ANNEX VI

APPLICATION OF COMMUNITY LAW BY THE NATIONAL COURTS : A SURVEY

1. Application of Article 234 of the EC Treaty[1]

In 2001, 237 requests for preliminary rulings were made by the national courts to the Court of Justice of the European Communities (hereinafter referred to as "the Court of Justice") in cases where difficulties arose in the interpretation of Community law or where there were doubts as to the validity of Community instruments.

When such references are recorded at the Court of Justice Registry, they are published in full in the Official Journal of the European Communities. The table below shows the number of references from each Member State over the last 11 years.[2]

Number of references per Member State

	Year										
	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Belgium	16	22	19	14	30	19	12	13	15	10	18
Denmark	3	7	4	8	4	7	7	3	3	5	8
Germany	62	57	44	51	66	46	49	49	47	53	59
Greece	1	5	-	10	4	2	5	3	3	4	7
Spain	5	7	13	10	6	9	55	4	5	4	3
France	15	22	36	43	24	10	16	17	12	15	8
Ireland	-	1	2	3	-	1	3	2	2	1	-
Italy	22	24	46	58	70	50	39	43	50	40	37
Luxembourg	1	1	1	2	2	3	2	4	-	2	4
Netherlands	18	43	13	19	10	24	21	23	12	14	12
Austria				2	6	35	16	56	31	57	31
Portugal	1	3	1	5	6	2	7	7	8	4	3
Finland				-	3	6	2	4	5	3	7
Sweden				6	4	7	6	5	4	4	5
United Kingdom	15	12	24	20	21	18	24	22	26	21	14
Benelux	-	-	-	-	-	-	-	-	1	-	-
Total	162	204	203	251	256	239	264	255	224	237	216

[1] The Commission will here follow the practice of the Court of Justice in its citation of the Articles of the Treaty establishing the European Community. Where there is a reference to the Treaty in its form before the entry into force of the Treaty of Amsterdam of 1 May 1999 the number of the Article is followed by the words "of the EC Treaty"; where there is a reference to the Treaty in its form after the entry into force of the Treaty of Amsterdam of 1 May 1999, the number of the Article is followed by the words "EC".

[2] The reports for 1996 to 1999 were published in OJ C 332, 3.11.1997, p. 198, OJ C 250, 10.8.1998, p. 195, OJ C 354, 7.12.1999, p. 182, and OJ C 192, 30.1.2001, p. 192. The reports for 2000 and 2001 are accessible on the Commission's website at (http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm).

After an increase in the number of cases following the 1995 accessions, the number of references has remained relatively stable. The courts of all the Member States referred questions to the Court of Justice. Those 216 cases constituted 45% of the 477 cases brought before the Court of Justice in 2002. The table below shows the number of references from courts of final instance in each Member State and identifies the referring courts.

Origin and number of references by courts of final instance in 2002, by Member State

Belgium	Court of Cassation	5
	Conseil d'Etat	5
	Other courts	8
Denmark	Højesteret	1
	Other courts	7
Germany	Bundesgerichtshof	3
	Bundesverwaltungsgericht	4
	Bundesfinanzhof	13
	Bundessozialgericht	4
	Other courts	35
Greece	Other courts	7
Spain	Tribunal Supremo	2
	Other courts	1
France	Court of Cassation	2
	Conseil d'État	3
	Other courts	3
Ireland	-	-
Italy	Corte suprema di cassazione	5
	Other courts	32
Luxembourg	Cour administrative	1
	Other courts	3
Netherlands	Raad van State	1
	Hoge Raad	6
	College van Beroep voor het Bedrijfsleven	1
	Other courts	4
Austria	Bundesvergabeamt	3
	Oberster Gerichtshof	12
	Verwaltungsgerichtshof	5
	Other courts	11
Portugal	Supremo Tribunal Administrativo	1
	Other courts	2
Finland	Korkein Hallinto-oikeus	3
	Korkein oikeus	2

	Other courts	2
Sweden	Högsta Domstolen Regeringsrätten Other courts	1 1 3
United Kingdom	House of Lords Court of Appeal Other courts	2 3 9

2. Significant decisions by national courts and the European Court of Human Rights

2.1. *Introduction*

This analysis reviews the account taken of Community law by national courts and the European Court of Human Rights. Unlike analyses undertaken in previous years, it is accordingly not restricted to the rulings of supreme courts; national courts at first instance are now called on to apply the relevant provisions of Community law.

The Commission has again had access to data compiled by the Research and Documentation Directorate and Computing Division of the Court of Justice; nevertheless, it is the Commission that has drawn up this report. Each year, some 1 200 judgments relating to Community law come to the attention of the Research and Documentation Directorate.

2.2. *The research*

Research was carried out on judgments first delivered or published in 1999 concerning the following questions:

a. i. Were there cases where decisions against which there was no appeal were taken without a reference for a preliminary ruling even though they turned on a point of Community law whose interpretation was less than perfectly obvious?

ii. Were there any other decisions regarding preliminary rulings that merit attention?

b. Were there cases where courts, contrary to the rule in Case 314/85 Foto-Frost,[3] declared an act of a Community institution to be invalid?

c. Were there any decisions that applied the rulings given in *Francovich*, *Factortame* and *Brasserie du Pêcheur*?

d. Were there any decisions that were noteworthy as setting good or bad examples?

3 Case 314/85 *Foto-Frost* [1987] ECR 4199 (judgment given on 22.10.1987).

Question 1

In Germany, several courts decided that there was no need for a reference to the Court of Justice on the basis of the doctrine of the "acte clair".[4] The Bundesfinanzhof, for instance, gave a judgment[5] on the application of the progressive income tax rate. A worker had received income both in Germany and, following relocation, in the Netherlands in the same year. The German tax administration argued that, although income received in another Member State during the relevant tax year but after the relocation was not taxable as such in Germany, account had to be taken of it for income tax purposes to establish the tax bracket within which the income received in Germany was to fall. The Bundesfinanzhof held that this determination of the progressive tax bracket was not contrary to Community law. In particular, Article 48(1) (now Article 39(1)) of the EC Treaty did not preclude this, since income in Germany et the Netherlands was taxed only once and the German tax was not higher than the tax that would have been payable by a worker who had remained in Germany throughout the tax year. Referring to the judgment given by the Court of Justice on 27 June 1996,[6] the Bundesfinanzhof held that the legal situation raised no doubts and that there was accordingly no need for a reference to the Court of Justice.

In the same judgment the Bundesfinanzhof referred to the judgment given by the Court of Justice on 14 September 1999,[7] whereby Article 48(2) of the EC Treaty (now, after amendment, Article 39(2) EC) is to be interpreted as not precluding the application of a Member State's legislation under which resident married couples are granted favourable tax treatment such as that under the splitting procedure whilst the same treatment of non-resident married couples is made subject to the condition that at least 90% of their total income must be subject to tax in that Member State or, if that percentage is not reached, that their income from foreign sources not subject to tax in that State must not be above a certain ceiling, thus maintaining the possibility for account to be taken of their personal and family circumstances in the State of residence. The Bundesfinanzhof concluded that the same would apply where only one of the spouses resided in Germany and the other in another Member State. The Bundesfinanzhof considered that the legal situation was clear enough to release it from the need to refer the question to the Court of Justice.

A similar judgment by the Bundesfinanzhof of 21 March 2002[8] concerns a German exporter who had exported livestock to third countries. The exported livestock died outside Community customs territory on account of its poor state of health, before being put on the market in the third country of destination but after customs formalities and payment of the export refund. The relevant German authorities thereupon called for repayment of the export refund. The Bundesfinanzhof, on the other hand, held that the payment of export refunds was conditional on customs formalities being actually completed in good and due form. While the release of the product on the market in the third country can be an additional condition for the grant of refunds, but it does not warrant the repayment of refunds by an exporter to whom they have been paid.

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4 Judgment of 6 October 1982 Case 283/81 *CILFIT* [1982] ECR 3415.

5 Judgment of 15 May 2002, Az I R 40/01, Der Betrieb 2002, p. 1743 et seq.

6 Judgment of 27 June 1996, Case C-107/94 *Asscher* [1996] ECR I-3089. The Bundesfinanzhof cites paras 46 et seq. (Bundesfinanzhof, judgment cited, Der Betrieb 2002, p. 1744, footnotes 3 and 4).

7 Judgment of 14 September 1999 Case C-391/97 *Gschwind* [1999] ECR I-5451.

8 Az. VII R 35/01, Recht der internationalen Wirtschaft 2002, p. 644.

The Bundesfinanzhof accordingly held that the customs administration could not rely on an argument that there was a loss of entitlement to export refunds and could not require the exporter to repay refunds already received. Since in the light of the law as stated by the Court of Justice[9] there was no doubt as to the possible or divergent interpretation of the Community rule, the Bundesfinanzhof declined to refer the question to the Court.

Still in Germany, regarding the obligation to refer, the Bundesarbeitsgericht had before it the question whether an employer managing a private school and a boarding school was acting contrary to the principle of equal treatment in paying a supplementary retirement pension only to people employed in the private school. The Bundesarbeitsgericht held on 19 June 2001[10] that this different treatment could be justified by the fact that the supplementary retirement pension for employees of the private school was substantially refinanced by the State under the Ersatzschulfinanzgesetz[11] whereas the employer has to pay the full pension for employees of the boarding school. The Bundesarbeitsgericht expressly rejected the applicant's request that this question be referred to the Court of Justice on the ground that in Community law there was no general principle of equal treatment and that in the instant case there was no evidence of any violation of Article 141 EC. It therefore concluded that there was no need for a decision from the Court of Justice to found its own judgment.

In two further judgments given on 11 July 2002 the Bundesgerichtshof considered that the Community rules were clear enough and declined to refer to the Court of Justice.[12] The cases concerned the distinction between medicines and in one case foodstuffs and in the other dietary supplements. Referring to the definition of medicine in the second paragraph of Article 1 of Directive 65/65/EEC[13] and the case-law of the Court of Justice,[14] the Bundesgerichtshof held that the concept of medicine must be interpreted broadly enough to cover all substances capable of affecting the actual functioning of the human organism. It observed that it was for the national authorities, subject to judicial review, to determine whether, given its composition, the potential risks generated by long-term consumption or its side-effects and, more generally, its overall characteristics, including its composition, its pharmacological properties as demonstrated by the current state of scientific knowledge, the mode of administration , the extent of its distribution, consumers' familiarity with it and the potential risks from using it, a product was or was not a medicine. The Bundesgerichtshof held that the entry into

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9 Judgment of 14 December 2000 Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569.

10 Bundesarbeitsgericht, Judgment of 19 June 2001, 3 AZR 557/00, Der Betrieb 2002, p. 436.

11 Land Nordrhein-Westfalen Act on the financing of private schools recognised by the Land, Ersatzschulfinanzgesetz NRW.

12 Bundesgerichtshof, Judgment of 11 July 2002, I ZR 273/99 (Sportlernahrung), Zeitschrift für das gesamte Lebensmittelrecht 2002, p. 660 et seq.; Judgment of 11 July 2002, I ZR 34/01(Muskelaufbaupräparate), Wettbewerb in Recht und Praxis 2002, p. 1141 et seq.

13 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, OJ 22, 9.2.1965, p. 369. Article 1(2) provides that medicines include any substance or combination of substances presented for treating or preventing disease in human beings or animals. Any substance or combination of substances which may be administered to human beings or animals with a view to making a medical diagnosis or to restoring, correcting or modifying physiological functions in human beings or in animals is likewise considered a medicinal product.

