*ANNEX VI*

## APPLICATION OF COMMUNITY LAW BY NATIONAL COURTS: A SURVEY

### 1. Application of Article 234 of the EC Treaty

In 1999, 255 requests for preliminary rulings were made by the national courts to the Court of Justice of the European Communities (hereafter 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 ten years [1].

[1] The last three reports were published in OJ C 332, 3.11.1997, p. 198, OJ C 250, 10.8.1998, p. 195 and OJ C 354, 7.12.1999, p. 182.

**Number of references per Member State**

| | Year | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 |
| Belgium | 17 | 17 | 16 | 22 | 19 | 14 | 30 | 19 | 12 | 13 |
| Denmark | 5 | 2 | 3 | 7 | 4 | 8 | 4 | 7 | 7 | 3 |
| Germany | 34 | 50 | 62 | 57 | 44 | 51 | 66 | 46 | 49 | 49 |
| Greece | 2 | 2 | 1 | 5 | — | 10 | 4 | 2 | 5 | 3 |
| Spain | 6 | 4 | 5 | 7 | 13 | 10 | 6 | 9 | 55 | 4 |
| France | 21 | 24 | 15 | 22 | 36 | 43 | 24 | 10 | 16 | 17 |
| Ireland | 4 | 1 | — | 1 | 2 | 3 | — | 1 | 3 | 2 |
| Italy | 25 | 18 | 22 | 24 | 46 | 58 | 70 | 50 | 39 | 43 |
| Luxembourg | 4 | 2 | 1 | 1 | 1 | 2 | 2 | 3 | 2 | 4 |
| Netherlands | 9 | 17 | 18 | 43 | 13 | 19 | 10 | 24 | 21 | 23 |
| Austria | | | | | | 2 | 6 | 35 | 16 | 56 |
| Portugal | 2 | 3 | 1 | 3 | 1 | 5 | 6 | 2 | 7 | 7 |
| Finland | | | | | | — | 3 | 6 | 2 | 4 |
| Sweden | | | | | | 6 | 4 | 7 | 6 | 5 |
| United Kingdom | 12 | 13 | 15 | 12 | 24 | 20 | 21 | 18 | 24 | 22 |
| Total | 142 | 186 | 162 | 204 | 203 | 251 | 256 | 239 | 264 | 255 |

As in 1998, references were made by courts in all Member States. In 1999, preliminary rulings accounted for about 47 % of the 543 cases brought before the Court. 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 1999, by Member State**

| | | |
|---|---|---|
| Belgium | Conseil d'État | 1 |
| Denmark | Højesteret | 1 |
| Germany | Bundesgerichtshof | 2 |
| | Bundesverwaltungsgericht | 1 |
| | Bundesfinanzhof | 4 |
| | Bundessozialgericht | 9 |
| Spain | Tribunal Supremo | 2 |
| France | Cour de cassation | 1 |
| | Conseil d'État | 4 |
| Ireland | Supreme Court | 1 |
| Italy | Consiglio di Stato | 2 |
| Luxembourg | Cour administrative | 1 |
| Netherlands | Raad van State | 3 |
| | Hoge Raad | 8 |
| | Centrale Raad van Beroep | 3 |
| | College van Beroep voor het Bedrijfsleven | 3 |
| Austria | Oberster Gerichtshof | 5 |
| | Bundesvergabeamt | 1 |
| | Verwaltungsgerichtshof | 7 |
| | Vergabekontrollsenat | 1 |
| Portugal | Supremo Tribunal Administrativo | 4 |
| Finland | Korkein Hallinto-oikeus | 1 |
| | Korkein oikeus | 1 |
| Sweden | Högsta Domstolen | 1 |
| | Regeringsrätten | 3 |
| United Kingdom | House of Lords | 1 |
| | Court of Appeal | 2 |

Only the Greek courts of final instance made no requests for preliminary rulings.

## 2. **Significant judgments by national courts of final instance**

### 2.1. *Introduction*

The following analysis illustrates developments in how Community law is taken into account by the superior national courts.

The Commission has again had access to data gathered by the Research and Documentation Department of the Court of Justice. It was thus able to identify decisions which applied Community law, though it is not possible, by consulting databases, to identify cases where national courts ought to have applied Community law but where the judgment contains no reference to it. Moreover, the Commission cannot undertake a systematic analysis of the many judgments delivered each year by the superior courts in the various countries. Each year, some 1 200 judgments relating to Community law come to the attention of the Research and Documentation Department.

### 2.2. *The research*

Research was carried out on the following questions in relation to decisions given or reported for the first time in 1999:

1. 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?

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

2. Were there cases where courts, contrary to the rule in Case 314/85 *Foto-Frost* [1], declared an act of a Community institution to be invalid?

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

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

In view of certain decisions made by the European Court of Human Rights this year, a fifth question arises:

5. Were there any decisions of the European Court of Human Rights which are of interest for the purposes of this survey?

***Question 1***

In *Germany* the Federal Administrative Court (*Bundesverwaltungsgericht*) heard a case concerning an application by a female warrant officer in the medical corps of the German army (*Bundeswehr*) to join the combat units' driving school. Without requesting a preliminary ruling from the Court of Justice, the *Bundesverwaltungsgericht* made an order of 20 May 1999 [2], rejecting the application on the grounds that the pertinent provisions of German law, and in particular Article 12a(4) of the Basic Law (*Grundgesetz*), preclude women from bearing arms and restrict them to the medical and music corps. According to the *Bundesverwaltungsgericht*, the German regulations are in accordance with Community law since Article 2(2) of Directive 76/207/EEC, on

[1] [1987] ECR 4199.

