

No 11

Review of significant judgments of national courts of final instance

1. As observed by the Commission in its previous reports, the reviews of national court judgments available to it show that the courts and tribunals of the Member States do in general apply Community law.

2. First, as regards Article 177 of the Treaty, in 1989 the national courts continued to refer to the Court of Justice for preliminary rulings in cases where difficulty arose concerning the interpretation of a given Community rule or the validity of a Community instrument.

Between 1 January and 31 December 1989 the Court was asked to give 139 preliminary rulings. This is lower than the total of 179 references recorded in 1988, but quite close to the 1987 figure of 144.

The table below, which provides a breakdown of references by State and by type of court, reveals considerable disparities between the Member States as regards the application of Article 177. However, in contrast with 1988, when no request for a preliminary ruling was received from Greece, Ireland or Portugal, in 1989 requests were received from all the Member States.

Member State	Total references	References by courts of final instance
Belgium	13 (32) (*)	— (1)
Denmark	2 (4)	1 (2)
France	28 (37)	1 (4)
Germany	47 (34)	22 (8)
Greece	2 (—)	— (—)
Ireland	1 (—)	1 (—)
Italy	10 (28)	1 (—)
Luxembourg	1 (2)	1 (2)
Netherlands	18 (25)	15 (16)
Portugal	1 (—)	— (—)
Spain	2 (1)	— (—)
United Kingdom	14 (16)	2 (2)

* 1988 figures in brackets.

3. In analysing the rulings of the highest national courts for the purposes of this report, the Commission has been greatly assisted by the documentation produced by the Court of Justice of the European Communities. The Court's documentation departments have devised a system for monitoring all judgments and decisions of the courts in the Member States which relate to the application of Community rules or make reference to them.

Analysis of the judgments referred to below leads to the conclusion that over the years Community law has continued to have a real impact on domestic legal systems. The last traces of resistance to the actual principle of the primacy of Community law are vanishing, and awareness of the need to apply Community rules, irrespective of the nature of the proceedings or the stage they have reached, is increasing.

4. Clearly, this does not mean that the national courts have applied Community law correctly in every case. And it should be pointed out that while the systematic consultation of databases containing the judgments of national courts does make it possible to identify decisions involving the application of Community law — whether correct or incorrect — it does not lend itself to identifying judgments where no mention is made of a particular Community rule which should have been applied.

That said, the Commission's analysis has shown no instance of national supreme courts having given judgments inconsistent with Community law.

5. In last year's report, reference was made to an infringement proceeding brought against France concerning a judgment by the Cour de Cassation upholding a lower court's ruling which was contrary to Community rules. This case is likely to be settled shortly following discussions between the French authorities and the Commission.

6. The following judgments by national supreme courts are noteworthy examples of the application of Community law in the Member States.

Conseil d'État (France) — Decision of 20 October 1989 — *Nicolo* — 108423

As stated by the Commission in its appendix ("The attitude of national supreme courts to Community law") to the sixth annual report to Parliament, one of the last remaining major difficulties encountered in the application of Community law by national courts of final instance lay in the refusal of France's Conseil d'État to recognize the primacy of Community rules over subsequent national law.

The Conseil d'État (the supreme administrative court) maintained the position set out in its decision of 1 March 1968 in *Syndicat Général des Fabricants de Semoules de France*: it was not for it to rule on the validity of a law in relation to any other legal act, so laws inconsistent with Community rules which had entered into force at an earlier date were to be applied.

Again recently, the Conseil d'État ruled that a party could not validly claim that the judgment challenged ignored the terms of Articles 30 and 34 of the Treaty of Rome, because it had been delivered on the strength of the Act of 21 July 1983, i.e. after the entry into force of the said Treaty (Decision of 27 April 1988, *Société Bernard Caront*, No 63712).

It should be borne in mind, however, that the Conseil d'État's holding related only to statutes (so not to legislation in the form of regulations) and, moreover, only to statutes enacted after the

pertinent Community legislation. It should also be borne in mind that, as early as 1975, the Cour de Cassation, which is the supreme court in the judicial hierarchy, had acknowledged the primacy of the EEC Treaty over national law, even where the latter had been enacted after the Treaty.

This is the background against which the Conseil d'Etat delivered its *Nicolo* decision on 20 October 1989, whereby it decided to examine the compatibility of rules defined by an Act of 7 July 1977 with Article 227 (1) of the Treaty establishing the European Economic Community.

An action was brought before the court seeking to have the elections to the European Parliament of 10 June 1989 declared void on the grounds that they had been vitiated by the participation of French nationals from the overseas departments and territories and by the inclusion of a number of such nationals in the lists of candidates.

In dismissing the action, the Conseil d'Etat quoted the terms of Article 227 (1) of the Treaty of 25 March 1957 establishing the European Economic Community ('This Treaty shall apply to . . . the French Republic . . .') and stated that the rules at issue, as defined by the Act of 7 July 1977, which stipulate that 'the overseas departments and territories shall form part of the single electoral constituency' are not inconsistent with the unambiguous terms of Article 227 (1) of the Treaty.

This decision constitutes a major reversal on a principle of fundamental relevance to the application of Community law.

It needs to be said, however, that the decision relates to the primacy of the Treaty itself, which in the case in point was all that was at issue. It is to be hoped, none the less, that the Conseil d'Etat will take the same view in respect of secondary legislation and acknowledge the primacy of Community directives and regulations over subsequent national legislation.