14 Judgment of 21 mars 1991 Case C-369/88 *Delattre*, [1991] ECR I-1487; Judgment of 20 May 1992 Case C-290/90 *Commission v Germany* [1992] ECR I-3317.

force of Regulation No 178/2002[15] laying down the general principles and requirements of food law had no impact on the demarcation line between foodstuffs and medicines as the Regulation merely introduced the concept of medicine as defined by Directive 65/65 into food law. There was no need to refer to the Court of Justice.[16]

Still in Germany, the Bundessozialgericht gave judgment on 9 October 2001[17] in a case concerning the reimbursement by a statutory health-care insurance scheme of medical expenses incurred in another Member State. A German national, without seeking prior authorisation from the German scheme, has received out-patient treatment in Belgium involving radiation therapy using radioactive iodine. In Germany the Radiation Protection Regulation (Strahlenschutzverordnung)[18] and a directive on radiation protection in medical matters[19] allow this form of radiation therapy only on an in-patient basis with hospitalisation for at least 48 hours on health protection grounds. Acting on the basis of the German regulation and Book V of the Welfare Code[20] - the authorities refused to reimburse the costs of the therapy. The patient challenged their decision, arguing that it was contrary to Community law. But the Bundessozialgericht dismissed the action without referring to the Court of Justice. In accordance with section 16 of Book V of the Welfare Code, entitlement to benefits is suspended when insured persons are abroad. There is an exception under section 18, whereby the health-care insurance scheme can the costs of care abroad where in the general state of medical knowledge treatment for a disorder is only possible abroad. The Bundessozialgericht held that the derogation in section 18 was not available as the requisite radiation therapies could be had in Germany. The fact that out-patient treatment was not possible in Germany did not mean that the therapy was only possible abroad. The refusal under German law to reimburse health-care costs incurred in Belgium was not contrary to Community law. The Bundessozialgericht held that the German rules on the basis of which reimbursement was refused did not constitute a barrier to freedom to provide services as they did not preclude the provision of the service as such in Belgium. They merely required a specific condition for the service, namely in-patient treatment. There were overriding radiation protection considerations in support of this as the protection was not so much for the actual patients as for others coming into contact with them. Moreover, even if Community law itself provided for health protection against the risks of ionising radiation,[21] that did not preclude Member States from adopting even stricter rules.[22]

A second series of judgments given by German courts emphasises the importance of preliminary rulings under Article 234 EC as an integral part of the German legal system. Regarding the importance of Article 234 EC in the German national legal order and the exclusive jurisdiction of the Court of

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15 Parliament and Council Regulation (EC) No 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31, 1.2.2002, p. 1.

16 This implicit decision of the Bundesgerichtshof has been criticised by D. Gorny, note to the judgment of the Bundesgerichtshof of 11 July 2002, I ZR 273/99, Zeitschrift für das gesamte Lebensmittelrecht 2002, p. 660.

17 Bundessozialgericht, Judgment of 9 October 2001, B 1 KR 26/99 R, Sammlung der Entscheidungen aus dem Sozialrecht 2002, p. 301.

18 Verordnung über den Schutz vor Schäden durch ionisierende Strahlen of 30 July 1989, Bundesgesetzblatt 1989 I, p. 1926.

19 Richtlinie Strahlenschutz in der Medizin of 14 October 1992, Bundesminister für Umwelt, Naturschutz und Reaktorsicherheit.

20 Sozialgesetzbuch V - Gesetzliche Krankenversicherung (ci-après le “SGB V”).

21 Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation, OJ L 159, p. 1.

22 Judgment of 25 November 1992 Case C-376/90 *Commission v Belgium* [1992] ECR I-6175, points 20 et seq.

Justice to interpret Community law, an Order of the Bundesverfassungsgericht given on 30 January 2002[23] concerning the consequences of a decision by a national court to refrain from referring a question to the Court of Justice for a preliminary ruling. The Bundesverfassungsgericht was hearing a constitutional action against a decision of an Oberlandesgericht which had held that the marketing of cough sweets under the name "biobronch" was not contrary to Article 2 of Regulation No 2092/91.[24] The applicant raised the question whether that court had violated the second sentence of Article 101(1) of the German Basic Law by not asking the Court of Justice for a preliminary ruling on the interpretation of the Article. Article 101 provides that no-one may be removed from the jurisdiction of his lawful judge. The Bundesverfassungsgericht has constantly held that the Court of Justice of the European Communities is within the definition of the "lawful judge".[25] Consequently, violation of the obligation to seek a preliminary ruling under Article 234 CE by a German court against whose judgments there is no appeal is also a violation of the German Basic Law. But the Bundesverfassungsgericht stated that all it could do was check whether the application of Article 234 EC by the national court was manifestly unjustifiable,[26] and in particular whether the court had totally violated its obligation to refer. On the basis of the case-law of the Court of Justice to the effect that it had no jurisdiction to apply the rules of Community law to a specific case but solely to supply the basis for the interpretation of Community law,[27] the Bundesverfassungsgericht added that a constitutional action relating to the violation of the obligation to refer must make clear whether the action concerns the interpretation of Community law rather than a question of application of a Community rule to the individual case. Where the applicant fails to do this, as in the instant case, the constitutional action must be dismissed as inadmissible.

On the same question, the Bundesgerichtshof, in an Order made 6 June 2002,[28] ruled on its jurisdiction to interpret the Convention Implementing the Schengen Agreement of 19 June 1990 and the question whether there was an obligation to seek a preliminary ruling from the Court of Justice on the interpretation of it. The action before it was for an interpretation, an action serving to secure the uniformity of German law. The referring court, against whose decision there was no appeal, asked whether the concept of "interruption of limitation periods" for the purposes of Article 62(1) of the Implementing Convention included periods during which limitation was suspended. The Bundesgerichtshof held that only the Court of Justice had jurisdiction to interpret the Implementing Convention and accordingly declined to act on the reference. The Bundesgerichtshof stated that under section 1(2) of the Act governing requests for preliminary rulings from the Court of Justice in matters of police and judicial cooperation,[29] a court against whose decisions there is no appeal in domestic law must refer to the Court of Justice whenever a question of interpretation of the Implementing

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23 Bundesverfassungsgericht, Order of 30 January 2002, 1 BvR 1542/00, Neue Juristische Wochenschrift 2002, p. 1486.

24 Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs, OJ L 198, p. 1.

25 Cf. Bundesverfassungsgericht, Judgment of 22 October 1986, 2 BvR 197/83 (Solange II); Entscheidungen des Bundesverfassungsgerichtes ("BVerfGE") Bd.73, p. 339 et seq. = NJW 1987, p. 577 et seq.; Bundesverfassungsgericht, Judgment of 31 May 1990, 2 BvL 12/88, 2 BvL 13/88, 2 BvL 1436/87, BVerfGE Bd.82, p. 159 et seq.

26 "... ob die Zuständigkeitsregel in offensichtlich unhaltbarer Weise gehandhabt worden ist."

27 Judgment of 24 September 1987 Case 37/86 *Coenen* [1987] ECR 3604.

28 Bundesgerichtshof, Order of 6 June 2002, 4 ARs 3/02, Neue Juristische Wochenschrift 2002, p. 2653 et seq.

29 Gesetz betreffend die Anrufung des Gerichtshofes der Europäischen Gemeinschaften im Wege des Vorabentscheidungsverfahrens auf dem Gebiet der polizeilichen Zusammenarbeit und der justiziellen Zusammenarbeit in Strafsachen nach Artikel 35 des EU-Vertrages du 6 août 1998 ("EuGH-Gesetz"), Bundesgesetzblatt 1998 I, n° 50, p. 2035.

Convention is raised and the national court considers that an answer to the question is necessary for its judgment. The Bundesgerichtshof went on to state that Article 62 of the Implementing Convention was based on Articles 31(b) and 34 of the Treaty on European Union. The jurisdiction of the Court of Justice under Article 35 of that Treaty, on the basis of Article 2(1) of the Protocol integrating the Schengen acquis in the European Union, was not confined to conventions concluded after the Amsterdam Treaty. It therefore included the Implementing Convention of 19 June 1990. This exclusive jurisdiction of the Court of Justice had been accepted by Germany with the enactment of the European Court of Justice Act, giving effect to Article 35(1) of the Treaty on European Union.

In Spain, the Tribunal Supremo, giving judgment on 7 March 2002,[30] declined to refer a question for a preliminary ruling on the interpretation of Article 17 of the Sixth VAT Directive[31] read with section 33.1.2º of the former Spanish VAT Act of 1985[32] and section 62.1.2º of its implementing regulation.[33] These provisions excluded the right to deduct VAT on transport or travel services for taxable persons, their staff or other persons, even if the services were used for business purposes. The applicant company wished the Court of Justice to be asked for a preliminary ruling on the compatibility of this exclusion with Article 17 of the Sixth Directive, which allows the deduction "in so far as the goods and services are used for the purposes of ... taxable transactions", as regards "goods or services supplied or to be supplied ... by another taxable person".

The Tribunal Supremo ruled on the compatibility of this exclusion with Article 17 of the Directive. It proceeded on the basis of two arguments. First, it held that Article 17 of the Directive was not directly applicable as the national legislature enjoyed a certain discretion in applying it and paragraph 6 gave the council four years from entry into force to determine the expenses that would not be deductible. Second, the Tribunal Supremo applied the final subparagraph of paragraph 6, whereby "Until the above rules come into force, Member States may retain all the exclusions provided for under their national laws when this Directive comes into force", the Spanish VAT Act having been enacted in 1985, before Spain acceded to the Communities and before the Sixth Directive entered into force in Spain on 1 January 1986.

The Tribunal Supremo also refused to put a question to the Court of Justice for a preliminary ruling on the ground that the obligations imposed by Article 177 of the EC Treaty were mitigated by the Pescatore doctrine, shared by the European Commission, to the effect that it is not necessary to seek a preliminary ruling where there is no doubt as to the validity of the relevant Community provision.

These opinions were expressed despite the judgment given by the Court of Justice on 6 July 1995,[34] recognising that Article 17(1) and (2) of the Sixth Directive were directly applicable. Likewise the Tribunal Supremo held that the Directive referred only to "provisions" and that the Spanish VAT Act, although in force only on 1 January 1986, when Spain actually acceded to the Communities, had

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30 Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección 2.ª, 7 March 2002, recurso de casación nº 9156/1996 (RJA 2002/3525).

31 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, OJ L 145, p. 1.

32 Ley 30/1985, de 2 de agosto, del Impuesto sobre el Valor Añadido (BOE 9-VIII-1985), abrogé par la Ley 37/1992, de 28 de diciembre (BOE 29-XII-1992).

33 Real Decreto 2028/1985, de 30 de octubre, por le que se aprueba el Reglamento del Impuesto sobre el Valor Añadido (BOE 31-X-1985).

34 Judgment of 6 July 1995 Case C-62/93BP *Soupergaz* [1995] ECR I-1883.

"provided" in 1985.

Still in Spain, in two judgment concerning the ex post recovery of customs duties not charged to the dutiable person, requiring the interpretation and the application of Article 2 of Regulation No 1697/79,[35] the Tribunal Supremo came to opposite solutions without putting questions to the Court of Justice.[36]

The two applicant companies had made imports in 1980 and 1982 and had paid the same customs agent a provision to cover the payment of duties. In December 1987, not having received payment of the duties, the customs administration sought to recover them by means of an action brought initially against the customs agent and then, when the agent was in solvent, against the applicant companies. Before bringing the actions, the customs had asked the companies to provide evidence of the payment to the customs agent so as to proceed against the proper debtor.

In the first of the judgments, the one given on 27 March 2002, the Tribunal Supremo held that Article 2 of Regulation No 1697/79 was not applicable in the case. That Article provides that an action for the recovery of uncharged duties may not be taken after the expiry of a period of three years from the date of entry in the accounts of the amount originally required of the person liable for payment or , where there is no entry in the accounts , from the date on which the customs debt relating to the said goods was incurred. The Tribunal Supremo took the view that the Regulation was not applicable as the debt arose in 1980 or 1982, well before Spain acceded to the Communities. The judgment accordingly applied the Spanish legislation that provided for a five-year limitation period and dismissed the action.

But in the second judgment, given on 16 November 2002, the Tribunal Supremo considered the question of the time at which the recovery action is to be regarded as having been "taken". This could be either before Spain acceded to the Communities and Regulation No 1697/79 became applicable there, on the date when the customs administration asked the applicants for evidence that they had paid the customs agent; or on the post-accession date when the customs administration finally demanded payment of the customs duties by the applicants. The Tribunal Supremo opted for the latter solution. It held that the three year period allowed for recovery was not a limitation period but an estoppel period that could not be interrupted. It accordingly declared Regulation No 1697/79 inapplicable and decided that the ex post recovery of customs duties could not take place.

In another Spanish case, the Tribunal Supremo decided[37] not to seek a preliminary ruling in a case

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35 Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties, OJ L 197, p. 1.

36 Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección 2.ª, judgments of 27 March 2002 (RJA 2002/3616) and 16 November 2002 (La Ley, 28-I-2003, marginal 599), recursos de casación nº 8459/1996 and 512/1997, respectively. There is a third Judgment of 15 June 2000, same chamber and section of the Tribunal Supremo (recurso de casación nº 7572/1995, RJA 2000/7564), taking the same solution as the Judgment of 16 November 2002 and therefore departing from the position taken in Judgment of 27 March 2002 without saying so.

