

## No 11

## Application of Community law by national courts

## I. APPLICATION OF ARTICLE 177 OF THE EEC TREATY

1. In 1991 the Court of Justice received 153 requests from national courts for preliminary rulings in cases where difficulties arose in the interpretation of Community law or there were doubts as to the validity of a Community instrument.

Over the last few years the number of cases referred to the Court for preliminary rulings has remained relatively stable — 141 in 1990 and 139 in 1989 — although the figure for 1988 was slightly higher (179).

2. For the second consecutive year, cases were referred by courts in all the Member States. Admittedly there are disparities between the various countries, most notably between Germany, which asked for rulings on 50 cases, and Ireland, which referred only one; but the figures show quite clearly that there is no longer a single Member State that is against the procedure on principle.

3. The three tables below show the number of references from each Member State, the number of cases referred by each court of final instance and the areas of Community law concerned. It should be pointed out that as and when these cases are recorded by the Court of Justice Registry, they are published in full in the *Official Journal of the European Communities*.

Number of cases per Member State

Member State	Total references (1)	References by courts of final instance (1)
Belgium	17 (17)	1 (4)
Denmark	2 (5)	— (—)
France	24 (21)	3 (2)
Germany	50 (34)	17 (12)
Greece	2 (2)	— (2)
Ireland	1 (4)	1 (2)
Italy	18 (25)	3 (1)
Luxembourg	2 (4)	1 (2)
Netherlands	17 (9)	4 (3)
Portugal	3 (2)	2 (—)
Spain	4 (6)	— (—)
United Kingdom	13 (12)	3 (2)

(1) 1990 figures in brackets.

## Origin of cases referred by national courts of final instance

Belgium	Cour de Cassation	1
	Hof van Cassatie	
France	Cour de Cassation	2
	Conseil d'État	1
Germany	Bundesverwaltungsgericht	2
	Bundesfinanzhof	9
	Bundessozialgericht	1
	Bundesgerichtshof	5
Ireland	Supreme Court	1
Italy	Corte Suprema di Cassazione	2
	Consiglio di Stato	1
Luxembourg	Conseil d'État	1
Netherlands	Hoge Raad	3
	Raad van State	1
Portugal	Supremo Tribunal Administrativo	2
United Kingdom	House of Lords	3

## Areas of Community law concerned

Agriculture	27
Brussels Convention	4
Commercial policy	1
Community staff	2
Company law	3
Competition	13
Environment and consumer policy	0
External relations	4
Free movement of capital	1
Free movement of goods	27
Free movement of persons	9
Social policy	41
State aid	4
Taxation	14
Transport	3

## II. REVIEW OF SIGNIFICANT JUDGMENTS OF NATIONAL COURTS OF FINAL INSTANCE

In an appendix to the Eighth Annual Report, the Commission published a study on the attitude of national superior courts to Community law, in particular their approach to the principle of the primacy of Community law over national law, the direct effect of many Community rules and the obligations arising from Article 177 of the EEC Treaty.

Analysis of the judgments referred to below shows that national superior courts are paying more and more attention to Community law.

As in the previous year, the Commission has had access to data gathered by the research and documentation department of the Court of Justice. It was thus able to identify decisions which were of significance for the application of Community law, although it should be pointed out that it is not possible, by consulting data bases, to identify cases where national courts ought to have applied Community rules but where the judgment contains no reference to them. Moreover, the Commission cannot undertake a systematic analysis of the thousands of judgments delivered each year by the national superior courts.

### The research

Research was carried out on the following questions:

1. Were there cases where decisions against which there was no appeal were taken without a reference for a preliminary ruling?
2. Were there any cases where courts, contrary to the ruling in Case 314/85 *Fotofrost*, declared an act of a Community institution to be invalid?
3. Were there any decisions that were noteworthy as setting good or bad examples?

Decisions given late in 1990 and in the course of 1991 were reviewed.

#### Question 1

A judgment given by the Bundesverfassungsgericht in Germany on 27 August 1991, upholding the decision of the Bundesgerichtshof of 15 January 1990 not to refer to the Court of Justice a series of questions relating to company law (compatibility of the German concept of 'disguised contributions in kind' with Council Directive 77/91/EEC) is particularly noteworthy. In two judgments given on 17 October 1991 the Bundesfinanzhof also declined to ask for preliminary rulings in cases concerning failure to take account of losses sustained on rental of property outside Germany (but within the Community) for income tax purposes, although the possibility exists where the property is situated within Germany. But questions on the same subject were subsequently put by the Landgericht Hannover (Case C-83/91).

