

# Important Judgements Delivered by the Court of Justice of the European Communities During the Period 1 October 1996 – 1 March 1997

*Imelda Higgins and Jesper Svenningsen\**

*EIPA Antenna Luxembourg*

## I

Questions concerning the scope of the Francovich judgement continue to come before the Court, and the principle of **state liability** for breach of Community law was again discussed in *Joined Cases C-178/94, C-188/94, C-189/94 and C-190/94 Erich Dillenkofer and Others*, 8 October, 1996. In this case the Court considered that Germany was financially liable for failure to implement the Directive on package travel within the prescribed period. In its judgement, the Court repeated its previous ruling to the effect that where a Member State fails to take the measures necessary to implement a Directive within the specified time limits, that Member State has manifestly and gravely disregarded the limits of its discretion in the exercise of its rule-making powers. Such a breach gives rise to a right to reparation on the part of individuals if the result prescribed by the Directive entails the grant of rights to them, the content of those rights is identifiable on the basis of the provisions of the directive and a causal link exists between the breach of the State's obligation and the loss and damage suffered by the injured parties. It is not necessary to take any other conditions into consideration. As a result, two consumers were entitled to bring compensation actions against Germany for losses arising out of the insolvency of two operators from whom they had purchased a package holiday.

## II

With respect to the **free movement of goods**, case *C-313/94 Fratelli Graffione SNC v. Ditta Fransa*, 26 of November 1996, concerned the interpretation of Articles 30 and 36 of the EC Treaty and Article 12(2)(b) of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks. The Scott multinational group of companies had been prohibited from selling various products in Italy under the Cotonelle trade mark on the grounds that it might mislead consumers into thinking that the products in question actually contained cotton. However the Scott group continued to use the trade mark in France and Spain. Fransa, who owned a supermarket in Italy, continued to sell products under the Cotonelle trade mark and Graffione brought an action against them on the basis that Fransa was infringing rules on unfair competition. Graffione claimed that as a wholesaler he was placed at a competitive disadvantage

as he was prevented from obtaining products bearing the Cotonelle trade mark directly from Scott in Italy, while Fransa continued to import them from other Member States where the trade mark is still valid. In its judgement the Court considered that an injunction prohibiting the marketing of the products did constitute an obstacle to Community trade and if the marketing of the products under the trade mark was generally prohibited, then this constituted a barrier to the free movement of goods and it was necessary to establish whether it was justified in the interests of consumer protection. In this respect, the Court considered that the possibility of allowing a prohibition of marketing on account of the misleading nature of a trade mark is not, in principle, precluded by the fact that the same trade mark is not considered misleading in other Member States. Linguistic, cultural and social differences between the Member States may give rise to a situation in which a trade mark is liable to mislead consumers in one Member State but not in another. The Court considered that the Trade Mark Directive was not relevant to the principal issue in the case as Article 12(2) of that Directive leaves it to national law to determine whether and to what extent the use of a revoked trade mark may be prohibited.

The full Court delivered another judgement concerning the issue of patent protection under Community law in *Joined Cases C-267/95 and C-268/95, Merckx & Co v. Primecrown and Beecham Group plc v. Europharm Ltd*, of 5 December last. This case concerned the extent to which a patent holder may oppose parallel imports of a drug in cases where those imports come from a Member State where their products are marketed but are not patentable. One of the questions put to the Court concerned the scope of the rule in *Case 187/80 Merckx v. Stephar and Exler* 1981 ECR 2063, in which the Court held that an owner of a patent protected by the legislation of a Member State may not rely on that legislation to oppose the importation of a product which has been lawfully put on the market in another Member State by the owner of the patent, even where the product was not patentable in the Member State concerned. Merckx and Beecham argued that this principle should be either over-ruled or restricted in the light of new circumstances. However the Court considered that the ruling in *Merckx v. Stephar and Exler* was still valid. While the Court admitted that certain circumstances had changed, it was nevertheless of the opinion that if a patentee could prohibit the importation of protected products marketed in another Member State by him or with his consent, he would be able to partition national

\* Respectively Lecturer and Senior Lecturer.

markets and thereby restrict trade between the Member States. The Court pointed out that if a patentee decides to put a product on the market in a Member State where it is not patentable, he must accept the consequences of his choice as regards the possibility of parallel imports. It seems that the Court was partially influenced by the fact that the situation addressed in the *Merckx* case is set to disappear as pharmaceutical products are now patentable in all the Member States.

