity or interpretation of a provision of Community law, or directly by the Community institutions, Member States or private parties under the conditions laid down by the Treaties.

(a) References for preliminary rulings

The national court or tribunal submits to the Court of Justice questions relating to the validity or interpretation of a provision of Community law by means of a formal judicial document (decision, judgment or order) containing the wording of the question(s) which it wishes to refer to the Court of Justice. This document is sent by the Registry of the national court to the Registry of the Court of Justice, accompanied in appropriate cases by a file intended to inform the Court of Justice of the background and scope of the questions referred.

During a period of two months the Council, the Commission, the Member States and the parties to the national proceedings may submit observations or statements of case to the Court of Justice, after which they are summoned to a hearing at which they may submit oral observations, through their Agents in the case of the Council, the Commission and the Member State or through lawyers who are entitled to practise before a court of a Member State, or through university teachers who have a right of audience under Article 36 of the Rules of Procedure.

After the Advocate General has delivered his opinion, the judgment is given by the Court of Justice and transmitted to the national court through the Registries.

(b) Direct actions

Actions are brought before the Court by an application addressed by a lawyer to the Registrar (P.O. Box 1406, Luxembourg), by registered post.

Any lawyer who is entitled to practise before a court of a Member State or a professor occupying a chair of law in a university of a Member State, where the law of such State authorizes him to plead before its own courts, is qualified to appear before the Court of Justice.

The application must contain:

The name and permanent residence of the applicant;
The name of the party against whom the application is made;
The subject-matter of the dispute and the grounds on which the application is based;
The form of order sought by the applicant;
The nature of any evidence offered;
An address for service in the place where the Court of Justice has its seat, with an indication of the name of the person who is authorized and has expressed willingness to accept service.

The application should also be accompanied by the following documents:

The decision the annulment of which is sought, or, in the case of proceedings against an implied decision, by documentary evidence of the date on which the request to the institution in question was lodged;
A certificate that the lawyer is entitled to practise before a court of a Member State;
Where an applicant is a legal person governed by private law, the instrument or instruments constituting and regulating it, and proof that the authority granted to the applicant's lawyer has been properly conferred on him by someone authorized for the purpose.

The parties must choose an address for service in Luxembourg. In the case of the Governments of Member States, the address for service is normally that of their diplomatic representative accredited to the Government of the Grand Duchy. In the case of private parties (natural or legal persons) the address for service - which in fact is merely a "letter box" - may be that of a Luxembourg lawyer or any person enjoying their confidence.

The application is notified to the defendant by the Registry of the Court of Justice. It requires the submission of a statement of defence; these documents may be supplemented by a reply on the part of the applicant and finally a rejoinder on the part of the defendant.

The written procedure thus completed is followed by an oral hearing, at which the parties are represented by lawyers or agents (in the case of Community institutions or Member States).

After hearing the opinion of the Advocate General, the Court gives judgment. This is served on the parties by the Registry.

E. ORGANIZATION OF PUBLIC SITTINGS OF THE COURT

As a general rule sessions of the Court are held on Tuesdays, Wednesdays and Thursdays except during the Court's vacations - that is, from 22 December to 8 January, the week preceding and two weeks following Easter, and from 15 July to 15 September. There are three separate weeks during which the Court also does not sit : the week commencing on Carnival Monday, the week following Whitsun and the first week in November.

The full list of public holidays in Luxembourg set out below should also be noted. Visitors may attend public hearings of the Court or of the Chambers so far as the seating capacity will permit. No visitor may be present at cases heard in camera or during proceedings for the adoption of interim measures. Documentation will be handed out half an hour before the public sitting to visiting groups who have notified the Court of their intention to attend the sitting at least one month in advance.

Public holidays in Luxembourg

In addition to the Court's vacations mentioned above the Court of Justice is closed on the following days:

New Year's Day	1 January
Easter Monday	variable
Ascension Day	variable
Whit Monday	variable
May Day	1 May
Robert Schuman Memorial Day	9 May
Luxembourg National Day	23 June
Assumption	15 August
All Saints' Day	1 November
All Souls' Day	2 November
Christmas Eve	24 December
Christmas Day	25 December
Boxing Day	26 December
New Year's Eve	31 December

This Bulletin is distributed free of charge to judges, advocates and practising lawyers in general on application to one of the Information Offices of the European Communities at the following addresses:

I. COUNTRIES OF THE COMMUNITY

BELGIUM

73 Rue Archimède
1040 Brussels (Tel. 7350040)

DENMARK

4 Gammel Torv
Postbox 144
1004 Copenhagen (Tel. 144140)

FEDERAL REPUBLIC OF GERMANY

22 Zitelmannstrasse
5300 Bonn (Tel. 238041)

102 Kurfürstendamm
1000 Berlin 31 (Tel. 892 40 28)

FRANCE

61 Rue des Belles Feuilles
75782 Paris CEDEX 16 (Tel. 5015885)

GREECE

2, Vassilissis Sofias
T.K. 1602
Athens 134 (Tel. 743982)

IRELAND

39, Molesworth Street
Dublin 2 (Tel. 712244)

ITALY

29 Via Poli
00187 Rome (Tel. 6789722)

61 Corso Magenta
20100 Milan (Tel. 803171 ext. 210)

LUXEMBOURG

Jean Monnet Building
Centre Européen
Luxembourg-Kirchberg (Tel. 43011)

NETHERLANDS

29 Lange Voorhout
The Hague (Tel. 469326)

UNITED KINGDOM

20, Kensington Palace Gardens
London W8 4QQ (Tel. 7278090)

4, Cathedral Road
P.O. Box 15
Cardiff CF1 9SC (Tel. 371631)

7, Alva Street
Edinburgh EH2 4PH (Tel. 2252058)

Windsor House, Block 2, 7th floor
9/15 Bedford Street,
Belfast

II. NON-MEMBER COUNTRIES

CANADA

Inn of the Provinces
Office Tower (Suite 1110)
350 Sparks Street
Ottawa Ont. KIR 7S8
(Tel. (613) 2386464)

CHILE

1177 Avenida Ricardo Lyon
Casilla 10093
Santiago 9 (Tel. 250555)

JAPAN

Kowa 25 Building
8-7 Sanbancho
Chiyoda-Ku
Tokyo 102 (Tel. 2390441)

PORTUGAL

35 rua da Sacramento à Lapa
1200 Lisbon (Tel. 66 75 96)

SPAIN

Oficina de Prensa e Información CE
Centro Serrano 41, 5° Piso
Madrid 1

SWITZERLAND

Case Postale 195
37-39 Rue de Vermont
1211 Geneva 20 (Tel. 349750)

THAILAND

10th floor Thai Military Bank Building
34, Phya Thai Road
Bangkok (Tel. 282 1452)

TURKEY

13, Bogaz Sokak, Kavaklidere
Ankara (Tel. 276145)

USA

2100 M Street, NW, Suite 707
Washington DC 20037
(Tel. 202.8629500)

1, Dag Hammarskjöld Plaza
245 East 47th Street
New York NY 10017
(Tel. 212.3713804)

VENEZUELA

Quinta Bienvenida, Valle Arriba,
Calle Colibri, Distrito Sucre
Caracas (Tel. 925056)


OFFICE FOR OFFICIAL PUBLICATIONS
OF THE EUROPEAN COMMUNITIES

L - 2985 Luxembourg

Catalogue number: DY-AA-82-002-EN-C