[2] Bundesverwaltungsgericht, decision of 20 May 1999, 1 WB 94/98. Neue Zeitschrift für Verwaltungsrecht 1999, 1343-1345 (= Zeitschrift für Beamtenrecht 1999. 161-165; Deutsche Verwaltungsblätter 1999, 1437-1439; Die Öffentliche Verwaltung 1999, 914-916).

the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1], excludes the armed forces from its scope. On 13 July 1998, the Hanover Administrative Court (*Verwaltungsgericht Hannover*) had already referred to the Court of Justice [2] for a ruling on whether Directive 76/207/EEC precludes the application of national provisions such as those of German law. The Court replied in its judgment of 11 January 2000 [3].

In Germany again, the First Chamber (*Erster Senat*) of the Federal Finance Court (*Bundesfinanzhof*) made a referral order on 9 September 1998 asking the Enlarged Chamber (*Großer Senat*) of the *Bundesfinanzhof* [4] to rule on whether the *Bundesfinanzhof* was obliged in a tax dispute to refer to the Court of Justice for the interpretation of Directive 78/660/EEC [5] on the annual accounts of certain types of companies. In Germany, the provisions on income tax refer to the commercial law transposing the Directive, which is not limited to certain types of company like the Directive itself but applies to all persons engaging in commercial activity [6]. Referring to the Court of Justice judgment of 17 July 1997 in *Leur-Bloem* [7], the First Chamber argues that it is for the national court to assess the exact scope of a reference by national law to Community law, in this case the reference to the Directive by the German legislator.

By its decision of 29 April 1999, the Hamburg Finance Court (*Finanzgericht Hamburg*) asked the Court of Justice to rule on its own competence to interpret the Directive in tax disputes [8].

In *Belgium* the Brussels Court of Appeal (*Cour d'appel de Bruxelles*) held on 5 March 1999 [9] that a judgment by which the national court refers for a preliminary ruling to the Court of Justice cannot be appealed. According to the *Cour d'appel*, such a judgment is neither a final decision on the substance of the case or on subordinate matters nor an interlocutory decision taken for examination pruposes or to regulate the parties' position provisionally pending a substantive decision. By requesting a preliminary ruling, the court does not decide any question of law or fact and does not prejudge the outcome of the case. The *Cour d'appel* concludes that unless such a judgment causes some other form of immediate injury to one of the parties, it is a decision or measure regulating the court's transactions which, under the terms of Article 1046 of the Judicial Code, cannot be appealed. The reference to the Court of Justice by the Brussels Court of First Instance (*Tribunal de première instance de Bruxelles*) thus stands [10]. The appellant, who had referred the matter to the Court of Cassation (*Cour de Cassation*), has dropped the appeal.

The Belgian Court of Arbitration (*Cour d'arbitrage*), in its judgment of 30 September 1999, partially annulled Article 6 of the Law of 10 December 1997 prohibiting advertising of tobacco products, which transposes Directive 98/43/EC of 6 July 1998 [11]. This was done without acceding to the request of certain parties to refer to the Court of Justice. Whereas Article 6(3) of the Directive provides for Member States to be able to postpone its implementation until 30 July 2002 (as regards the press) or 2003 (as regards sponsorship), Article 6 of the Belgian law provides that it enters into force on 1 January 1999. The claimants argued, *inter alia*, that banning advertising and sponsorship of tobacco products made it impossible to organise events — in particular motor racing events — which were funded or sponsored by the tobacco industry. Some of the claimants were specifically critical of the failure to make special arrangements for world-class events and to take advantage of the scope afforded by the Directive for postponing these bans where such events are concerned. The *Cour d'arbitrage* reviewed the aims of the law, namely to safeguard public health by cutting tobacco consumption and to reduce the social and financial costs of such consumption, and noted that, while the financial and job losses which would inevitably result from such bans were substantial, they could not in principle be disproportionate if they were the price to be paid for safeguarding public health effectively. On the other hand, as regards world-class events, it recognised that there was a significant risk of relocation since the other Member States might avail themselves of Article 6(3) of the Directive to postpone these bans. The *Cour d'arbitrage* also noted that the law's effectiveness will be significantly impaired since such events are mainly viewed by televised retransmission and many viewers would continue to see such programmes and would thus not be affected by the bans. Bearing these two points in mind, the *Cour d'arbitrage* held that the measure is disproportionate in the current circumstances and breaches the principles of equality and non-discrimination enshrined in Articles 10 and 11 of the Constitution, read in conjunction with the principle of freedom to engage in commerce and industry. The *Cour d'arbitrage* therefore annulled Article 6 of the Law, but only in so far as it applies to world-class events and activities before 1 January 2003. The *Cour d'arbitrage* was also asked to rule on the compatibility of the advertising ban with Article 28 (ex Article 30) of the EC Treaty. It considered that, quite apart from the fact that what was at issue was a sales technique, this measure would be equally applicable to all and would not represent a barrier to free movement of goods. In any case, it would be justified by the need to safeguard public health.

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(1) OJ L 39, 14.2.1976, p. 40.
(2) OJ C 278, 5.9.1998, p. 31.
(3) Case C-285/98, judgment not yet published in the ECR. Unlike the Bundesverwaltungsgericht, the Court of Justice holds that Directive 76/207/EEC precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from bearing arms and restrict them to the medical and music corps.
(4) Bundesfinanzhof, decision of 9 September 1998, I R 6/96. Sammlung der Entscheidungen und Gutachten des Bundesfinanzhofes Band 187, 215-223. The Enlarged Chamber of the Bundesfinanzhof consists of the President of the Bundesfinanzhof and a member of each of its chambers. According to Article 11(4), of the Code of Procedure before the Finance Court (Finanzgerichtsordnung), a question of basic importance may be put to the Enlarged Chamber when a chamber considers it necessary for the development of law or to ensure coherent jurisprudence.
(5) Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11).
(6) See Article 5 of the Income Tax Act (Einkommensteuergesetz).
(7) Case C-28/95 [1997] ECR 1-4161.
(8) OJ C 333, 20.11.1999, p. 13 (Case C-306/99); also published in Betriebs-Berater 1999, 1866-1867 (= Entscheidungen der Finanzgerichte 1999, 1022-1034; Recht der Internationalen Wirtschaft 1999, 793-800).
(9) Cour d'appel de Bruxelles, 5 March 1999, No 322/96.
(10) Case C-108/96, pending.
(11) Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 213, 30.7.1998, p. 9).