Another question addressed in the case concerned how far the *Merckx* case applies where patentees are legally obliged to market their products in the exporting State. The Court pointed out that in such a case, the patentee cannot be deemed to have consented to the marketing of the products concerned and is therefore entitled to oppose the importation and exportation of those products in the State where they are protected. However there must be a genuine existing obligation to market the product concerned in the exporting State. On the other hand, the Court ruled that *Merckx* does apply to situations where ethical obligations compel patentees to provide supplies of drugs even where they are not patentable. The Court considered that such considerations are not such as to make it possible to properly identify the situation in which the patentee is deprived of his power to decide freely how he will market his product.

Another interesting case concerning the free circulation of medicinal products occurred in *Case C-201/94, The Queen v. The Medicines Control Agency, ex parte Smith & Nephew Pharmaceuticals Ltd and between Primecrown Ltd and The Medicines Control Agency* which was decided on the 12 of November 1996. This case concerned the interpretation of Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products and of the obligations associated with the authorisation of proprietary medicinal products. However, it is not intended to discuss this case in the context of the present article.

### III

One of the most controversial cases which has come before the Court in this period concerned EC **Labour Law**. In *Case C-84/94 United Kingdom v. Council*, 12 November, 1996, which concerned the so-called Working Time Directive (OJ 1993 L 307, P. 18), the UK brought a 173 action against the Council seeking annulment of the Directive on the basis that it was adopted on the incorrect legal basis. The Directive was adopted on the basis of Article 118a, and the UK claimed that it should have been adopted on the basis of Article 100 of the EC Treaty or Article 235. After a detailed analysis of the working of Article 118a and of the objectives of the Directive, the Court concluded that it had been adopted on the correct legal basis. Moreover, the Court expressly stated that neither Article 100 nor Article 100a could have constituted an appropriate legal basis. However, the most interesting aspect of the case

was not the judgement itself but rather the reaction of the UK government. Following the announcement of the ruling, John Major indicated that London would ask for the legislation to be modified in the framework of the IGC. The British Prime Minister also indicated that the UK would block any agreement on the reform of the EU if the changes to the Treaties called for by London were not accepted.

### IV

Two rulings of interest were handed down in the area of **social security law**. In *Joined Cases C-245/94 and C-312/94 Hoefer and Zachow v. Land Nordrhein-Westfalen*, 10 October, 1996, the Court was asked whether a child-raising allowance can be treated as a family benefit within the meaning of Article 4(1)(h) of Regulation No. 1408/71. In response to this question, the Court reiterated previous case-law to the effect that a benefit is to be regarded as a social security benefit if it is granted to recipients without any individual and discretionary assessment of personal needs on the basis of a legally defined position and if it concerns one of the risks expressly listed in Article 4 (1) of Regulation No 1408/71. The child-raising allowance in question therefore fell within the Regulation as it constituted a legally defined right and was granted automatically to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs.

Another question put to the Court concerned the *rationae personae* of the Regulation. Neither Mrs. Hoefer nor Mrs Zachow were covered by the Regulation themselves, however both their husbands were. It was therefore argued that they could not rely on the Directive by virtue of the judgement in *Case 40/76 Kermaschek* 1976 ECR 1669, where the Court ruled that members of a worker's family can only claim derived rights under the Regulation. In response to this claim, the Court pointed out that the scope of the rule in *Kermaschek* was limited in *Case C-308/93 Cabanis-Issarte*, 30 April 1996, where the Court held that the former case was limited to cases in which a member of a worker's family relies on provisions of Regulation 1408/71 which are applicable solely to workers and not to members of their families. The Court considered that this was not the case with Article 73 of the Regulation, the precise purpose of which is to guarantee members of the family residing in a Member State other than the competent State the grant of the family benefits provided by the applicable legislation. The Court concluded that the distinction between personal rights and derived rights does not in principle apply to family benefits.