37 Tribunal Supremo, Sala de lo Contencioso-Administrativo, sección 3.ª, Judgment of 20 June 2002, recurso de casación nº 3971/1996 (La Ley, 5-VIII-2002, marginal 6227 and RJA 2002/9555).

concerning the compatibility with Regulation No 4055/86[38] of the Spanish authorities' refusal to allow the use of the port of Alicante by a UK-controlled and registered ship for a passenger and goods transport service between that port and the Moroccan port of Nador. The administrative decision was based on the need for an authorisation under the Shipping Agreement between the Kingdom of Morocco and the Kingdom of Spain or to await amendment of that Agreement, under negotiation at the material time.

The Tribunal Supremo held that there was no need to refer a question for a preliminary ruling, as it was possible to deduce the proper interpretation of Community law from the judgment given by the Court of Justice on 20 February 2001[39] on a request for a preliminary ruling from the same section of the Tribunal Supremo. That judgment determined the conditions for admissibility of a prior administrative authorisation for regular maritime cabotage services in accordance with Regulation No 3577/92.[40]

The Tribunal Supremo restated some of the considerations underlying that judgment. It held that, even if a national provision which makes the provision of services subject to a prior administrative authorisation is such as to impede the provision of the services or at least make it less attractive and is therefore a restriction on free movement, "the freedom to provide services, as a fundamental principle of the Treaty, may be limited only by rules justified on overriding grounds of the general interest applying to every person or firm exercising an activity in the territory of the host Member State. If the relevant national rules are to be regarded as valid, they must be designed to attain the objective they pursue and go no further than what is needed for that purpose". It held that these considerations were applicable to navigation by inland waterway and accepted that it was legitimate to uphold the decision withholding authorisation as there were overriding general interest safety considerations. These concerned the inadequate facilities at the port of Alicante for customs inspection of international traffic. The Tribunal Supremo accordingly rejected the action challenging the decision and confirled that it was compatible with the Regulation.

But the Tribunal Supremo did not refer to the condition laid down by the judgment of the Court of Justice whereby the criteria for admissibility of the prior authorisation scheme for cabotage must not only be objective and non-discriminatory but must also be " known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. Accordingly, the nature and the scope of the public service obligations to be imposed by means of a prior administrative authorisation scheme must be specified in advance to the undertakings concerned".[41] But this condition seems relevant here since, as the Tribunal Supremo itself acknowledges, unlike the situation regarding inland waterway navigation and cabotage for profit,[42] the Spanish shipping legislation does not mention the possibility of imposing a prior

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[38] Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ L 378, p. 1.

[39] Judgment of 20 February 2001 Case C-205/*99 Asociación Profesional de Empresas Navieras de Líneas Regulares and others* [2001] ECR I-1271.

[40] Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide sevices to maritime transport within Member States (maritime cabotage), OJ L 364, p. 7.

[41] Judgment of 20 February 2001 para 38 and operative part 1.

[42] Sections 80(3) and 81(1) and (2) of Act 27/1992 of 24 November, de puertos del Estado y de la marina mercante (BOE 25-XI-1992).

authorisation for international transport.

In another Spanish case, the Tribunal Supremo declined to refer a question for a preliminary ruling as requested by the claimant in a case concerning the compatibility of a decision by the tax administration with the freedom of establishment provided for by Article 52 of the EC Treaty.[43] The decision was a refusal to apply the concessionary tax scheme for groups of companies to a stable establishment of a Belgian firm for 1992, 1993 et 1994 on the grounds that national legislation[44] required both the holding company and the subsidiaries to be resident in Spain.

After reciting the text of Article, the Tribunal Supremo rules on the compatibility of this type of tax decision with it. It proceeded on the basis of the fact that "the conditions laid down by Spanish law for Spanish firms require that both the holding company and the subsidiaries be public limited companies in accordance with national law". It added that "it has been neither shown nor even alleged that the stable establishment of a Spanish firm in Belgium is eligible for the concessionary tax scheme for groups of companies".

The Tribunal Supremo went on to hold that the claimant's alleged violation of two judgments of the Court of Justice interpreting the scope of Article 52 of the EC Treaty in relation to the two subsidiaries was inadmissible as a ground for setting aside the judgment of the court below.[45] It stated that the judgments of the Court of Justice and the decisions of the administrative courts, the superior courts of the Autonomous Communities and the Audiencia National, the Court of Auditors and the Constitutional Court did not constitute case-law the violation of which was a ground for setting aside a judgment for the purposes of Article 95.1.4º of the Administrative Jurisdiction Act 1956.[46] The Tribunal Supremo added that in any event there was no similarity between the two judgments of the Court of Justice and the questions in issue in the case since the two judgments were inapplicable to the hypothesis of a refusal to allow entitlement to the tax scheme claimed in the instant case.

The Tribunal Supremo based its decision to refrain from seeking a preliminary ruling on the "acte clair" doctrine. It referred expressly to the Court of Justice decision in *Cilfit* and to the "Pescatore doctrine" to hold that the case raised no doubts as to the interpretation of Article 52 EC.

In Finland, the Korkein hallinto-oikeus (Supreme Administrative Court) held, without referring to the Court of Justice, that the Finnish rules governing controlled foreign corporations (CFCs) was in accordance with Community law.[47]

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43 Tribunal Supremo, Sala de lo Contencioso-Administrativo, sección 2.ª, Judgment of 15 July 2002, recurso de casación nº 4517/1997 (RJA 2002/7724).

44 Real Decreto-Ley 15/1977, 25 February (BOE 28-II-1977), and Real Decreto 1414/1977, 17 June (BOE 24-VI-1977).

45 Judgment of 28 January 1986 Case 270/83 *Commission v France* [1986] ECR 273 (inadmissibility in freedom of establishment terms of the refusal to allow the tax relief for subsidiaries and branches in France of insurance companies established in another Member State), and judgment of 15 May 1997 Case C-250/95 *Futura Participations SA and Singer* [1997] ECR I-2471 (conditions for admissibility of legislation which, as in Luxembourg, makes it possible for losses to be carried over to another non-resident company only if there is an economic relation between the losses and profits in that country.

46 Ley reguladora de la jurisdicción contencioso-administrativa, 27 December 1956 (BOE 28-XII-1956). The ground for the appeal in cassation was "violation of the material statutory rules and case-law".

47 Judgment of 20 March 2002, KHO: 2002:26. Available in English in International Tax Law Reports 2002, Vol. 6, p. 1043.

Under the CFC rules, the passive income[48] of subsidiaries established in tax havens may be taxed by the holding company's country of residence. The foreign subsidiaries are regarded as CFCs. The definition of a CFC has three components:

- the company must be non-resident;
- the company must be controlled by one or more resident persons or companies, which is the case where: either one or more resident shareholders directly or indirectly hold at least 50% of the capital or voting rights in the company, or they are entitled to at least 50% of the product of the firm's net value;
- the local tax scheme must satisfy the criteria of the concessionary tax scheme: a foreign tax scheme is regarded as concessionary if the actual rate of corporate income tax borne by the foreign company is less than three fifths of the actual rate borne by Finnish companies.

In the case in the Supreme Administrative Court, the Finnish company A Oyj Abp had a Belgian subsidiary – A Finance NV – which was responsible for financial services and certain other services required by A Group companies in Central Europe. A Finance NV was registered and domiciled for tax purposes in Belgium. It enjoyed the benefit of the Belgian tax scheme for coordination centres. The purpose of this scheme was to allow international groups to centralise and coordinate certain of their activities in Belgium. These centres were subject to corporate income tax at the standard rate, but their basis for assessment was determined on a flat-rate basis in agreement with the tax authorities regardless of profits. The flat rate was a percentage of the centre's total expenditure and costs, excluding personnel and financial costs. Coordination centres were also subject to an annual flat-rate tax of BFR 400 000 per employed person, with a maximum of BFR 4 million. The effect of the Belgian tax rules was that the tax burden borne by A Finance NV in Belgium was probably less than three fifths of the burden borne by companies in Finland at the beginning of fiscal 1999.

A Oyj Abp, in accordance with Finnish legislation, had applied for an opinion from the keskusverolautakunta (Central Taxation Commission) on the question whether the income of A Finance NV could be taxable in Finland under the CFC legislation. The Commission considered that A Oyj Abp could be taxed in Finland under the CFC rules and that the provisions of the Tax Convention between Belgium and Finland or of Community law relating to the right of establishment and the free movement of capital did not preclude this. A Oyj Abp then challenged the decision concerning fiscal 1999 and 2000 in the Supreme Administrative Court.

The Supreme Administrative Court held that the CFC legislation had not prevented A Finance NV from being established in Belgium and that A Oyj Abp was not in a worse position in Finland than if it had not established a subsidiary in Belgium or the establishment had had another form rather than being a coordination centre. Nor had the CFC legislation prevented A Finance NV from transferring capital to Belgium and enjoying tax relief there. The Court compared the situation in the case before it with what would have been A Oyj Abp's situation if it had not established a subsidiary in Belgium or if the subsidiary had been in another form rather than a coordination centre. It concluded from the comparison that the CFC legislation did not restrict the right of establishment for the purposes of Article 43 EC or restrict the free movement of capital for the purposes of Article 56 EC.

The Court held that while the CFC legislation had not prevented A Oyj Abp's subsidiary from being established in Belgium and enjoying tax relief there, it might in practice prevent A Group companies

[48] Passive income means the proceeds of shareholdings.

from enjoying that relief because A Oyj Abp could be taxed on the basis of A Finance NV's income in Belgium. The Court did not regard that as a restriction on the right of establishment or as discrimination against either the Finnish holding company or the Belgian subsidiary as it was an arrangement in domestic law affecting companies resident in Finland.

In France, the Council of State[49] reviewed the legality of a decree adopted following the annulment[50] of regulations establishing exceptional contributions payable by pharmaceutical laboratories, declared incompatible with Community law by the Court of Justice on 8 July 1999 (*Baxter*)[51] and reimbursed following the annulment. The Court of Justice had held that the effect of the contributions was to put firms having their main establishment in other Union Member States and operating in France through subsidiaries at a disadvantage.

The new exceptional contribution payable by laboratories was established by the Social Security (Finance) Act for 2000,[52] and the rate of the contribution was set by decree.

The Council of State denies all accusations that it has violated *res judicata* in the form of the judgment given by the Court of Justice of the European Communities on 8 July 1999, arguing that the new contribution does not concern the same taxable persons, is assessed on a different basis and is not subject to the same exemptions.

But the Council of State did not see fit to refer a question to the Court of Justice on the two main objections made by the claimants in support of their application for annulment of the relevant decree – the discriminatory nature of the scheme and the possibility of regarding it as a form of State aid that ought to have been notified to the European Commission.

On the first objection, it held that the basis for assessment to the new contribution was defined on the basis of objective criteria related to its purpose of making firms doing business in pharmaceutical specialties contribute to financing social protection and to the equilibrium of the bodies involved.

There is no nationality discrimination in the contribution contrary to Article 12 EC and no barriers to freedom of establishment. But there are grounds for wondering whether there is indirect discrimination as home-based laboratories enjoy a practical advantage.

On the second objection, the Council of State summarily dismisses the description of the scheme as an aid scheme, regarding the fact that certain pharmaceutical firms would have enjoyed the benefit of the gain represented by the difference between the total sums reimbursed by the sickness insurance scheme under the decision that it gave following the Court of Justice's *Baxter* judgment and the total sums paid by way of the new contribution as a mere coincidence that does not make the contribution scheme into an aid scheme that is illicit as not having been notified to the European Commission under Article 88(3) EC.

Also noteworthy were the views expressed by the council of State on the principle of the primacy of

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49 C.E. 3 December 2001, SNIP (Droit administratif 2002 nº 55).

50 C.E. 15 October 1999, Soc. Baxter and others.

51 Judgment of 8 July 1999 Case C-254/97 *Baxter* [1999] ECR I-4809.

52 LFSS 99-1140, 29 December 1999, OJRF, 30 December 1999, p. 19706.

Community law. It held that the principle cannot have the effect in domestic law of weakening the supremacy of the Constitution, even though there was no conflict between a Community rule and a constitutional rule. That said, the Council of State used the digression to formally assert the primacy of the Constitution, at least in the domestic legal order, using a form of words that for the first time referred to Community law. This had not been the case in *Sarran*,[53] where it referred more generally to international agreements.