In *Greece*, the Council of State (*Symvoulio tis Epikrateias*), despite a dissenting minority view, declined to refer to the Court of Justice or avoided doing so in two cases. It rendered two judgments according to two different lines of reasoning, endorsing the administrative refusal of recognition in Greece to degrees from universities from other Member States, where some of the teaching had been carried out in Greece on the satellite campuses of these universities. Both the teaching by the satellites and the system of supervision and examination were the same as those in the 'parent' university and the instruction was given by staff from the parent university who travelled to Greece for this purpose. In both cases, the Greek qualifications body (the Dikatsa) had cited Articles 7 and 8 of Greek Law No 741/1997 and had refused to recognise the foreign degree as fully equivalent to the Greek one on the grounds that part of the studies, i.e. the first two years on the satellite campus, had taken place at a 'free study centre in Greece'.

In the first judgment (2807/1997 ([1])), the Sixth Chamber of the *Symvoulio tis Epikrateias* noted that Article 16 of the Constitution, which stipulates that only legal persons subject to public law and acting under the control of the State may provide higher education and forbids the creation of higher education establishments by private persons, conflicts with Articles 48, 52 and 126 of the EC Treaty (which after amendment of the Treaty have become Articles 39, 43 and 149 respectively) and Directive 89/48/EEC on mutual recognition of higher-education diplomas ([2]).

While recognising that these provisions prevail over domestic law, the Sixth Chamber nonetheless seems initially to restrict this primacy to non-constitutional national law. In order to resolve the matter, the Chamber argued that it is for the Court of Justice, under Article 177 of the EC Treaty (now Article 234) to rule on whether the diploma in question is covered by Community law and, if so, whether the refusal to recognise it is compatible with Community law. However, although it is a court of last resort within the meaning of Article 177, the Sixth Chamber did not itself refer the matter for a preliminary ruling but referred the whole case, in view of its importance, to the plenum of the *Symvoulio tis Epikrateias*. Since the claimant subsequently dropped the case, the plenum did not give judgment.

When the same issue was raised by a different claimant, the *Symvoulio tis Epikrateias* followed an entirely different approach in judgment 3457/1998 ([3]). The administrative refusal to recognise the diploma in question was upheld solely on the basis of Article 126 of the EC Treaty (now Article 149), thus dropping the question of the primacy of Community law over the Constitution. The *Symvoulio tis Epikrateias* holds that Article 126, by guaranteeing the cultural and linguistic diversity of the Member States, excludes the content of education and the organisation of education systems from the sphere of Community competence and thereby justifies the barriers which might result for the free movement of persons and capital and the free provision of services. Directive 89/48/EEC and the Articles 49, 57 and 66 of the EC Treaty to which it refers (Articles 40, 47 and 55 respectively following amendment) were not regarded as pertinent. Finally, the *Symvoulio tis Epikrateias* saw no reason to refer to the Court of Justice for a preliminary ruling.

In *Italy*, the Court of Cassation (*Corte di cassazione*) was asked to rule on whether Articles 15 and 18 of Council Regulation (EEC) No 1035/72 on the common organisation of the market in fruit and vegetables ([4]) mean that the members of a producers' organisation are entitled to the financial compensation provided for by the Regulation only if the organisation proves that it has paid its members an indemnity for the quantities of products that remain unsold ([5])

Applying the principle that a national court of last resort is not required to request a preliminary ruling from the Court of Justice where the legal instrument in question is *acte clair* or there is no reasonable doubt as to the interpretation of provisions of Community law, the *Corte di cassazione* itself construed these Articles. However, since it could not rely on the letter of the Articles or on previous judgments of the Court of Justice, which had never been asked to rule on this issue, the *Corte di cassazione* had to resort to a systematic and purposive interpretation of the Articles in order to reconstruct the intention of the Community legislator. The Corte di cassazione considered that the Articles required the organisation in question to prove that it had paid its members an indemnity for the unsold products. It therefore quashed the judgment given and referred the case to another chamber of the Bari Court of Appeal (*Corte d'Appello di Bari*) for a substantive decision in the light of this interpretation.

On 14 September 1999 ([6]), the Corte di cassazione found that, in certain cases, national courts whose decisions can be appealed in domestic law have a duty to refer to the Court of Justice.

The *Corte di cassazione* considered an appeal on grounds of jurisdiction (*regolamento di competenza*) by a limited company in a case before the Bologna District Court (*Tribunale di Bologna*). This concerned an application for reimbursement of the amounts paid by this firm as annual company registration dues which the appellant claimed were collected by the Italian State in breach of Community law. In its appeal, the firm contested the lawfulness of suspension of proceedings by the *Tribunale di Bologna*, which had held that the outcome depended on the interpretation by the Court of Justice in Case C-260/96, which at the time was pending ([7]), and had stayed proceedings under Article 295 of the Italian Code of Civil Procedure to await the Court of Justice judgment. This Article requires a national court to

([1]) Symvoulio tis Epikrateias, judgment of 8 July 1997. 2807/1997. Armenopoulos 1997, p. 1182-1194.
([2]) Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ L 19, 24.1.1989, p. 16).
([3]) Symvoulio tis Epikrateias, judgment of 25 September 1998, 3497/1998. Armenopoulos 1999, p. 125-135.
([4]) OJ L 118, 20.5.1972, p. 1.
([5]) Corte di cassazione. Sezione 1 civile. 7 May 1999, nº 4564, Il massimario del Foro italiano. 1999, col. 539.
([6]) Corte di Cassazione. Sezione I civile, 14 September 1999, nº 9813. Il massimario del Foro italiano. 1999, col. 1030.
([7]) Case C-260/96 Ministero delle Finanze v Spac SpA [1998] ECR I-4997, judgment of 15 September 1998.

suspend judgment if it itself or another court is to give a preliminary ruling in a matter which must be resolved in order to judge the case. This applies to references to the Court of Justice under Article 177 of the EC Treaty (now Article 234).