### V

The second case concerned Directive 79/7 and the issue of equal treatment for men and women in matters of social security. In case *C-77/95 Bruna-Alessandra Züchner* 7 November, 1996, the Court was presented with an ingenious argument aimed at extending the

personal scope of application of the Directive. The case concerned the wife of a paraplegic who provided him with both therapeutic treatment and general care and home nursing. She claimed that she should be considered as a member of the working population since she provided care for which she had to undergo training and which, by virtue of its nature and scope, could be assimilated to an occupational activity. If she did not provide such care, it would have to be provided by someone else against payment, or in a hospital. The Court however refused to accept this interpretation. In the first place, it pointed out that the term ‘activity’ included in Article 2 of the Directive can only be construed as referring to an activity undertaken in return for remuneration. In addition, it was of the opinion that to adopt the proposed interpretation would have the effect of infinitely extending the scope of the Directive. In this respect the Court pointed out that the education of children, housework, and the management of private property are all activities which require a degree of competence and must be provided by an outside agency in return for remuneration if there is no one else who will do so without payment.

## VI

In the area of **environmental law**, the Court was asked to interpret the scope of application of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment (Environmental Impact Assessment Directive). Thus in *Case C-72/95, Aannemerbedrijf P.K Kraaijeveld BV v. Gedeputeerde Staten an Zuid-Holland* 24 October, 1996, the Court was asked whether the expression ‘canalisation and flood relief works’ covers certain types of work on a dyke running alongside a waterway. The Court considered that such work was covered by the Directive despite the divergences existing in the different language versions. In this respect the Court considered that in situations where there are differences between the various versions of a Directive, it is necessary to interpret the Directive in accordance with the purpose and context of the rules of which it forms part. The Court pointed out that it was clear from Art 3 that the Directive was intended to have a wide scope and a broad purpose and consequently the Court concluded that dyke works were covered.

Various other cases in the area of environmental law concerned actions against Member States for failure to implement various environmental directives within the prescribed periods.

## VII

In *Case C-73/95, Viho Europe v. Commission*, 24 October, 1996 the Court upheld a ruling of the Court of First Instance concerning the application of Article 85 (1) to conduct which occurred within a group of companies. The Court considered the company concerned (Parker) and its subsidiaries formed a single economic unit and that the subsidiaries did not enjoy

any real autonomy in determining their course of action in the market but merely carried out the instructions issued by the parent company controlling them. The fact that Parker’s distribution policy, according to which its subsidiaries were required to restrict the distribution of Parker products to their allocated territories, had the effect of dividing the various national markets and was capable of producing effects outside the Parker group, was not sufficient to make Article 85 (1) applicable.

## VIII

*Case C-311/94 Ijssel – Vliet Combinatie BV v. Minister van Economische Zaken*, 15 October, 1996, concerned the field of **state aid law**. The case arose because the Ministry for Economic Affairs refused an application for a subsidy for the construction of a fishing vessel. This refusal was challenged in the national courts, and a reference was made to the Court of Justice. The first question sought to establish whether the Commission, when exercising its powers under Arts 92 and 93 of the Treaty, can adopt guidelines requiring compliance, not only with the competition rules but also with those relating to the common fisheries policy, even when the Council has not expressly authorised it to do so. The Court considered that not only was the Commission entitled to take account of considerations relating to the common fisheries policy when assessing whether aid in the fisheries sector is compatible with the common market, it was essential for it to do so. In response to the second question posed by the national court, the Court of Justice went on to say that the guidelines issued by the Commission must be taken into consideration by the Member States when deciding on an application for aid for the construction of a vessel intended for fishing and that the Guidelines are binding on the Member States.