In Ireland, the District Court in *Masterson v Director of Public Prosecutions*[54] put two questions to the High Court on the compatibility of a prohibition on imports of kerosene containing coumarins in section 12 of the Hydrocarbon (Heavy) Oil Regulations 1991[55] with Article 28 EC and Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products.[56] Coumarin is a substance used as a marker to identify the origin of kerosene. It is used for that purpose in Northern Ireland but its use in kerosene is strictly controlled in Ireland. The High Court, without even considering the possibility of a reference to the Court of Justice, held that the prohibition laid down by the national regulations pursued an objective relating to administration, surveillance and tax controls and was not therefore contrary to Article 28 EC which, unlike the Treaty's tax provisions, concerned trade.

On the question whether the national regulations were contrary to Directive 92/12, the High Court went on to examine Article 21(4) of the Directive[57] and held that, although they might be contrary to Article 28 EC, they must be interpreted in the light of Article 93 EC. Referring to the judgment given by the Court of Justice in Case 74/76 *Iannelli v Meroni* ([1977] ECR 557) on 22 March 1977, the Court held that the national regulations were necessary for the administration of excise duties and that every component of them was necessary for that purpose. An appeal against the High Court's judgment lies to the Supreme Court, but in fact no appeal has been brought.

In Italy, the Court of Cassation gave judgment in case 21549 on 4 June 2002, concerning the compatibility of sections 4bis and 4ter inserted in Act 401 of 13 December 1989 by Act 388 of 23 December 2000 with Community law. These provisions concern the organisation of the collection of bets on sporting events and prohibit all organised activity to accept, collect or facilitate the collection by any means, including telephone and electronic communications, of bets of whatever kind accepted by any person in Italy or abroad, unless the activates were authorised by the State monopolies administration. They extended the scope of the national rules reserving for the State or its concession operators all activity in the collection of bets on sporting events. There was a preliminary ruling on these provisions in Case C-67/98 (judgment given on 21 October 1999 [1999] ECR I-7289), where the Court of Justice held that, even if such rules act as a barrier to the freedom to provide services, they may be justified by consumer protection objectives.

The Court of Cassation took this judgment as a basis for declining to refer to the Court of Justice the question raised by the parties of the possibility of a conflict between the new legislation and the rules on freedom of establishment and freedom to provide services. The parties submitted that the sole

53 C.E., Ass., 13 October 1998, Revue Française de Droit Administratif 1998, p. 1081.

54 High Court, 13 May 2002.

55 S.I. 269 of 1991.

56 Council Directive 92/12/EEC of 25 February 1992, OJ L 76, p. 1.

57 "Mineral oils may be held, transported or used in Ireland, other than in the running tanks of vehicles permitted to use rebated fuel, only where they comply with that State's control and marking requirements".

purpose of sections 4bis and 4ter was to raise resources for the State, so that they were not justified on grounds of public policy, public security or public health. But the Court of Cassation held that these rules, like those in *Zenatti*, on which the Court of Justice had expressed its analysis, had "the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public-interest purposes" (paragraph 35 of *Zenatti*). It further recalled that even before the sections were enacted it had interpreted the earlier rules as meaning that the rules reserving the activities of taking bets for the State also applied to the organisation of betting by telephone or electronic communications. All the sections did was codify the interpretation given by the courts "in the light of technological innovations in electronic data transmission".

It should be noted here that, while the Court of Cassation felt no need to raise the question of the interpretation of the Community rules on freedom of establishment and freedom to provide services, two courts of first instance, the Tribunal at Ascoli Piceno and at Modena, referred the same question to the Court of Justice, where their references are still pending.[58] And at the same time the Tribunal at Ascoli Piceno referred a question for constitutional review which the Constitutional Court, by Order No 85 made on 1 and 21 March 2002, declared to be manifestly inadmissible, as the referring judge proceeded from the hypothesis that sections 4bis and 4ter were applicable in the Italian legal order whereas doubts were cast on this by the reference for a preliminary ruling in the European context.

In another Italian case, No 7636, the Court of Cassation made an Order on 24 May 2002,[59] on an action ("regolamento di competenza") challenging the Order whereby the Florence Court of Appeal referred a question to the Court of Justice for a preliminary ruling (Case C-207/01) concerning the interpretation of Articles 81, 82 and 85 EC and Directive 92/12, the question being whether the Directive precluded the Italian rules on surcharges ("*sovrapprezzi*") for nuclear charges and new electricity-generating plant. In the action in cassation, the applicant submitted that the question should not have been referred for a preliminary ruling and challenges the terms in which it was put.

The Court of Cassation dismissed the action, holding that, under Article 234 EC, Article 20 of the Statute of the Court of Justice and the second paragraph of Article 64 of the Rules of Procedure of the Court of Justice, where a national court believes that an interpretation from the Court of Justice is necessary settle the case, it can apply to the Court of Justice which has exclusive jurisdiction in this respect and may order proceedings to be stayed pending the Court of Justice's reply. The Court of Cassation concludes that its review of orders staying proceedings in the event of a reference to the Court of Justice can extend only to "verifying the legal correctness" of the facts taken as a basis by the referring court, since that is a matter solely for that court and any review of the grounds for the reference can be made only in the judgment on the merits.

The prosecution service further stated that the judicial review of such an Order by the Court of Cassation could only concern cases of interpretations that were manifestly "arbitrary or implausible".

Still in Italy, giving judgment in Case 10452 on 19 July 2002,[60] the Court of Cassation rules on the jurisdiction of the Community courts in the event of a Member State violating one of the fundamental rights enshrined in the European Human Rights Convention ("ECHR"). The national dispute

[58] Cases C-243/01 *Gombelli* and C-359/02 *Lanzotti* pending.

[59] Foro italiano 2002, I, Col. 3090.

[60] Foro italiano 2002, I, Col. 2607.

concerned a measure applying a *vincolo paesaggistico* (restriction imposed by countryside conservation rules) as provided for by decree 490 of 29 October 1999. The applicant pleaded a la violation of the fundamental right of property ownership in Article 1 of Protocol No 1 to the ECHR and sought annulment of a judgment given by the Court of Appeal for failure to refer to the Court of Justice the question of the compatibility of the national rules with that provision of the ECHR.

The Court of Cassation dismissed this ground of the appeal, holding that, although Article 6 of the Treaty on European Union required the Union to respect the fundamental rights secured by the ECHR, it could not be interpreted as inserting Community law in compliance with the convention by the Member States of the Community. Consequently, as the Court of Justice had held in Case C-299/95 *Kremzow* ([1997] ECR I-2629, judgment given on 29 May 1997), Community law did not give the Court of Justice jurisdiction to interpret national legislation or, therefore, to declare it contrary to the ECHR. Its jurisdiction was confined to interpreting acts of the European institutions, the only ones to which Article 6 of the Union applied.

In the Netherlands, the Benelux Gerechtshof had before it a request for a preliminary ruling[61] on the concept of notion of "bad faith" by the trademark holder in Article 3(2)(d) of Directive 89/104[62] and Article 4(6) of the Benelux Uniform Law on Trademarks.[63] There was no reference to the Court of Justice even though it has a monopoly of the interpretation of concepts in Community law [64].

Likewise, in a judgment concerning the right of supervision exercised by the Commissariaat voor de Media over the Luxembourg company RTL/Veronica in the Holland Media Groep SA ("HMG"), responsible for transmitting RTL4 and RTL5 in the Netherlands, the Raad van State interpreted[65] Article 2 of Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC,[66] without asking the Court of Justice for a preliminary ruling. The Raad van State, a national court against whose decisions there is no right of appeal, did not consider the question of the absence of reasonable doubts as to the interpretation of this provision of Community law.[67]

Again in the Netherlands, in a judgment given on 24 July 2002[68] concerning the direct effect of a Directive, the Raad van State considers a question on which it had already put questions for

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61 Benelux Gerechtshof, 24 June 2002, IER 2002, p. 311, and Hoge Raad 22 June 2001, NJ 103.

62 First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ L 40, p. 1.

63 See also Article 51(1)(b) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, OJ L 11, p. 1.

64 Judgment of 4 November 1997 Case C-337/95 *Parfums Christian Dior v Evora* [1997] ECR I-6013.

65 Afdeling bestuursrechtspraak Raad van State, RTL/Veronica, Holland Media Group SA and CLT-UFA SA/Commissariaat voor de Media, AB Rechtspraak Bestuursrecht 2002, 5.

66 The Raad van State held that HMG, as the company responsible for broadcasting RTL4 and RTL5 in the Netherlands, should under Article 2(3)(a) of the directive be under supervision by the Dutch authority ("Commissariaat voor de Media") rather than the Luxembourg authority (ground 2.6.4 of the judgment).

67 The Raad van State interpreted a provision of Community law imposing binding legal requirements on the Commissariaat voor de Media.

68 Raad van State, afdeling bestuursrechtspraak, Judgment of 24 July 2002, Vereniging X. e.a./Burgemeester en Wethouders van Ede, Milieu en Recht 2002, Jur. p. 329-331.

preliminary rulings in another case[69] (necessary to settle that case), withour awaiting the reply from the Court of Justice in the first case.

In our last Netherlands case, the Hoge Raad, giving judgment after the Court of Justice had answered the questions put to it by way of preliminary ruling, put a fresh, similar question to the Court of Justice by order made on 18 October 2002.[70]

Second question

In Spain, the Audiencia Nacional[71] followed *Francovich* and *Brasserie du Pêcheur/Factortame* in a case concerning complaints by several people, most of them nationals of other Member States, following loss sustained as a result of Spain's delay in transposing Directive 94/47 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.[72]

The Audiencia Nacional proceeds from decision given by the Court of Justice on the general principle of the liability of public authorities in the Member States in the event of a violation of Community law, citing *Francovich,*[73] *Haim II,*[74] *Brasserie du Pêcheur/Factortame,*[75] *British Telecommunications,*[76] *Hedley Lomas*,[77] *Dillenkofer*[78] and *Norbrook Laboratories*.[79] Relying on *Norbrook Laboratories*, it enumerates the three conditions on which liability depends: "the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the damage sustained by the individuals concerned". The judgment went on to analyse the presence of the three conditions in the instant case. It concluded, first, that there was a violation of Community law by the Spanish State, since the transposal of Directive 94/47 by the Act of 15 December 1998[80] was not performed within the thirty months allowed by the Directive. Second, the purpose of the Directive was to confer rights on individuals, and such was the case of the right to withdraw from a contract and the rights flowing from the prohibition of advance payments before the time allowed for withdrawal. Third, there was a direct causal link between the loss suffered and the national law applicable at the material time which, by failing to secure those rights, made it impossible to exercise them. Lastly, since the defendant authority

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69 Raad van State, afdeling bestuursrechtspraak, Judgment of 27 March 2002, JM 2002, 76. Landelijke Vereniging tot Behoud van de Waddenzee et Nederlandse Vereniging tot Bescherming van Vogels, C-127/02, pending.

70 Stichting Goed Wonen/Staatssecretaris van Financiën, Beslissingen in belastingzaken 2002, 397. "Goed Wonen", C-376/02, pending.

71 Audiencia Nacional, Sala de lo Contencioso-Administrativo, Judgment of 7 May 2002, recurso contencioso-administrativo nº 365/2001 (RJCA 2002/634).

72 OJ L 280, p. 83.

73 Judgment of 19 November 1991 Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

74 Judgment of 4 July 2000 Case C-424/97 *Haim* [2000] ECR I-5123.

75 Judgment of 5 March 1996 Cases C-46/93 and C-48/93 *Brasserie du Pêcheur/Factortame* [1996] I-1029.

76 Judgment of 26 March 1996 Case C-392/93 *British Telecommunications* [1996] ECR I-1631.

77 Judgment of 23 May 1996 C-5/94 *Hedley Lomas* [1996] ECR I-2553.

78 Judgment of 8 October 1996 Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer* [1996] ECR I-4845.

79 Judgment of 2 April 1998 Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531.

80 Ley 42/1998, 15 December, sobre derechos de aprovechamiento por turno de bienes inmuebles de uso turístico y normas tributarias (BOE 16-XII-1998).

had acknowledged its liability in the course of the proceedings, the Audiencia Nacional wasted no time on the question.