The *Corte di cassazione* construed Article 295 to mean that a national court which is not a court of last resort and which is unable to interpret directly a provision of Community law is required to refer the matter to the Court of Justice for a preliminary ruling even if the same points are at issue in a case currently before the Court of Justice. It therefore declared the stay of proceedings without reference to the Court of Justice to be unlawful since it would deprive the parties of the procedural guarantees afforded by a reference, i.e. the right to submit observations and to be served with a certified copy of the Court of Justice judgment.

In three decisions on 24 December 1998 [1] on the compatibility with Community law of the provincial regulations on transport of waste, the *Netherlands* Council of State (*Raad van State*) found, without making any request for a preliminary ruling, that the ban on exporting waste from one province of the Netherlands to another is not a measure having an effect equivalent to a restriction on exports within the meaning of Article 34 of the EC Treaty (now Article 29) although the Court of Justice had found, on the basis of Article 9 of the EC Treaty (now Article 23), that *ad valorem* charges on trade in goods between regions of the same Member State constitute charges having an effect equivalent to customs duties [2].

In *Royscott Leasing Ltd and others* v *Commissioners of Customs and Excise* [3], in connection with Directive 77/388 [4], the Court of Appeal in the *United Kingdom* refused to withdraw the request for a preliminary ruling which it had made to the Court of Justice [5], despite an intervening ruling by that Court in a case which related to the same Directive [6]. Although it considered that it was competent to do so, the Court of Appeal emphasised that this competence should be exercised only if it was clear that the reference was entirely without interest. It rejected the *Commissioners*' arguments and held that this condition was not met in the instant case. Firstly, the Court of Appeal took the view that the Court of Justice could itself ask the national court to withdraw a request for a preliminary ruling if it considered that the issue had been decided in another case and there was no prospect of a different answer. The fact that the Court of Justice had not done so in this case in itself indicated that it did not regard the questions referred as being covered by the *acte clair* doctrine. Secondly, the further advanced the proceedings before the Court of Justice, the greater was the importance of its asking for the reference to be withdrawn. In the present case, the hearing was imminent and the Advocate General was to deliver his conclusions in about two months' time. Finally, at this advanced stage of proceedings before the Court of Justice, the Court of Appeal considered that withdrawing the reference for a preliminary ruling might unduly prolong the case as a whole.

In its judgment of 16 June 1999 [7], the *Swedish* Supreme Administrative Court (*Regeringsrätten*), held that Article 234(3) of the EC Treaty (ex Article 177(3)) did not require it to refer to the Court of Justice before dismissing the appeal against the Government's decision of 5 February 1998 to withdraw the licence to operate the nuclear reactor of the Barsebäck 1 power station following the entry into force of the Nuclear Phase-out Act of 18 December 1997 [8]. The claimants included not only the licensee but also its owner and a German firm which was one of the main shareholders in the owning company. They argued, *inter alia*, that the Government's decision to withdraw the licence was contrary to several rules of Community law. With regard to Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [9], as amended by Directive 97/1/EC, the *Regeringsrät* held that those of its provisions which were invoked were not essential to the material outcome of the case and that there was therefore no reason to ask for a preliminary ruling. As regards Directive 96/92/EC concerning common rules for the internal market in electricity, the Regeringsräten held that the government's decision did not conflict with it. As regards the EC Treaty provisions invoked by the claimants, the Regeringsrät [10] considered that Articles 29 (ex Article 34) and 56 (ex Article 73B(1)) on the free movement of goods and capital were not applicable and that the government's decision did not represent a breach of Article 43 (ex Article 52) or the former Article 53 (annulled) on freedom of establishment. On the other hand, as regards the competition provisions invoked, i.e. Articles 82 (ex Article 86) and 86(1) (ex Article 90(1)) of the EC Treaty, the Regeringsrät referred to two Court of Justice judgments [11] and held that while certain matters of public interest of a non-economic nature were not subject to the competition rules, they had nonetheless to be so organised that they were compatible with the Community rules on free movement of goods and services and with competition. Referring again to the case law of the Court of Justice [12], the Regeringsrät considered that regulations concerning such interests should not give rise to exorbitant prices and should allow supply to match demand. The Regeringsrät concluded that the main question arising in the instant case was

(1) Raad van State, Icova BV v Gedeputeerde Staten ('GS') van Noord-Holland, Administratiefrechtelijke beslissingen, 1999, nº 153; Koks Nilo Milieu BV v GS van Noord-Holland, Milieu en recht, 1999. Jur., p. 128-132 and Van Vliet Recycling BV v GS van Utrecht, Milieu en Recht, 1999, Jur., p. 122-127 pp.

(2) Joined Cases C-485/93 and C-486/93 Simitzi [1995] ECR I-2655, paragraph 27 judgment of 14 September 1995.

(3) Court of Appeal (England and Wales). 5 November 1998, Royscot Leasing Ltd and others v Commissioners of Customs and Excise. Common Market Law Reports, 1999. Vol. 1. 903-906.

(4) Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ L 145. 13.6.1977, p. 1)

(5) This has since given rise to the Court of Justice ruling of 5 October 1999. Case C-305/97 Royscott Leasing, not yet published in the ECR.

(6) Case C-43/96 Commission v France [1998] ECR I-3903, judgment of 18 June 1998.

(7) Regeringsrättens dom i Mål nr 1424-1998, mål nr 2396-1998 och mål nr 2939-1998 meddelad i Stockholm den 16 juni 1999.

(8) Lagen (1997:1320) om kärnkraftens avveckling.

(9) Council Directive 85/337/EEC of 27 June 1985 (OJ L 175, 5.7.1985, p. 40).