In Portugal the Supremo Tribunal de Justiça declined to request a preliminary ruling in a recent case concerning Decree-Law No

430/83, which provides for the expulsion from Portugal of foreign nationals convicted of certain offences. Having regard to the judgment given by the Court of Justice in Case 67/74, *Bonsignore*, it upheld the decision to expel a Dutch national convicted of a drug offence.

There was a particularly important development in Spain. An administrative division of the Tribunal Supremo and the Tribunal Constitucional both had doubts as to their jurisdiction to refer questions for a preliminary ruling on the compatibility of a national provision with Community law. In four judgments given at the end of November 1990 on Spanish legislation implementing the Sixth VAT Directive, the Sala de lo Contencioso Administrativo of the Tribunal Supremo held that a court or tribunal whose jurisdiction is confined to reviewing administrative measures and regulations and does not extend to reviewing administrative measures and regulations and does not extend to reviewing legal provisions has no power to ask the Court of Justice questions that might lead to a ruling as to the applicability or otherwise of a legal rule; the Tribunal Constitucional alone had that power. But the Tribunal Constitucional did not share that interpretation of its own jurisdiction. In two judgments that were by no means unanimously acclaimed, it held that it could not rule on the compatibility of Spanish law with Community law since Community law was not part of the Spanish Constitution. The first of these judgments — given on 14 February 1991 — concerned the compatibility of a Spanish law governing the election of Members of the European Parliament with a decision of the Council of the European Communities. The Tribunal Constitucional held that the question whether a provision of Spanish law conflicted with Community law did not fall to be treated as a question of constitutional law: it concerned a conflict of laws arising below the constitutional level and could be adjudicated by the lower courts. The Tribunal declared that it had no jurisdiction to ensure the uniform application of Community law and accordingly declined to refer the question for a preliminary ruling. By a further judgment given on 22 March 1991 it upheld its earlier approach, adding that it could review the implementation of Community law by the Spanish authorities only where an abuse of fundamental rights was involved.

A final decision worthy of comment in this field is that given by the Dutch College van Beroep voor het Bedrijfsleven on 30 January 1991. It had been established that the Dutch Government, contrary to Article 5 of Directive 88/301/EEC, had failed to notify the Commission of terminals type-approval procedures. The applicant in the main proceedings had argued that this failure to discharge a Community obligation invalidated all type-approval procedures. The Court used Case 380/87, *Enichem Base v. Comune di Cinisello Balsamo*, as authority for holding that neither the terms nor the purpose of the Directive warranted a conclusion that failure to notify invalidated all procedures. But it must be remembered that the legal effect of failure to notify technical rules is in issue in several cases pending before the Court of Justice (e.g. Cases C-69/91, *Decoster*; C-92/91, *Taillandier*; C-93/91, *Evrard*).

#### Question 2

Research revealed no cases of this type.

*Question 3*

Research yielded several exemplary decisions of supreme courts in the Member States; the judgment given by the Italian Corte Costituzionale on 18 April 1991 is a shining example. It confirmed the right in Italian law for an individual to plead provisions of a Directive which are sufficiently precise and unconditional against the State if the State has failed to transpose the Directive into national law or has done so but not correctly. The Corte Costituzionale held that where a court established that a national provision conflicts with a directly applicable provision of Community law it must of its own motion disapply the national provision; it need not refer the question for constitutional review, and if it did so the reference would be dismissed for want of jurisdiction.

A few cases to close with:

- the decision of the House of Lords in *Chief Adjudication Officer v. Foster*, based on the judgment of the Court of Justice of 12 July in Case C-188/89, rejected arguments in

favour of restrictive interpretations of Court of Justice judgments;

- on 4 June 1991 the commercial division of the French Court of Cassation, in *Doyen et al v. Société des pompes funèbres des régions libérées*, annulled a Court of Appeal judgment as unreliable in law since it had applied Article 86 of the EEC Treaty without regard for the criteria established by the Court of Justice;
- on 8 July 1991 the French Conseil d'État, in *Palazzi*, held a decree governing rights of residence to be illegal as incompatible with Council Directive 64/221/EEC on the coordination of special measures applicable to the movement and residence of foreign nationals on grounds of public policy, public security or public health;
- on 4 December 1990 the Dutch Raad van State declared in *Bruin & Hartveld v. Minister van Landbouw* that it had jurisdiction to check a national administrative regulation for conformity with a principle of Community law (in this case the principle of proportionality).