## IX

The Court was called upon to interpret the Second Council Directive (77/91/EEC) in *Case C-42/95 Siemens AG v. Henry Nold*, 19 November, 1996. Essentially the national court wished to know whether the Second Directive, and in particular Article 29 (1) and (4), precludes a Member State’s domestic law from granting a right of pre-emption to shareholders in the event of an increase in capital by consideration in kind and from subjecting the legality of a decision withdrawing the right of pre-emption to a substantive review. Article 29 (1) of the Directive provides that whenever capital is increased by consideration in cash, the shares must be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares. Article 29 (4) authorises the general meeting in certain circumstances to decide to restrict or withdraw that right. In its judgement, the Court of Justice, first emphasised that the Second Directive seeks to set out a minimum equivalent protection for both shareholders and creditors of public limited liability companies. The Court then pointed out that the fact that the provision only applies to cases in which the capital is increased by

consideration in cash does not mean that the Community legislator elected to restrict the shareholders right of pre-emption to such cases, thereby precluding Member States from extending it also to increases in capital by consideration in kind. On the contrary, the fact that the Second Directive does not deal with this situation means the Member States remain at liberty to provide or not to provide for a right of pre-emption in such a case.

## X

In cases *C-317/94, Elida Gibbs v. Commissioners of Customs and Excise* and *Case C-288/94 Argos Distributors v. Commissioners of Customs and Excise*, which were both decided on the 24 October 1996, the Court confirmed the principle that **value added tax** may only be charged on the actual payment made by the consumer. The use of different voucher schemes such as money-off and cash back vouchers means that only the value of the goods or services actually received are taxable. The Court considered that the fiscal consideration is a 'subjective' value (the money actually received in each case) and not a value estimated according to objective criteria.

Other interesting cases include: Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit International BV, VITIC Amsterdam BV and Voormeer BV v. Bundesamt für Finanzen* of the 17 October 1996, which concerned the interpretation of Articles 3 and 5 of Council Directive 90/435 of 23 July 1990 on the **common system of taxation** applicable in the case of parent companies and subsidiaries of different Member States.

## XI

The **Brussels convention** was interpreted in *Case C-383/95 Ruten v Cross Medical Ltd* which was decided on 9 January last. Article 5(1) of the Convention provides that in matters relating to a contract, a person domiciled in one Contracting State may be sued in another Contracting State. Employers may be sued in the place where the employee habitually carries out his work or, if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is situated. In relation to this Article, the Court ruled that where an employee carries out his work in several Contracting States, the place where he habitually carries out his work is the place where he has established the effective centre of his working activities.

In *Case C-78/95 Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH* which was decided on the 10 October 1996, the Court of Justice was asked to consider Article 27 (2) of the Brussels Convention. This Article provides that a judgement will not be recognised where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence. The Court was asked whether

this Article applies in a case where the defendants were represented by a lawyer, but the lawyer concerned was not authorised by the defendants to appear on their behalf. The Court held that in such a case the defendant must be regarded as a defendant in default of appearance within the meaning of Article 27 (2) of the Convention.

## XII

The Court has been called upon to interpret the **principle of legitimate expectation** in a number of cases. This principle was again at issue in *Case T-336/94, Effisol v. Commission* which was decided on the 16 October, 1996. This case concerned a company which was issued an import quota for the chemical product CFC 11 but was subsequently refused an import licence. The company claimed damages from the Commission for breach of the principle of legitimate expectation. The Court of First Instance held, in accordance with previous case-law, that while an individual may rely on this principle in situations in which the Community institutions have led him to entertain justified expectations this is not the case 'if a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests. The company was consequently refused damages on the basis that the issuing of the import quota and the issuing of a licence were two independent stages and the company was not justified in assuming that because they had obtained a quota, they would also obtain a licence.

## XIII

*Case C-143795 P. Commission v. Socurte* was decided on 9 January 1997. This case concerned the extent of notification which is required before the time limit for an **annulment action** starts to run. Although the Commission argued that it is sufficient for the two month period to start if the parties receive information from which the existence of a decision can be inferred, the Court of Justice upheld the Court of First Instance's ruling to the effect that notification necessarily involves the communication of a detailed account of the contents of the measure notified and of the reasons upon which it is based.

## XIV

Finally it is of interest to note that on 9 December 1996, the Court of Justice issued a **Note for Guidance on References by National Courts for Preliminary Rulings**. In point 6 of this Note, the Court states that an order for reference should include: a statement of the facts which are essential to a full understanding of the legal significance of the main proceedings; an exposition of the national law which may be applicable; a statement of the reasons which prompted the reference; and, where appropriate, a summary of the arguments of the parties. □