(10) Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 (OJ L 27, 30.1.1997, p. 20).

(11) Judgments of 30 April 1974. Case 155/73 Sacchi [1974] ECR 409 and 18 June 1991. Case C-260/89 ERT [1991] ECR I-2925.

(12) Judgments of 4 May 1988. Case 30/87 Bodson [1988] ECR 2479, and 23 April 1991. Case C-41/90 Höfner [1991] ECR I-1979.

whether the State-owned nuclear reactors should not be the first to be closed down. This could not be answered on the basis of Community jurisprudence but, since the Nuclear Phase-out Act was based on acceptable considerations of public interest and the government decision being challenged was compatible with the general principles of law, the Act in question and the principle of proportionality, it could not be in breach of Articles 82 and 86(1) of the EC Treaty. Here again, the Regeringsrät did not think it necessary to ask for a preliminary ruling from the Court of Justice.

In Sweden again, the Supreme Court (*Högsta Domstol*) gave judgment on 9 July 1998 [1] on an appeal in connection with trade-mark law over the interpretation of Directive 89/104/EEC [2]. Article 6(1)(b) and (c). It did so without requesting a preliminary ruling from the Court of Justice. The issue was whether a non-franchised operator was entitled to use a protected motor car trade mark to indicate that he carried out repairs on this make. The Högsta Domstol concluded that the Directive did not prohibit such a practice provided the mark was not used in a fraudulent manner to give the impression that there was an economic relationship between the non-franchised operator and the brand. The Court of Justice plenum had recently ruled on the same issue in the *BMW* judgment [3], reaching the same conclusion as regards application of Directive 89/104/EEC.

Mention should also be made of a preliminary ruling by the *Benelux* Court of Justice (Benelux *Gerechtshof*) on the concept of exhaustion of the right conferred by a trade mark according to Article 13A(8) of the Benelux Uniform Law on trade marks [4] [5]. The claimant was the proprietor of a registered trade mark for bags and similar articles who marketed part of the collection in the European Union and claimed to reserve another part for the American market. The products intended for the two markets were distinguished by means of a monkey attached to each bag, of slightly different design for the products intended for the American market. The defendant had purchased a batch of products from a parallel importer with a view to resale in Belgium. This parallel importer had obtained these products from the claimant's American importer. The claimant stated in the court trying the substantive issue that it had never placed these products on the market within the European Union and had not given its consent for this to be done. Although the Benelux *Gerechtshof* stated that it was interpreting the provision in question in the light of Article 7(1) of the underlying Directive 89/104/EEC [6], it did not ask the Court of Justice for a preliminary ruling.

With regard to the concept of placing of products on the Community market by the proprietor of the mark within the meaning of Article 13 A(8) of the Uniform Law, the Benelux *Gerechtshof* first states that this concept implies that the proprietor should have made the products available to a buyer for further commercial use within the Community and goes on to observe that Article 13 A(8) treats placing on the market by another person with the consent of the proprietor as equivalent to placing on the market by the proprietor. According to the Benelux *Gerechtshof*, this implies both that the proprietor of the mark should be aware of this act of making the products available and approve of it and that his consent should apply to each specimen of the product for which exhaustion is invoked. With regard to the burden of proof, the Benelux *Gerechtshof* considers that it is for the party against whom the proprietor is bringing an action based on Article 13A and who invokes exhaustion of the right to show that the products have been placed on the Community market by the proprietor or with his consent, even if he proves that he has purchased the products within the Community from a reseller established there.

***Question 2***

In *France*, the Dijon Administrative Tribunal (*Tribunal administratif de Dijon*) gave a judgment on 5 January 1999 [7] in the light of the *Foto Frost* jurisprudence [8] to the effect that, although the national courts have no jurisdiction to declare that acts of Community institutions are invalid, they may nonetheless dismiss grounds advanced for invalidity if they regard them as unfounded. The claimant sought reimbursement of a VAT credit which was refused by the authorities and argued that the Council Decision of 28 July 1989 [9] was incompatible with the principle of proportionality. The Decision authorised France to continue temporarily and under certain conditions to exclude expenditure for accommodation, restaurants, hospitality and entertainment from the right to deduct VAT. The *Tribunal administratif* held that, since the claimant merely asserted that the principle of proportionality had been breached without specifying how, it had not advanced a sufficiently precise argument to cast serious doubt on the validity of the Decision and that it was therefore not necessary to ask the Court of Justice for a preliminary ruling.

In the *Netherlands*, the Supreme Court (*Hoge Raad*) had occasion to rule on whether a national court could verify whether a Member State's conduct in the course of a Community decisional process was compatible with the Treaties. The President of the District Court of The Hague (*Arrondissementsrechtsbank te's-Gravenhage*), as the judge of first instance, had issued an injunction forbidding the national

(1) Högsta domstolens dom i Mål nr T-4219/96, meddelad i Stockholm den 9 juli 1998, Nytt Juridiskt Arkiv 1998 I p. 474-487.
(2) 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, 11.2.1989, p. 1).
(3) Case C-63/97 BMW [1999] ECR I-905, judgment of 23 February 1999.
(4) As amended by the Protocol signed in Brussels on 2 December 1992 to adapt the Uniform Law to Directive 89/104/EEC.
(5) Benelux Gerechtshof, 6 December 1999, Nederlands juristenblad, 2000, p. 163-164.
(6) 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, 11.2.1989, p. 1).
(7) Tribunal administratif de Dijon, première chambre. 5 January 1999. Société BSAD, nº 97-1250. Revue de droit fiscal 1999. Comm. 669. p. 1129-1130. Revue de jurisprudence fiscale. 1999. p. 333-334.
(8) Case C-314/85 [1987] ECR 4199, judgment of 22 October 1987.
(9) Council Decision 89/481/EEC of 28 July 1989 authorising the French Republic to apply a measure derogating from the second subparagraph of Article 17(6) of sixth Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes (OJ L 239, 16.8.1989, p. 21).