The Audiencia Nacional then considered the procedural conditions for a finding of State liability. Citing *Francovich*, *Norbrook Laboratories* et *Haim II*, it held that the State must compensate for losses under national law governing liability in conditions that must not be less favourable than those applicable in the event of purely domestic disputes and could not be adjusted to make it extremely difficult or indeed virtually impossible to obtain compensation. In Spanish law, the framework was supplied by Article 106(2) of the Constitution, which conferred on individuals the right to be compensated for loss caused to their property or entitlements by public authorities. Title X of Act 30/1992 of 26 November[81] and sections 145.2 and 4.2 of Royal Decree 429/1993 of 26 March 1993[82] provide for a one-year period for the commencement of a civil action against the Staten running from the date when the harmful act occurs or its effects become apparent.

As regards the date on which time begins to run, the Audiencia Nacional concludes from the applications that the loss flowed from the signing of the timeshare acquisition contracts without the acquirers being given the rights conferred by the Directive, in particular the right to reimbursement of advance payments, the amount of which was what the action concerned. The judgment then considers the situation of the twenty-five applicants one by one on the basis of the date when the contracts were signed, concluding that only seven had brought their action within the time allowed and dismissing the rest.

Lastly the Audiencia Nacional dismisses the defence plea from the defendant administration that liability should be shared between the State and the sellers, halving the authorities' share of the compensation payable. It emphasises that the avowed purpose of the Directive was to prevent sellers from demanding advance payments from buyers. As for the payment of interest, the judgment proceeds from the *restitutio in integrum* principle that governs State liability and declares it payable.

In two other judgments concerning transfers of civil service pension entitlements to the Community scheme, however,[83] the Tribunal Supremo did not hold the public authorities liable for their violation of Community law.

In the first of these cases,[84] Community officials with Spanish nationality who had previously been civil servants in Spain had unsuccessfully asked the Council of Ministers to transfer the actuarial equivalent of their pension rights ("*derechos pasivos*"). The basis for their application was in Article

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81 Ley 30/1992, 26 November, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE 27-XI-1992).

82 Real Decreto 429/1993, 26 March, por el que se aprueba el Reglamento de los Procedimientos de las Administraciones Públicas en materia de Responsabilidad Patrimonial (BOE 4-V-1993).

83 Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección 7.ª, judgments of 26 July 2002 and 3 December 2002, recursos contencioso-administrativos nº 223/1998 and 419/2000, published on the courts service website at http://www.poderjudicial.es/tribunalsupremo; the second judgemtn is also published in la Ley, 21.1.2003 marginal 229.

84 The subject-matter of this case is identical to the Judgment of Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección 7.ª, 23 July 2001 (recursos contencioso-administrativos nº 551/1997, 593/1997 y 223/1998, acumulados, RJA 2001/6922). The judgment of 26 July 2002 expressly states that it is taking over the same argumentation.

11(2) of Annex VIII to the Staff Regulations of officials of the European Communities.[85] In the alternative they applied for the State to be held liable for violation of Community law in connection with the loss caused by failure to transfer their entitlements to the Community scheme. The Court of Justice, incidentally, had already given judgment against Spain for failure to take the necessary measures to allow the transfers.[86]

The Tribunal Supremo acknowledged the applicants' right to have their pension rights transferred and accordingly accepted the principal claim. But it dismissed the application for compensation on the ground that the legislative procedure required for the transfers had been completed during the proceedings.[87] The Tribunal Supremo held that the delay in enacting the legislation had not made the transfers impossible and did not therefore constitute an actionable omission. But if the delay in the transfers were to cause a future loss of pensions payable to those concerned, the State could be held liable for failure to meet its obligations under Community law.[88] The same reasoning is used to dismiss the request for compensation for the impossibility of exercising the right to apply for early retirement on account of the delayed transfer of pension rights. The Tribunal Supremo held that this was a purely contingent right and that the loss materialised only when the right became effective.

Another action directly challenged a Royal Decree of 30 December 1999 approving the pension transfer system and applied for compensation for violation of Community law. After dismissing the grounds pleaded in support of the allegation of illegality motifs of the decree, the Tribunal Supremo also dismissed the application for compensation on the basis of the arguments sets out in its previous judgments.[89]

In France, in a dock dues case, the Commercial, Financial and Economic Chamber of the Court of Cassation had before it an application from a company, Peynoird, for compensation for the loss sustained by reason of sums wrongly charged in terms of Community law.[90]

The applicant had imported divers merchandises into Guadeloupe between September 1991 and December 1992, paying dock dues and the additional charge. On the basis of *Legros*[91] and *Lancry*,[92] where the Court of Justice had held that the dock due was a tax having an equivalent effect to a customs duty incompatible with Community law, Reynoird was applying for repayment of amounts wrongly charged by the customs administration and for compensation for the loss sustained by reason of the illegal charge.

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85 Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968 (OJ L 56, p. 1), as last amended by Regulation (EEC, Euratom, ECSC) No 571/92 of 2 March 1992 (OJ L 62, p. 1).

86 Judgment of 17 July 1997 Case C-52/96 *Commission v Spain* [1997] ECR I-4637.

87 **Real Decreto 2072/1999, 30 December, sobre transferencias recíprocas de derechos entre el sistema de previsión social del personal de las Comunidades Europeas y los regímenes públicos de previsión social españoles (BOE 18-I-2000).**

88 Such was the case of one of the applicants in the judgment of 23 July 2001, who obtained a statement that the State was liable and ordered to pay interest on the monthly differences between the pension actually paid and the pension that would have been paid if Spain had fulfilled its obligation to transfer rights, until he receives the difference under Royal Decree 2072/1999.

89 23 July 2001 and 26 July 2002. See footnote 84.

90 C. Cass. (Chambre commerciale, financière et économique), 22 October 2002, Sté Primistères Reynoird/Direction générale des douanes et droits indirects de Guadeloupe.

91 Judgment of 16 July 1992 Case C-163/90 *Legros and others* [1992] ECR I-4625.

92 Judgment of 9 August 1994 Cases C-363/93, C407/93 to C-411/93 *Lancry and others* [1994] ECR I-3957.

Concerning the application for compensation, note that in *Legros* the Court of Justice confined its interpretation within a specific time-frame, holding that the only amounts repayable were those paid before the date of the judgment, unless a court action had been commenced before then. So it is hardly surprising that the Court of Cassation held Reynoird's application inadmissible as it sought the repayment of sums paid before 16 July 1992.

But the Court of Cassation is more attentive to the response to the application for compensation for loss sustained by reason of sums wrongly charged. The possibility of such an action against the State, first raised in *Just*,[93] was confirmed by the Court following *Brasserie du Pêcheur* in *Comateb*.[94] The Court held there that "traders may not be prevented from applying to the courts having jurisdiction, in accordance with the appropriate procedures of national law, and subject to the conditions laid down in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, for reparation of loss caused by the levying of charges not due, irrespective of whether those charges have been passed on", in particular if it has "had the effect of restricting the volume of imports from other Member States". Even if no reference is made to decision of the Community courts either by the Court of Cassation or by the applicant, the merit of this judgment is that it implies acceptance of the principle of such an action since the Court of Cassation looks in depth into the conditions for exercising the right to compensation. But it concludes that the application for compensation must be dismissed as there was not "at the time when the offending dues were charged, a sufficiently serious violation of Community law".[95] The Court of Cassation justifies its position on the grounds of "the uncertainty as to the legitimacy of the dues ... in relation to Community law", reflected in the attitude taken by the Council in Decision 89/688/EEC of 22 December 1989, authorising France to maintain the dock dues scheme as then in force until 31 December 1992. While accepting the principle of actions for compensation for loss sustained by reason of a charge wrongly charged, the Court of Cassation gives a strict interpretation of the concept of serious violation.

Third Question

In Germany, le Bundesgerichtshof, in a case[96] turning on the relationship between the Act on withdrawal from doorstep contracts and similar transactions[97] and the consumer credit Act,[98] interpreted national law in the light of the letter and spirit of the Directives transposed by those Acts as interpreted by the Court of Justice on 13 December 2001.[99] On the consumer credit side German law provided for a right to withdraw from the debtor-creditor relationship , but no such right was

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93 Judgment of 27 February 1980 Case 68/79 *Just* [1980] ECR 501.

94 Judgment of 14 January 1997 Cases C-192/95 to C-218/95 *Comateb and others* [1997] ECR I-165.

95 According to the Court of Justice (Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1995] ECR I-1029), there are three such conditions: the Community rule must have the purpose of conferring rights on individuals, the violation must have been serious and there must be a causal link between the violation and the loss sustained.

96 Judgment of 9 April 2002, XI ZR 91/99 ("Heininger"), Neue Juristische Wochenschrift 2002, p. 1881 et seq.

97 Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften (ci-après: "HWiG") transposing Directive 85/577/EEC on contracts negotiated away from business premises.

98 Verbraucherkreditgesetz (ci-après: "VerbrKrG") transposing directive 87/102/EEC on consumer credit.

99 Judgment of 13 December 2001 Case C-481/99 *Heininger* [2001] ECR I-9945.

provided for in the event of a credit contract secured on real property.[100] Moreover, in the event of a consumer credit contract, German law also excluded the right to withdraw from doorstep contracts.[101] It was consequently possible to find situations – as in the instant case – where the consumer had no right to withdraw, even if the credit contract was in fact a doorstep contract.

But in that judgment the Court of Justice held that the doorstep sales Directive applied also to a credit contract secured on real property and that the fact that it was also a consumer credit contract had no impact on the right to withdraw under Article 5 of Directive 85/557.

In accordance with that judgment the Bundesgerichtshof concluded that, since the VerbRKG did not offer an equivalent right to withdraw, the right provided for by the HwiG was not excluded, even if the contract was one to which the VerbrKrG applied. The Bundesgerichtshof based its conclusion on the fact that the wording of the relevant provision[102] was open to interpretation. The legislative intention, which according to the explanatory memorandum accompanying the Bill in Parliament was to confirm the primacy of the VerbrKrG, did not prevent this. Accepting the contrary hypothesis would be tantamount to supposing that the legislative intention was to deliberately breach the directive. Although the material scope of the HWiG was broader than that of the directive and the relevant provision was not confined to doorstep contracts nut extended to all contracts signed subsequently under the influence of doorstep techniques, the Bundesgerichtshof refused to confine its interpretation to situations covered by the directive. The Bundesgerichtshof held that such a split interpretation wuld violate the principle of equal treatment.

In our last German case, the Bundesfinanzhof, departing from a long line of cases,[103] rejected the tax authorities' practice of applying tougher conditions for tax deductibility of expenditure on language courses abroad than for courses in Germany. The Bundesfinanzhof, stating that the decision was the direct result of applying Community law, followed the decisions of the Court of Justice without feeling an y need to seek a preliminary ruling. The applicant, a commercial agent acting for a trading firm that also had business on the French and English (sic) markets, followed a French language course in southern France. He put the course down as professional expenditure on his annual income tax return. But the tax authorities, in accordance with their regular practice, refused to allow the deduction of the cost of the French course as professional expenditure. Given the general context of the trip, in particular the fact that the course was abroad, the authorities argued that the trip was not a study trip for business purposes. But the Bundesfinanzhof held that the expenditure could not be disallowed merely because the course was organised in another EU Member State. The mere fact that the applicant followed a language course in another Member State although it was possible to do so nearer home within the Member State is not in itself sufficient to make the trip a private one.

In Austria, a case in the Verwaltungsgerichtshof[104] concerned the administrative authorisation for

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[100] See section 3(2)(2) of the VerbrKrG, now section 491(3)(1) of the Civil Code. This provision was repealed by an Act of 23 July 2002 (Bundesgesetzblatt 2002 I, Nr. 53, p. 2850 et seq.) following controversy provoked by "*Heininger*" in the Court of Justice and the Bundesgerichtshof.

[101] See section 5(2) of the HWiG, now section 312b of the Civil Code. This provision was amended in lione with the judgment of the Bundesgerichtshof *Heininger* by the Act of 23 July 2002.

[102] Section 5(2) of the HWiG. XSee also footnote 101.

[103] Bundesfinanzhof, Judgment of 13 June 2002, VI R 168/00, Finanz-Rundschau Ertragsteuerrecht 2002, p. 1231 et seq. = Internationales Steuerrecht 2002, p. 776 et seq.