Lastly, it is interesting to note that earlier in the year (on 3 February) the Conseil d'Etat, in its *Alitalia* judgment, had established the possibility of challenging the legality of a regulatory measure beyond the time limit for appeal on grounds of misuse of power and without any objection of illegality being raised by recognizing the right to bring an action asking the court to find against the administration for failure to adopt, within the time allowed, the amendments to the regulations which are required in order to ensure the application of Community directives.

House of Lords — United Kingdom — Judgment of 18 May 1989 — *Factortame Limited*

Under a hitherto sacrosanct rule of common law, the courts may not, for the purposes of interim protection, grant interim injunctions against the Crown.

In a judgment delivered on 10 March 1989, the Queen's Bench Divisional Court, to which application had been made to have that part of the Merchant Shipping Act 1988 which imposes

strict conditions on the registration of fishing vessels as British vessels declared incompatible with Community law, referred to the Court of Justice for a preliminary ruling on the substantive issues and granted an injunction disapplying the operation of the legal provisions challenged pending the outcome of the reference. This injunction was set aside by the Court of Appeal.

On 18 May the House of Lords, to which the case had been appealed as the court of final instance, ruled that as a matter of English law there was no jurisdiction to grant interim relief against the Crown. But it also adjourned further consideration of the appeal and made its own separate reference to the Court of Justice for a preliminary ruling on the question whether Community law either obliges the national court or gives it power to grant interim protection of rights claimed under Community law having direct effect in national law with respect to a national measure which, if applied, would automatically deprive the party concerned of the rights claimed.

This important decision opens up the possibility of a break with the principle whereby courts may not grant interim protection of rights claimed by suspending the operation of a national measure adopted by central government.

The Commission will propose to the Court of Justice that it reply to the reference in the following terms: the obligation laid upon national courts to apply Community law having direct effect and to protect the rights which it confers on individuals includes the obligation to consider whether interim protection of rights claimed against the authorities has to be granted in order to prevent irreparable damage being suffered and to grant such interim relief as may be appropriate.

Cour de Cassation, Chambre commerciale (France) 10. July 1989 — *Bodson v. Société des Pompes Funèbres* — No 85.10.727

In a judgment given on 10 July 1989 the Chambre Commerciale of the Cour de Cassation overruled an appeal court's interim order prohibiting a firm from engaging in any activity forming part of 'external services' for funerals on the grounds that an exclusive concession had been granted by a local authority to another firm.

The higher court held that it was for the court below to ascertain whether the situation at issue was manifestly unlawful under Article 86 of the EEC Treaty by seeking to determine whether the firm holding the concession occupied a dominant position and had abused that position, and that the court making an interim order could not refer this task to the court dealing with the substance of the case.

The value of this decision must be seen in the light of the major developments which have taken place in France as regards the *procédure de référé*, which makes it possible to obtain a very

rapid but interim judicial decision in cases where the obligation invoked cannot be seriously challenged or where a manifestly unlawful situation has to be brought to an end.

The judgment of the Cour de Cassation signalled to the court that had made the interim order that, although it was not deliberating on the substance of the case, it was responsible for determining whether the legal situation before it was incompatible with Community law and, if so, for ending the manifestly unlawful situation constituted by such an infringement.

Constitutional Court (Italy) Judgment No 389 of 11 July 1989

This judgment is of interest first because it follows on from the judgment given by the Court of Justice on 14 January 1988 in Case 63/86 *Commission v. Italy* [1988] ECR 29, and second because it affords the Constitutional Court an opportunity to clarify its rulings in the matter of the relationship between Community law having a direct effect and national law.

In Case 63/86 the Court of Justice declared that Italian legislation restricting the right to purchase or lease subsidized housing and to obtain reduced-rate mortgage loans to Italian nationals was incompatible with Articles 52 and 59 of the EEC Treaty.

To comply with the Court of Justice's judgment, the Italian Government adopted a special measure making it clear to the regions and autonomous provinces, which have exclusive powers in this field, that they are obliged to treat all Community nationals equally. This resulted in a conflict of jurisdiction which was raised before the Constitutional Court by the autonomous province of Bolzano.

The Constitutional Court adopts a clear position on a number of points.

While confirming its previous rulings finding that a Community provision having direct effect must be applied in accordance with the interpretation given by the Court of Justice under Article 177 of the EEC Treaty, the Constitutional Court extends its view specifically to judgments under Article 169 of the

Treaty, where the decision of the Court of Justice, though delivered in a different context, has the same characteristics as a ruling giving an interpretation of Community law.

As regards the relationship in the national legal order between Community rules having direct effect and incompatible national provisions, the Constitutional Court:

- (a) reiterates its position on the autonomy of and coordination between the two legal orders and on the primacy of Community law;
- (b) specifies that this primacy serves to render the incompatible national provision inapplicable but not to rescind or cancel it;
- (c) states (for the first time in such explicit terms) that all those responsible in the national legal order for enforcing laws (whether it be the courts or the administration) are legally bound not to apply domestic measures which are incompatible with Community law;
- (d) stipulates, however, that this does not release Member States from the obligation to rescind or amend those measures to bring them into line with Community law; from the point of view of the national legal order this requirement is a matter of certainty in the law, and from the point of view of Community law it serves as a fundamental guarantee of compliance with the principle of primacy, establishing a specific obligation on the Member States which does not admit of any exception.

This judgment is to be seen as consistent with the way in which the case law of the Italian Constitutional Court has progressed towards full acceptance of the principles defined by the Court of Justice.

Most of these principles had already been recognized in the past (up to the milestone judgment No 170 of 1984), but judgment No 389 does offer a number of extremely useful and significant clarifications.