government to vote in the Council in favour of revising Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community [1], on the grounds that this revision was contrary to the treaty rules in that it meant it would no longer be possible to import sugar from the OCTs free of duty. This injunction applied pending replies to the requests for preliminary rulings made by the same judge [2]. The *Hoge Raad* upheld the lifting of this injunction by the Court of Appeal of The Hague (*Gerechtshof te's-Gravenhage*) on the grounds that the system of judicial protection provided for by the EC Treaty did not allow for a judge sitting in chambers to be competent to intervene in the Community decisional process for reasons based on a breach of Community law [3]. The *Hoge Raad* referred to the exclusive competence of the Court of Justice to review the validity of Community Instruments and pointed out that proceedings for annulment under Article 230 of the EC Treaty may be brought only against Instruments which have been finally adopted. A judge sitting in chambers has only limited powers with respect to such Instruments subject to the conditions established by the case law of the Court of Justice.

***Question 3***

In *Germany*, the principles developed by the Court of Justice in *Bosman* [4] have been applied by the Federal Court of Justice (*Bundesgerichtshof*) to interpretation of Article 12 of the Basic Law on professional freedom. In its judgment of 27 September 1999 [5], the *Bundesgerichtshof* declared void the 'training and promotion payment' clause in the Lower Saxony regional league rules for transfer of a semi-professional player. This requires a new employer taking on a sportsman to make a payment to the previous employer. The *Bundesgerichtshof* explicitly stated that the Court of Justice's reasoning in *Bosman* has to be followed when applying Article 12 of the Basic Law and found that the payment in question is a barrier to professional freedom, which is not justified by the aim of supporting the discovery of talent and training of young players. The *Bundesgerichtshof* also found that freedom of association as provided for in Article 9(1) of the Basic Law does not justify this barrier since the rules on the training and promotion payment are not necessary to ensure this freedom.

In *Austria*, the Supreme Court (*Oberster Gerichtshof*) [6]heard a case concerning a refusal of registration in the Austrian commercial register to the branch of a firm established under United Kingdom law which had its registered address in the UK although it engaged in no commercial activity there.

The competent court of first instance had refused registration on the basis of paragraph 10 of the Austrian law on private international law (IPRG), which provides that a firm's capacity to have legal personality is to be assessed according to the law of the State in which the actual seat of the main office of the firm is located. Since the claimant had never engaged in commercial activity in the United Kingdom, there was no head office in that Member State and the firm could not have legal personality and was therefore not entitled to establish a branch in Austria. In accordance with the Court of Justice judgment of 9 March 1999 in *Centros* [7], the *Oberster Gerichtshof* held that paragraph 10 of the IPRG was contrary to Articles 52 and 58 of the EC Treaty (now Articles 43 and 48) and that it was therefore not applicable in the instant case in view of the principles of the primacy and direct effect of Community law. It also held that the right to establish a company under the law of one Member State and to set up branches in other Member States was inherent in the freedom of establishment within a single market as guaranteed by the Treaty, even if the firm in question engaged in no commercial activity in the first Member State. Registration of the branch could therefore not be refused.

In Austria again, following the preliminary ruling by the Court of Justice in *Familiapress* [8], the *Oberster Gerichtshof* sitting in chambers refused, in the order in question [9], to apply the preliminary ruling on the grounds that the checks it required the national courts to carry out could not be made in the course of procedures in chambers.

In its preliminary ruling, the Court of Justice had stated that Article 30 of the EC Treaty (now Article 28) does not preclude application of legislation of a Member State the effect of which is to prohibit the distribution on its territory by an undertaking established in another Member State of a periodical produced in that latter State containing prize puzzles or competitions, provided that that prohibition is proportionate to the objective pursued, especially as regards the maintenance of press diversity. According to the ruling, this assumes that the newspapers offering the chance of winning a prize in games, puzzles or competitions are in competition with small newspaper publishers who are deemed to be unable to offer comparable prizes and that the prospect of winning is liable to bring about a shift in demand. Finally, it is for the national court to determine whether those conditions are satisfied on the basis of a study of the national press market concerned.

The *Oberster Gerichtshof* considered that it was incompatible with the purpose of a procedure in chambers to call on experts to study the market conditions in question and consumers' habits. According to the Austrian court, only evidence which can be provided immediately can be accepted in such a procedure, and this excludes expert opinions. Since it was not possible to study conditions on the press market as part of the proceedings of which it was seized, the *Oberster Gerichtshof* considered it sufficient for the claimant to have established the plausibility of these conditions being met and left it to the court trying the substantive issue to determine whether they actually obtained.

(1) Council Decision of 25 July 1991 (OJ L 263, 19.9.1991, p. 1).
(2) See Case C-17/98 Emesa Sugar, judgment of 8 February 2000, not yet published in the ECR.
(3) Hoge Raad, judgment of 10 September 1999. Emesa Sugar No C98/012 HR. Nederlands Juristenblad. 1999. p. 1661.
(4) Case C-415/93 [1995] ECR 1-4921, judgment of 15 December 1995.
(5) Bundesgerichtshof, judgment of 27 September 1999. II ZR 305/98. Zeitschrift für Wirtschaftsrecht 1999. 1807-1811 (= Wertpapier-Mitteilungen 1999. 2164-2168. Neue Juristische Wochenschrift 1999. 3552-3554: Deutsches Steuerrecht 1999. 1781-1784; Versicherungsrecht 1999. 1504-1507).
(6) Oberster Gerichtshof. 15 July 1999. 6 Ob 123/99b, osterreichisches Recht der Wirtschaft 1999, p. 719.
(7) [1999] ECR 1-1459.
(8) Case C-368/95 [1997] ECR 1-3689, judgment of 26 June 1997.
(9) Oberster Gerichtshof, order of 23 March 1999, 4 Ob 249/98s. Vereinigte Familiapress Zeitungsverlags-und Vertriebs GmbH v Heinrich Bauer Verlag. Wirtschaftsrechtliche Blätter 1999, p. 378.