[104] VwGH, Judgment of 27 June 2002, 99/10/0159.

extension of a golf course neighbouring a zone protected by both national and Community law ("NATURA 2000 ") inhabited by certain species, including the corncrake, protected by Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora and Directive 79/409/EEC on the conservation of wild birds. The relevant authority based its authorisation decision primarily on the expert opinions and advice supplied by the applicants to show that the obligations imposed were adequate to protect the corncrakes' nesting areas. The appeal, brought by the Landesumweltanwalt (Environment Commissioner), procedure first from the failure to run an impact assessment procedure as provided by the directives and national law. Second, it complained of the mere reproduction expert advice without official reactions.

The Verwaltungsgerichtshof relied on a series of judgments of the Court of Justice relating to Article 4 of Directive 79/409 holding that the relevant areas of land, even if not formally declared to be "special protection areas" by the Member State, were eligible for protection under the directive as "actual protection areas". It recalled that the Court of Justice has developed of the principle that the interpretation of national law, whether dating from before or after the adoption of the directive, must be as far as possible in conformity with the wording and purpose of the directive so as to attain its objectives. The relevant authority should have based its decision on Article 4 of Directive 92/43 and checked whether the relevant piece of land was within the definition of "actual area" with all the consequences that that entailed. As the facts had not been proved, the Verwaltungsgerichtshof annulled the decision for violation of procedural rules.

In Belgium, a case in the Arbeidshof Antwerpen[105] concerned the pension of a married employed person who had worked in the Netherlands and then Belgium subject to the pensions scheme operating in each of those countries. When he reached retirement age in Belgium in 1993, he was given a pension by the Office national des pensions, the amount being calculated in accordance with section 3(1)(a) of the Belgian Pensions Act.[106] The Dutch Sociale Verzekeringsbank also awarded him a retirement pension plus an additional amount on the ground that his wife, a housewife, was not yet of statutory retirement age.

In 1994, his wife reached the age of 65 and was eligible for a retirement pension under Dutch legislation. The award of this pension generated a cut in the husband's Dutch pension by an amount equivalent to his wife's pension and a cut in the Belgian pension under section 3(1)(a) and 8 of the Act. These provisions provide for a reduction in the amount of the pension to reflect the pension paid to the spouse by a scheme in another Member State. Paragraph 8 further provides that the fact that one of the spouses enjoys one or more retirement or survivor's pensions from a foreign country's scheme does not preclude the other spouse from receiving a retirement pension calculated as provided by paragraph 1(1)(a), provide the aggregate amount of the pensions of the first conjoint is less than the difference between the amounts of the retirement pension of the other spouse, calculated in accordance with paragraph 1(1)(a) (worker whose spouse does not receive a retirement pension) and paragraph 1(1a)(b) (other cases).[107]

Given the reduction in the pensions payable to the spouses as a result, the Arbeidshof Antwerpen felt

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105 Arbeidshof Antwerpen, 4e kamer, Judgment of 7 February 2002, A.R. 960218.

106 Act of 20 July 1990 establishing a flexible retirement age for employed persons and adapting their pensions to general prosperity (Moniteur belge, 15 August 1990).

107 In case a), the real gross income taken into account for pension purposes is as to 75%, whereas in case b), it is as to 60%.

the need to ask the Court of Justice for a ruling on their conformity with Article 48 of the EC Treaty (now Article 39 EC). The Court of Justice held[108] that where the competent authorities of a Member State apply a provision of law which 1º fixes the amount of the retirement pension awarded to a married worker (such is the case of section 3(1)), 2º provides for that pension to be reduced, by the amount of a pension awarded to his spouse under the scheme of another Member State (such is the case of section 3(1) and (8)), but 3º provides for the application of a derogating clause in respect of overlapping where the pension paid elsewhere is less than a certain amount (such is the case of section 3(8)), it is contrary to Article 48 of the EC Treaty (now, after amendment, Article 39 EC) for those authorities to reduce the amount of the pension awarded to a migrant worker by the amount of a pension awarded to his spouse under the scheme of another Member State, when the grant of that latter pension does not involve any increase in the couple's total income. The Arbeidshof Antwerpen concluded that the Office national des pensions could not withdraw or reduce the husband's pension in accordance with section 3(1) and (8).

Another case in the Belgian Court of Cassation[109] concerned a rental contract between the European Community and Zurich concerning taxes on a building in Brussels. In 1988, the two parties signed a lease whereby the former agreed to rent property belonging to the latter. A clause in the lease provided for all taxes levied or to be levied on the property would be borne by the lessee. An Order made by the Region of Brussels-Capital on 23 July 1992 imposed a tax on buildings used for non residential purposes. Commune Regulations provided for taxes payable by the lessor on office space. The company (Zurich) asked the lessee to reimburse the regional and commune taxes. The Community refused to reimburse as the Order and regulation were incompatible with Article 23 of the Vienna Convention of 18 April 1961 on diplomatic relations, Article 28 of the Treaty establishing a Single Council and a Single Commission of the European Communities and Article 3 of the Protocol on the Privileges and Immunities of the European Communities annexed to the Treaty of 8 April 1965. The European Community accordingly asked for the following question to be referred to the Court of Justice for a preliminary ruling: must Article 28 of the Treaty and Article 3 of the Protocol, in conjunction if appropriate with Article 23 of the Vienna Convention, be interpreted as meaning that they prohibit the adoption of national legislation or other national provisions establishing a direct tax which appears to be chargeable on persons who contract with legal persons governed by international law (such as the European Community) but which in reality has the object or effect of causing legal persons governed by international law (such as the European Community) to bear the actual burden of the tax. The European Community then argued that the Order of the Region of Brussels-Capital and the Commune Regulation violated the principle of the performance of international treaties in good faith pursuant to Article 26 of the Vienna Conventions of 23 May 1969 and 21 March 1986 on the law of treaties. And it submitted that, even if the transfer of the obligation to pay the tax in the form of an additional rental charge was based on a contract governed by private law, the contract clause concerned an illegal tax that was contrary to overriding rules of public policy and that a contract generating an obligation contrary to overriding rules of public policy or based on an illicit cause could not be enforced.

The Court of Cassation held that the request for reimbursement of the tax was based solely on the relevant clause in the lease and that the judgment against which the appeal was brought, giving Zurich the right to reimbursement, did not apply the Order and Regulation. It accordingly rejected the European Community's argument on grounds unrelated to provisions that might have been the subject

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[108] Judgment of 26 September 2000 Case C-262/97 *Engelbrecht* [2000] ECR I-7321.

[109] C.Cass. (Belgium), 1ère chambre, Judgment of 1 March 2002, Larcier - Cassation 2002 nº 1002 (résumé).

of the preliminary ruling and decided not to make the reference. Moving on to the validity of the clause in issue, it held that there was no violation of Article 23 of the Vienna Convention as the exemption in that Article was for the benefit of an accrediting State or head of mission, which was not the lessee's case. As for the Order of the Region of Brussels-Capital, the Court of Cassation held that this legal instrument, which had neither the object nor the effect of shifting the burden of the relevant tax on to the European Community, was not contrary to the immunities it enjoyed in direct tax matters under Article 3 of the Protocol on the Privileges and Immunities of the European Communities annexed to the Treaty of 8 April 1965.

The Court of Cassation accordingly rejected the European Community's appeal, the Community being therefore obliged to reimburse the amounts paid by Zurich by way of local and regional taxes.

In Spain, three judgments of the Tribunal Supremo in similar cases[110] interpreted and applied les Articles 3 and 8(1)(B)(iv) of Regulation No 1224/80 on the valuation of goods for customs purposes [111] and annulled the judgments given by the Audiencia Nacional. The Spanish customs administration had considered that, for the determination of the valuation for customs purposes of certain goods imported by two Spanish companies from their Dutch holding companies between 1989 and 1992, payments for research costs flowing from a contract for general services between the subsidiaries and the holding company should be added to the price actually paid. These decisions were confirmed by the Audiencia Nacional. The Tribunal Supremo held that charging costs of "engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Community and necessary for the production of the imported goods", prescribed by Article 8(1)(B)(iv) of the Regulation, was possible only if the work was undertaken elsewhere than in the Community as the Regulation expressly provided. Since the holding company was in the Community, the Tribunal Supremo held that it was not possible to add research costs to the price actually paid.

A minority opinion written by one of the members of the chamber in one of the cases pointed out that Regulation No 1224/80 was not yet applicable in Spain at the material time. Under Articles 31 to 51 of the Act of Accession of Spain, import customs duties were abolished with effect from 1 January 1993. During the period between then and the date of accession, the earlier provisions on trade with third countries continued to apply for the determination of the value for customs purposes. The customs territorial was defined by existing agreements between Spain and the European Community in force on 31 December 1985. The relevant national provision was accordingly the GATT Code on value for customs purposes of 12 April 1979, whereby it would be necessary to add to the price actually paid the of engineering and design work "undertaken elsewhere than in the importing country", including work undertaken in the Netherlands.

The Tribunal Supremo also heard an action challenging a judgment upholding a decision of the customs administration. The decision determined the value for customs purposes of certain goods bought by a Spanish firm from a French company in the same group on the basis not of the transaction value as defined by Article 3(1) of Regulation No 1224/80,[112] which consists of the price actually paid,

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110 **Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección 2.ª, 11 December 2001, 19 December 2001 and 6 March 2002, recursos de casación n.º 4882/1996, 5628/1996 and 822/1997, respectively (RJA 2002/4089, 2002/4090 et 2002/3428).**

111 Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes, OJ L 134, p. 1.

112 Council Regulation (EEC) No 1224/80.

but of the transaction value charged in the event of sales between buyers and sellers not belonging to the same group of companies, in accordance with Article 2(3) of the Regulation. The latter provision allows the value to be determined "using reasonable means" if it is not possible to determine it by the means prescribed by Articles 4 to 7 of the Regulation. By judgment given on 10 May 2002[113] the Tribunal Supremo held that whether the transaction value declared by the applicant was "acceptable for customs purposes" was a question of fact, the burden of proof being on the administration. Since there was no specific reference to this fact in the judgment appealed against and the only argument raised by the administration for rejecting as unacceptable the transaction value lay in the corporate links between buyers and sellers, the Tribunal Supremo annulled the judgment and the decision by the customs administration. This position was adopted despite the clear drafting of Article 3(2)(b) of the Regulation, whereby "in a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with paragraph 1 whenever the importer demonstrates that such value closely approximates to one of the following ..." - the reference being to the criteria provided for by Articles 4 to 7, and Article 3(2)(c), which adds that the criteria are to be used "at the initiative of the importer".

In France, the *Renie* case[114] gave the Council of State an opportunity to record a violation of the Community principle of free movement of workers enshrined in Article 39 EC. The case focused on a provision of the Social Security Code. The Social Security (Miscellaneous Financial Measures) Act of 28 December 1979 provided for a health-care insurance contribution levied on all basic or supplementary pensions, wherever the pensioner resided (section L 241-2 of the Social Security Code). Where a worker had been employed in France but retired in another Member State and was not covered by a compulsory health-care insurance scheme in France, the effect was to cut the retirement pension by the amount of the contribution without any health-care benefits being available in return, this being the kind of anomaly that would deter a worker from going to work in France.

Eighteen years later, the Social Security (Finance) Act for 1998 (19 December 1997) repeated the provision. It laid down specific rates of health-care insurance contribution for persons not resident for tax purposes in France and covered by a compulsory health-care insurance scheme in France (section L. 131-7-1 of the Social Security Code); the status quo is maintained for non-resident pensioners not covered by a compulsory scheme.

The contribution rates are determined by decree: 1% for supplementary retirement pensions for persons not covered by a compulsory health-care insurance scheme in France, wherever they are resident for tax purposes; 3.8% for non-residents covered by a compulsory scheme (section D. 242-8 of the Social Security Code).

Mr Renie, former manager in a firm at Le Havre, decided in 1999 to retire to Hastings, in the United Kingdom, fell victim to this arrangement. The applicant, who received a pension from the general social security scheme and a supplementary pension, saw his pension cut by 3.8% on the basis of section D. 242-8 of the Social Security Code. He applied for annulment of the decision by the Minister of Employment and Solidarity implicitly refusing to repeal the section imposing a contribution for health-care, maternity, invalidate and death cover of 3.8% or 1% on retirement benefits other than those paid from the general scheme to persons not resident in France.