This reasoning, followed by the *Oberster Gerichtshofin* this order and in another order on the same date, was applied by the Vienna Higher Regional Court (*Oberlandesgericht Wien*) in a decision on 22 April 1999 [1]

In its judgment of 15 April 1999 [2], the *Oberster Gerichtshof* ruled on whether the transfer of municipal or private music academies in Tirol province to a legal person subject to public law (deprivatisation) fell within the scope of Directive 77/187/EEC [3] with the result that the province had a duty to maintain the rights and obligations of the former music teachers. According to Article 1 (2) of the transposing law (*Arbeitsvertragsrechts-Anpassungsgesetz*, (AVRAG), it does not apply to the (existing) employment relationships of private employees of the provinces, associations of municipalities (*Gemeindeverbände*) and municipalities. In passing, the *Oberster Gerichtshof* confirmed that the Directive had not been transposed as regards employment relationships. It also stated that the music academies are undertakings within the meaning of the Directive. Referring to the Court of Justice judgment of 15 October 1996 in *Henke* [4], it held that the Directive's scope does not cover reorganisation of the structures of the public administration or the transfer of administrative functions between public administrative authorities. However, it noted that the music academies did not perform any activity pertaining to the exercise of public authority, so that no reorganisation of the public administration was involved, and concluded that the contested operation constituted transfer of an economic entity which had retained its identity.

The *Oberster Gerichtshof* went on to state that exclusion of the employees of the provinces from the scope of the AVRAG was based on the allocation of powers by the Austrian constitution and thus did not release Austria from its obligation to transpose the Directive correctly since the Court of Justice has consistently held that a Member State cannot plead provisions, practices or situations pertaining to its internal legal order to justify failing to comply with the obligations and deadlines arising from Community directives. The *Oberster Gerichtshof* then referred to the Court's jurisprudence on direct effect, recognised that Directive 77/187/EEC had such effect and held that it was applicable in the instant case, with the result that the province of Tirol was obliged to maintain the rights and obligations of the former music teachers of the academies in question.

It is relevant that the *Oberster Gerichtshof*, in a judgment in 1998 [5], had already ruled that the AVRAG applied to a transfer of activities between legal persons subject to public law, although this was not expressly provided for by the law.

In a judgment of 24 February 1999 [6], the Austrian Constitutional Court (*Verfassungsgerichtshof*) considered whether the Austrian law on telecommunications ('TKG') is compatible with the pertinent Community law, in particular Directive 90/387/EEC [7], as amended by Directive 97/51/EC.

Article 5a of the Directive as amended requires Member States to ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to a body independent of the parties involved. In Austrian law, this body is the *Telekom-Control-Kommission* ('the TC Commission'). This is not a court (*Gericht*) in terms of the Austrian legal system but a board (Kollegialbehörde) with judicial functions under Articles 20(2) and 133(4) of the Federal Constitution. It is thus a tribunal within the meaning of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and a court or tribunal within the meaning of Article 177 of the EC Treaty. Article 133(4) of the Constitution provides that appeals will not lie before the Higher Administrative Court (*Verwaltungsgerichtshof*) unless this is explicitly provided for by the ordinary law regulating the matter in question. Since the TKG does not provide for the TC Commission's decisions to be appealed to the *Verwaltungsgerichtshof*, the TC Commission acts as a court of last resort.

Recognising that Article 5a of the above Directive has direct effect, the *Verfassungsgerichtshof* held that the primacy of Community law over national law requires that Article 133(4) of the Constitution, which is the only obstacle to such an appeal, should be set aside in this case.

In a dispute between the *Belgian* pharmacists' association (*Ordre des pharmaciens*) and one of its members over the association's ban on advertising, the Court of Cassation (*Hof van cassatie*) ruled on application of the competition rules [8] to the liberal professions. The *Hof van cassatie* began by noting that, although pharmacists are not traders and perform a social function, they do nonetheless engage in the provision of goods and services and routinely seek economic gain. They must therefore be regarded as businesses for the purposes of the competition rules [9]. With regard to the pharmacists' association, the *Hof van cassatie* notes that it is a professional body with the mission, conferred by public authority, of ensuring professional standards and maintaining the honour, integrity and dignity of its members. In doing so, it admittedly does not pursue economic gain. However, it is nonetheless an association of businesses and the lawfulness of its decisions must be examined in the light of the competition rules by the bodies responsible for its regulation, to the extent that they impinge or tend to impinge on competition.

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(1) Oberster Gerichtshof, order of 23 March 1999, 4 Ob 26/99y, Verein zur Förderung des freien Wettbewerbs im Medienwesen v Heinrich Bauer Spezialzeitschriften Verlage KG, Hamburg, Wirtschaftsrechtliche Blätter 1999, p. 240-244; Oberlandesgericht Wien, order of 22 April 1999, I R 41/99b, Verein zur Förderung des freien Wettbewerbs im Medienwesen v TV Spielfilm Verlag Gesellschaft mbH.

(2) OGH, 8 ObA 221/98b-g. Wirtschaftsrechtliche Blätter 1999, p. 467.

(3) Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ L 61, 5.3.1977, p. 26).

(4) Case C-298/94 [1996] ECR I 5013.

(5) OGH, 23 December 1998, 9 ObA 153/98k, Ecolex 1999, p. 344.

(6) B 1625/98, osterreichische Zeitschrift für Wirtschaftsrecht 1999, p. 82.

(7) Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ L 192, 24.7.1999, p. 1).

(8) The matter had been referred to the Hof van cassatie on the basis of the provisions of the Law of 5 August 1991 on safeguarding of economic competition, which are modelled on Articles 81 (ex-Article 85) et seq. of the EC Treaty.

(9) Hof van cassatie, 7 May 1999. Rechtskundig Weekblad, 1999-2000, p. 112-115.