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113 Tribunal Supremo, Sala de lo Contencioso-Administrativo , Sección 2.ª, Judgment of 10 May 2002, recurso de casación nº 740/1997 (RJA 2002/5527).

114 C.E., 3 April 2002, Rev. de jurisp. sociale 2002, p. 777-778.

The issue before the Council of State was the compatibility of these two rates of contribution with the Community principle of free movement of workers.

Regarding the 3.8% contribution levies on supplementary retirement pensions, it dismissed the applicant's argument based on violation of the equal treatment principle. It held that, the contribution borne mainly by persons not actually resident in France and not resident there for tax purposes and set at a rate 2.8 points higher than the contribution payable by persons resident for tax purposes in France for the same benefits, the difference in treatment, not based directly or indirectly on nationality, was justified by the fact that persons resident for tax purposes in France were required to pay the general social contribution. The purpose of the higher rate for non-residents was to restore equality.

Regarding the 1% contribution levied on retirement benefits other than those paid by the general social security scheme to persons not resident for tax purposes in France and not covered by a compulsory health-care insurance scheme in France, the Council of State accepted Mr Renié's arguments. Following the submissions of the Advocate-general, it held that requiring the contribution to be paid by persons receiving retirement benefits paid by reason of earlier employment in France who have decided to retire to another Member State of the European Community and therefore cannot be covered by a compulsory health-care insurance scheme in France and are ineligible for the benefits financed by the contribution, constitutes a barrier to the free movement of workers, contrary to Article 39 EC.

In another French case, *Griesmar*, the Council of State gave judgment on 29 July 2002,[115] complying strictly with the preliminary ruling given by the Court of Justice on 29 November 2001[116] on its reference of 28 July 1999.

The case focused on section L. 12)(b) of the Civil and Military Retirement Pensions Code, which allows a one-year bonus in pensionable years of service for each child, payable to "female civil servants". In the preliminary ruling of 29 November 2001, the Court of Justice, after stating unequivocally that the French pension scheme was within the scope of Article 119 of the Treaty establishing the European Economic Community, now Article 141 EC, held that, despite Article 6(3) of the Agreement annexed to Protocol 14 on Social Policy annexed to the Treaty on European Union, the principle of equal pay precluded a bonus for the calculation of pension entitlements of persons who have brought up children being reserved for women whereas men who had brought up their children were excluded.

The Council of State accordingly held in *Griesmar* that the relevant provision of the Civil and Military Retirement Pensions Code was incompatible with the equal pay principle laid down by the Treaty establishing the European Community and the Agreement annexed to Protocol 14 on Social Policy annexed to the Treaty on European Union.[117] Consequently it held that the decision whereby the Minister of Economic and Financial Affairs and Industries refused to allow Mr Griesmar entitlement to the additional pensionable years provided for by section L. 12)(b) of the Civil and Military

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115 C.E., 29 July 2002, Dalloz 2002, p. 2832.

116 Judgment of 29 November 2001 Case C-366/99 *Griesmar* [2001] ECR I-9383.

117 Article 6(3) of the agreement provides that a Member State may take measures to facilitate the exercise of professional activity by women or to prevent or offset their career disadvantages. Assessed on this basis, the additional amount could easily be regarded as justified in terms of the equal pay principle.

Retirement Pensions Code, even though he could show that he had brought up his children was unlawful and that the applicant was entitled to have it the Order of 1 July 1999 disallowing the entitlement annulled.

Griesmar this confirms, albeit implicitly, that retirement pensions are to be treated in the same way as wages and salaries; it also recalled that the equal opportunities principle applied to both women and men. Two months earlier, on 5 June2002, the Council of State had taken the same line in *Choukroun*.

Mr Choukroun's wife was a policewoman responsible for speed checks on the Paris boulevard périphérique; she was shot dead while on duty on 20 February 1991. The applicant's request for a widower's reversionary pension was rejected on the basis of section L. 50 of the Civil and Military Retirement Pensions Code, which provides that the pension entitlement of a female civil servant is suspended as long as there is an orphan receiving a reversionary pension available immediately, and is until the orphan has reached the minimum pensionable age, generally 60. Sections L. 38 *et seq*. of the Code do not preclude immediate entitlement to a reversionary pension where the surviving spouse is a woman, even if there is an orphan.

Mr Choukroun therefore pleaded the incompatibility of section L. 50 of the Civil and Military Retirement Pensions Code with Article 141 EC, on the ground that there were unwarranted differences in the conditions for eligibility for a reversionary pension depending on the sex of the surviving spouse.

As in *Griesmar*, the Council of State first considered the applicability of Article 141 EC. Considering that the reversionary pension scheme was not to be distinguished from the general civil service retirement pensions scheme, it held that pensions paid under the Civil and Military Retirement Pensions Code, including reversionary pensions, were covered by Article 141 CE.

Secondly, regarding eligibility for reversionary pensions, it held that section L. 50 of the Civil and Military Retirement Pensions Code contained "discrimination between male and female civil servants, not justified by any difference in their situation as regards the award of the relevant pensions". There was accordingly no basis in law for the refusal to accept Mr Choukroun's request for the immediate award of a reversionary pension following his wife's death.

In Ireland, in *Minister for Arts, Heritage, the Gaeltacht and the Islands v. Kennedy*,[118] the High Court rejected an application for a permanent injunction prohibiting the execution of work thought to be about to commence on a conservation site listed in accordance with the European Communities (Natural Habitats) Regulations, 1997. These national regulations transposed into Irish law Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the habitats directive").[119]

The third subparagraph of Article 4(2) of the habitats directive reads: "The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21." The importance of the list is clear from Article 4(5), which provides: "As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article

118 [2002] ILRM 94.
119 OJ L 206, p. 7.

6 (2), (3) and (4)." Article 6(2) requires Member States to "take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive". By Article 6(3), "Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public".

Section 17 of the national regulations, in terms similar to Article 6(3) of the habitats directive, requires a proper assessment to be made of the impact on the site of any project not directly related to or necessary for the management of the site but liable to significantly affect it, in the light of the conservation objectives of the site. If the Minister, having regard to the conclusions of the assessment, is of the opinion that the plan or project may adversely effect the integrity of the site, he must apply for an injunction prohibiting it.

The Minister's application was made under section 17. The court and counsel for the two parties agreed that, when the Minister applied for the injunction, the relevant conservation site was not on the Commission list in accordance with the third subparagraph of Article 4(2) of the habitats directive, the parties proceeding on the basis of the judgment given by the Court of Justice in Case C-67/99 Commission v Ireland ([2001] ECR I-5757), finding that Ireland had not fulfilled its obligations under the directive. By Article 4(1) these obligations involved transmission of a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. But the court noted that at the time of the application for an injunction, the site was on the list that was to be established by national regulations so that it was possible to issue the injunction accordingly. But it held that the injunction would be possible a proper assessment of the impact of the plan or project on the site, preferably an "environmental impact assessment", in the light of the conservation objectives of the site, even though the Minister had argued that the possibility of applying for the injunction flowed from the actual directive.

In Ireland also, the applicant in[120] challenged Council Regulation (EC) No 894/97 of 29 April 1997 laying down certain technical measures for the conservation of fishery resources.[121] But the High Court was able to decide the case by annulling the Sea Fisheries (Drift Nets) Order, 1998[122] for violation of the first subparagraph of Article 15.2.1° of the Irish Constitution, whereby "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas [Parliament]: no other legislative authority has power to make laws for the State." The problem was that the Minister had given effect to certain obligations under Council Regulation (EC) No 1239/98[123] of 8 June 1998, amending Regulation (EC) No 894/97 by subordinate legislation and not by Act of Parliament.

Regulation No 1239/98 required measures to be taken in the event of failure to comply with the

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120 High Court, 6 March 2002.

121 OJ L 132, p. 1.

122 S.I. 267 of 1998.

123 OJ L 171, p. 1.

obligations it imposed. The Regulation was implemented by Ministerial Order, the Sea Fisheries (Drift Nets) Order, 1998, which created indictable offence. But, since section 3(iii) of the European Communities Act, 1972, enabling Community measures to apply in Irish law, expressly prohibits the implementation ministerial regulations creating new offences, the Minister issued the Order on the basis of the Fisheries (Consolidation) Act, 1959. The High Court held that this was not the proper Act on which to base the enforcement of Community measures. Moreover the use of it as a legal basis excluded the application of section 4 of the European Communities Act, 1972, which provides for parliamentary review of instruments transposing Community law. Consequently the transposal of Regulation No 1239/98 by Ministerial Order instead on Act of Parliament not only violated the Oireachtas' monopoly power to make legislation but also contributed to the democratic deficit in the transposal of Community law.

By Order 135 made on 11 April 2002[124] the Italian Constitutional Court dismissed the challenge to constitutionality of sections 189 and 266 to 271 of the Code of Criminal Procedure, and in particular section 266 concerning the admissibility of interceptions of conversations or communications, the question having been referred by the investigating judge at the Tribunal in Alba. The second paragraph of section 266 expressly excluded the admissibility in evidence of interceptions of communications between persons in the places specified in section 614 of the Criminal Code, i.e. private dwellings. This also excluded video recordings in the same places. A special authorisation from the relevant court was required in accordance with section 189 of the Code of Criminal Procedure.

The question was raised in view of the risk of a conflict between these rules and the principles of non-discrimination (Article 3 of the Constitution) and the inviolability of the home (Article 14 of the Constitution).

For its constitutional review of the second paragraph of section 266, the Court began by considering the question whether interceptions of communications in private dwellings are generally prohibited by constitutional rules. It held that the second paragraph of Article 14 of the Constitution allows restrictions to be placed on the principle of the inviolability of the home to allow inspections, searches and seizures. It therefore allows the possibility of intrusions into private dwellings for law-enforcement purposes. The Court also noted that even the principles of the secrecy of communications and the right to personal freedom, of which the inviolability of the home is a sub-categories, can be restricted on grounds of public health and public security and economic and tax grounds.

The Court held that the illegality of the restriction on the inviolability of the home was not borne out by the European Human Rights Convention (Article 8), nor by the International Covenant on Civil and Political Rights (Article 17), nor by the Charter of Fundamental Rights of the European Union (Article 7 and 52), which, "though not legally binding", may be taken into by the Constitutional Court since it expresses principles that are common to the legal systems of Europe.

On the other hand the Constitutional Court held that it was not possible to make exceptions from the principle that video recordings in private dwellings are unconstitutional when they do not concern communications between persons. In such cases, the only factor that is relevant is the intrusion in the home and therefore the restriction of the right to inviolability. But even if both the freedom of the home and the freedom of communication – as also secured by the European Convention, the International Covenant and the Charter of Fundamental Rights of the European Union – are both

[124] GURI 2002. SS, Edit. strz. p. 26.

aspects of the general protection of private life, they serve a different purpose. Video recording that do not concern communications between individuals can therefore be admitted in evidence only if expressly provided for by statute. They must be regulated by legislation in compliance with the constitutional guarantees of Article 14 of the Constitution.

Still in Italy, in another judgment (No 445 of 24 October -12 November 2002[125]) the Constitutional Court refers to the Charter of Fundamental Rights of the European Union as a basis for constitutional review of an Italian statutory provision allowing only single and widowed persons to sit the entrance examination for the *Guardia di finanza* (fraud squad). The Court held that the provision violated the fundamental right to marry secured by Articles 2 and 29 of the Constitution, Article 16 of the Universal Declaration of Human Rights, Article 12 of the ECHR and Article 9 of the Charter of Fundamental Rights of the European Union.

Hearing a legal aid application, the Court of Appeal at Rome held, in an Order made on 11 April 2002,[126] that the right to legal aid was based not only on the Constitution but also on the European Human Rights Convention, whose principles had been received into Community law by Article 6 of the Treaty on European Union.

It added that the right was secured by Article 47 of the Charter of Fundamental Rights of the European Union, which, even if it was not yet inserted in the Treaties, was ‘now to be regarded as fully applicable as a vital point of reference not only for the activities of the Community institutions but also for courts in European interpreting the law, so much so that it is constantly referred to in instruments issued by the European institutions and regularly also in submissions by the Advocate-general in the Court of Justice of the European Communities”.

The Italian Constitutional Court was asked for a constitutional ruling on the first paragraph of section 19 of Decree 688 of 30 September 1982 on the repayment of taxes wrongly charged. The referring court referred a question on the conformity of the provision with the principle of non-discrimination laid down by Article 3 of the Constitution on the ground that, by placing on applicants for reimbursement the burden of proving that the economic loss was not borne by other individuals, the provision, applied only to domestic taxes and not to those provided for by Community law. By judgment No 332 given on 1 July 2002,[127] the Constitutional Court answered the question in the affirmative since, for taxes contrary to Community law, section 29 of Act 428 of 29 December 1990 placed the burden of proving their impact on other individuals on the tax authorities and not on individuals.

Still in Italy, the Ministry of Finance brought an appeal in cassation against a decision of the Tax Commission for the Friuli-Venezia Giulia Region confirming the decision of the Tax Commission of first instance accepting an appeal by two firms. They had challenged the authorities' refusal to allow them the tax relief provide for by regional legislation following a decision by the European Commission declaring the tax relief incompatible with the common market. By judgment No 17564 given on 20 December 2002,[128] the Court of Cassation upheld the Ministry's appeal. It recalled that, on the basis of both community and Italian case-law, since the decision contained provisions that were

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125 GURI 2002, SS nº 46, p. 15.

126 Giurisprudenza costituzionale 2002, p. 2221-2224.

127 Diritto e prattica tributaria 2002 II, p. 1223-1227.

128 Il fisco: giornale tributario di legislazione e attualità 2002, p. 17800.

unconditional and sufficiently precise, it had direct effect and prevailed over instruments of domestic law. The tax authorities had accordingly been right to apply the Commission decision direct to refuse to allow the firms the tax relief provided for by the regional legislation providing for state aids that were incompatible with the common market.

The Court also ruled for the first time on the potential effects of the new Article 117 of the Italian Constitution on the principles governing the relation ship between domestic and Community law. The Article provides that "the power to make legislation shall be exercised by the State and the regions in compliance with the Constitution, *the obligations flowing from the Community legal order* and international obligations". The problem of interpretation that arose was whether the reference to obligations of Community law was a new parameter for constitutionality of national legislation, entailing the invalidity of all provisions contrary to Community law and the jurisdiction of the Constitutional Court to rule whether they were or not compatible with Community law. The Court of Cassation held that, if that interpretation was followed, the structure of the relationship between the two legal orders would be distorted as, in the event of a conflict between a domestic instrument and Community law, the courts would always have to put the question constitutionality of the domestic instrument to the Constitutional Court. That would definitively destroy the primacy of Community law over Italian law.

In the Netherlands, two judgments given by the Raad van State on 23 October 2002[129] concerned Article 3(4) of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community. It begins by holding that this is a directly applicable provision. Authorisations to emit substances on the "black list" had been issued for an unlimited period contrary to Article 3(4) of the directive.

The Raad van State departed from earlier decisions concerning the direct effect of Community instruments in a triangular relationship between a public authority, the holder of an authorisation and a third party. Under those decisions, an administrative must automatically apply the provisions of Community directive that are unconditional and sufficiently precise even if they have not been transposed into domestic law in the time allowed and even if doing so has adverse consequences for individuals. It now held that such provisions are directly applicable to the detriment of individuals only if a third party has based a claim directly on them. But there are doubts as to the questions conformity of this position with Court of Justice cases such as *Fratelli Constanzo,*[130] *Kraaijeveld,*[131] *Kolpinghuis,*[132] *Busseni* [133] and *Arcaro.* [134]

But another judgment, given on 13 November 2002, seems to depart from the new decisions of 23 October 2002[135] by holding that "where the conditions in which individuals can plead a directive in

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129 Raad van State, afdeling bestuursrechtspraak, A./Dagelijks Bestuur van het Hoogheemraadschap van West-Brabant, AB Rechtspraak Bestuursrecht 2002, 417 and A./Dijkgraaf en hoogheemraden van het Hoogheemraadschap Amstel, AB Rechtspraak Bestuursrecht 2002, 418.

130 Judgment of 22 June 1989 Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839.

131 Judgment of 24 October 1996 Case C-72/95 *Kraaijeveld and others* [1996] ECR I-5403.

132 Judgment of 8 October 1987 Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969.

133 Judgment of 22 February 1990 Case C-221/88 *CECA v Busseni* [1990] ECR I-495.

134 Judgment of 26 September 1996 Case C-168/95 Arcaro [1996] ECR I-4705.

135 Raad van State, afdeling bestuursrechtspraak, A. Bosscher/Burgemeester en Wethouders van Lochem, AB Rechtspraak Bestuursrecht 2003, 26.

the national court are met, every public authority must apply such provisions". This suggests that it is no longer for a third party to plead the disposition direct.

In the United Kingdom, following the judgment of the Court of Justice in *Arsenal Football Club Plc v Matthew Reed*,[136] the referring court held[137] that the Court had acted *ultra vires* and that there was therefore no need to follow its decision. The case concerned a trademark violation. In 1989, Arsenal Football Club registered the words "Arsenal" and "Arsenal Gunners" and the cannon and shield emblem as trademarks for a wide range of merchandise. Since 1970 Mr Reed had been selling football souvenirs and memorabilia that virtually all bore symbols referring to Arsenal at a number of stalls outside the football ground. He informed his customers that these were not official souvenirs by placing a large signboard clearly stating the origin of the products. Arsenal FC criticised Mr Reed for selling products using symbols identical to those that it had registered and launched a trademark violation action. The national court put two questions to the Court of Justice for preliminary rulings on the interpretation of Community trademark law. The first was whether the holder of a trademark that has been validly registered may prevent third parties in business life from using that mark on products that are identical to those for which the mark was registered where such use entails no statement as to the origin of the products. The second concerned the impact on the trademark holder's rights of the fact that the general public might perceive the mark as a badge of support for or loyalty or affiliation to the trademark proprietor.

The Court of Justice recalls that the primary purpose of a trademark is to provide the consumer with a guarantee as to the true origin of a product or service, allowing him to distinguish it without any risk of confusions from goods of a different origin. The purpose of the exclusive nature of the right conferred by the registered trademark on the proprietor under Article 5(1)(a) of Directive 1989/104/EEC to approximate the laws of the Member States relating to trade marks is to protect this essential function and cannot b justified on any other ground. "The proprietor may not prohibit the use of a sign identical to the trade mark for goods identical to those for which the mark is registered if that use cannot affect his own interests as proprietor of the mark, having regard to its functions. Thus certain uses for purely descriptive purposes are excluded from the scope of Article 5(1) of the Directive because they do not affect any of the interests which that provision aims to protect, and do not therefore fall within the concept of use within the meaning of that provision".[138]

According to Justice Laddie, the Court observed that where it was not the defendant's intention that his use of the trademark should be seen as an indication of origin and the use is not so perceived by the public, there is no infringement. The Court of Justice ought therefore to have answered the first of the questions referred to it in the affirmative. But it had answered neither in the affirmative nor in the negative, merely observing that "in circumstances such as those in the present case" the trademark proprietor could rely on Article 5(1)(a) of the Directive to prevent that use.

Justice Laddie refers to paragraph 61 of the judgment: "Once it has been found that, in the present case, the use of the sign in question by the third party is liable to affect the guarantee of origin of the goods and that the trade mark proprietor must be able to prevent this, it is immaterial that in the context of that use the sign is perceived as a badge of support for or loyalty or affiliation to the proprietor of the mark."

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[136] Judgment of 12 November 2002 Case C-206/01 *Arsenal Football Club* [2002] ECR I-10273.

[137] [2002] EWHC 2695 (ch.), ALLER (2003) Vol. I, p. 137-147.

[138] Ibid. point 54.

He considers that the court has come to a finding of fact, namely that use of the sign is liable to affect the origin of the goods. Examining the words "Once it has been found", he states that it was the court that made the finding, contradicting that of the High Court. Concluding that the Court of Justice acted *ultra vires*, Justice Laddie held himself not bound by its conclusions. But he did state that has was bound to follow the Court of Justice's findings as to the law applicable to the facts as found by the High Court.

Also in the United Kingdom, in *Secretary of State for the Home Department v International Transport Roth GmbH and others,* [139] the Court of Appeal (Civil Division) upheld on appeal a decision of the High Court that legislation imposing penalties on lorry-drivers transporting illegal immigrants was contrary to the European Human Rights Convention. But the decision was set aside in so far as it declared that there was a violation of Community law on the free movement of goods.

To stem the flow of illegal immigration, the British Government enacted the Immigration and Asylum Act 1999 providing among other things for penalties of £2000 per person to be imposed either on the owner or on the driver or on any other person involved where illegal immigrants were detected in lorries. The authorities were given the right to hold the lorry until the fine was paid. There was a right of objection to the Home Secretary, but the fines were imposed by administrative authorities without prosecution, the burden of proof being on the carrier. The High Court, in which an action was brought by fifty or so carriers and drivers challenging the legislation as contrary to the European Human Rights Convention and Community law on the free movement of goods, accepted their arguments. The Home Secretary appealed.

On the Community law aspect, la Court of Appeal, by a majority, following the judgment given by the Court of Justice on 5 October 1994 in C-280/93 *Germany v Council* [1994] ECR I-4973, expressly cited, accepted the Home Secretary's argument that the potential impact of the fines on carrier's business decisions to reduce their services to the UK or to use different ports or shipping lines was too indirect and uncertain to be a restriction on intra-Community trade or a measure with equivalent effect.

Regarding the European Human Rights Convention, the Court was not unanimous. Lord Justice Laws fully accepted the Home Secretary's arguments but Lord Justice Parker regarded the fines scheme as unjust on carriers and contrary to Article 6 of the Convention. Lord Justice Brown acknowledged that the scheme did not directly violate the Convention but that it was unjust on carriers. In any event, the decision of the court below was upheld on this point.

Lord Justice Simon Brown said: "Difficult and worrying as I have found this case to be, in the last analysis, affording all such deference as I believe I properly can to those responsible for immigration control and for devising and enacting the legislation necessary to achieve it, I have come to regard this scheme as, quite simply, unfair to carriers."

Also in the UK, in an appeal judgment in the "metric martyrs" case,[140] the High Court (Divisional Court) specified how the implementation and primacy of Community law proceeded for constitutional purposes in the UK.

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[139] (2002) EWCA Civ 158.

[140] Thoburn v Sunderland City Council; Hunt v Hackney London Borough Council; Harman and others v Cornwall County Council; Collins v Sutton London Borough Council (2002) CMLR p. 1461-1500.

Five traders had been prosecuted for breach of provisions imposing the metric system of weights and measures. Four of them were prosecuted for offences against the UK legislation, and a fifth failed in his application for renewal of his licence to sell in public markets, on the ground that they all calculated the prices of their goods (fruit and vegetables, and in one case fish) on the basis of the imperial system of weights rather than the metric system. The metric system was compulsory in the UK under the Weights and Measures (Metrication Amendments) Regulations 1994, adopted to transpose Directives 80/181 and 89/617.

They challenged the validity of the Regulations, which amended an Act of Parliament, the Weights and Measures Act 1985. There is a provision in the European Communities Act 1972 ("ECA") enabling the executive to do this, known as the "Henry VIII clause" after that King's absolutist habits, and that was the clause used as a basis for the obligation to use the metric system. They argued that the Henry VIII clause in the 1972 Act had been implicitly repealed by the 1985 Act.

On the basis of a detailed analysis of the implementation of and compliance with the principle of the primacy of Community law in the United Kingdom, Lord Justice Laws stated that at common law the ECA "is a constitutional statute: that is, it cannot be impliedly repealed". The other arguments –in particular that the Henry VIII clause could be used solely to make minor amendments – were also rejected, and the appeals failed.

Lord Justice Laws summed up the relationship between Community law and the law of the United Kingdom as follows: "(1) All the specific rights and obligations which EU law creates are by the ECA incorporated into our domestic law and rank supreme: that is, anything in our substantive law inconsistent with any of these rights and obligations is abrogated or must be modified to avoid the inconsistency. This is true even where the inconsistent municipal provision is contained in primary legislation. (2) The ECA is a constitutional statute: that is, it cannot be impliedly repealed. (3) The truth of (2) is derived, not from EU law, but purely from the law of England: the common law recognises a category of constitutional statutes. (4) The fundamental legal basis of the United Kingdom's relationship with the EU rests with the domestic, not the European, legal powers. In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the ECA were sufficient to incorporate the measure and give it overriding effect in domestic law. But that is very far from this case".