In Belgium again, the Brussels Court of Appeal (*Cour d'appel de Bruxelles*) found that the selective distribution network set up by the company SA Club Méditerranée constituted an agreement prohibited by Article 85(1) of the EC Treaty (now Article 81(1)) and was thus automatically void by virtue of paragraph 2 of the same Article [1]. Upholding the decision of the Brussels Commercial Court (*Tribunal de commerce de Bruxelles*) on an injunction sought by a travel agency to which the SA Club Méditerranée had refused permission to sell its products, the *Cour d'appel* concluded that this refusal was contrary to honest commercial practice, being based on an unlawful distribution system, and ordered its termination. The *Cour d'appel* defined the market in question as that of 'club village' holidays covering the whole of Belgium. As regards distortion of competition, it considered that, even if the SA Club Méditerranée's market share were under the 10 % threshold mentioned in the Commission's communication on agreements of minor importance, this communication in any case does not allow the *de minimis* rule to be applied to vertical agreements whose purpose is to fix retail prices or afford territorial protection to the companies participating or other companies. Since the SA Club Méditerranée controlled the prices to be charged by its distributors, the *Cour d'appel* concluded that the system fell within the scope of Article 85(1) of the Treaty. On examining the distribution network established, the *Cour d'appel* recognised that the nature of the product could for brand image reasons justify the establishment of a selective distribution system, provided this was based on objective qualitative criteria applied in a non-discriminatory manner, but noted that this was not the case in this instance. Firstly, the SA Club Méditerranée granted sales authorisations to different legal persons on the basis of strictly personal criteria, without stating what conditions had to be met in order to satisfy them, and this was considered to imply that the selection was arbitrary. Secondly, the *Cour d'appel* noted that the SA Club Méditerranée had itself admitted that its network was not based solely on qualitative criteria but that access was also restricted on the basis of quantitative considerations. Finally, the SA Club Méditerranée imposed retail price maintenance and this, in the view of the *Cour d'appel*, in itself implied that the network should be prohibited.

In *Finland*, in a judgment of 10 September 1999 [2], the Supreme Administrative Court (*Korkein hallinto-oikeus*) held that the national regulations on parallel imports of medicines were incompatible with the Community principle of free movement of goods as set out in the Treaty. These regulations require the format and dimensions of the packaging of imported medicines to match those used by the manufacturer or his approved importer. Although this requirement is intended to ensure that patients are not confused, the Supreme Administrative Court did not think the authorities had proved that such a measure was justified in order to safeguard public health. Given the principle of free circulation of goods, the National Agency for Medicines (*Lääkelaitos*) could not refuse a parallel importer authorisation to sell medicines on the grounds that he used a different size of packaging from the approved importer.

In two judgments given on the same day [3], the *French* Council of State (*Conseil d'État*) found that the national provisions setting the initial and final dates of the hunting season were contrary to the species preservation aims of Article 7(4) of Directive 79/409/EEC [4].

In the first case, the claimants sought to have annulled as *ultra vires* an implicit decision by the Prime Minister rejecting an application for a decree in the forms provided for by Article 37 of the Constitution to rescind the provisions of the Law of 15 July 1994 determining the closed season for the hunting of migratory birds and replace them by new provisions in conformity with the Directive. The *Conseil d'État* took the view that, having regard to the hierarchy of statutes and the national authorities duty to ensure implementation of Community law, the Prime Minister was obliged, on receiving such applications, to take account of the fact that in the present state of scientific knowledge virtually all the provisions of the Law of 15 July 1994 determining the closed season for hunting of migratory birds were incompatible with the objectives of Article 7(4) of Directive 79/409/EEC as interpreted by the Court of Justice in a judgment of 19 January 1994 [5]. The *Conseil d'État* found that the decision by which the Prime Minister had refused to initiate the procedure provided for in Article 37, second paragraph, of the Constitution to amend a legislative text by decree is not an act of government but is an aspect of the exercise of regulatory powers and may thus be regarded as an administrative decision which can be challenged as *ultra vires*. However, it also held that the case documentation did not establish that, at the dates on which they were taken, the decisions implicit in the Prime Minister's failure to respond within a four-month period to the claimants' applications showed any manifest error of judgment.

In the second case, the action for annulment related to a decision by the Minister for Regional Planning and the Environment to set the early opening of the waterfowl season at 1 September 1998. The *Conseil d'État* again found that the provisions setting the dates of early opening and temporary closing of the waterfowl season [6] were incompatible with the species preservation aims of Article 7(4) of Directive 79/409/EEC. Since these provisions were inapplicable, they could not justify the refusal by the minister with responsibility for hunting to exercise his regulatory powers in accordance with the Directive's aims when he was asked to do so.

In France again, a *Conseil d'État* judgment of 19 May 1999 [7] recognised the admissibility of an application to have a decision of the French government annulled as *ultra vires*. This decision had been announced by a press release and, pursuant to Council Regulation No 2081/93 [8], determined how the sums allocated to France

[1] Cour d'appel de Bruxelles, 22 April 1999, Revue de droit commercial belge, 1999, p. 418-424.

[2] Korkein hallinto-oikeus, 10 September 1999, No 1789/3/98 2461.

[3] Conseil d'État, judgments of 3 December 1999 Association ornithologique et mammalogique de Saône-et-Loire (AOMSL) v Rassemblement des Opposants à la Chasse (ROC). Nos 164789 and 165122, and Association ornithologique et mammalogique de Saône-et-Loire (AOMSL) v Association France Nature Environnement, Nos 199622 and 200124.

[4] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103, 25.4.1979, p. 1).

[5] Case C-435/92 Association pour la protection des animaux sauvages and others v Préfet de Maine-et-Loire et préfet de Loïre Atlantique [1994] ECR I-67.

[6] Provisions inserted in the second paragraph of Article L. 224-2 of the Rural Code by the Law of 3 July 1998.

[7] Conseil d'État. 19 May 1999, Région du Limousin v Ministre de l'Intérieur et de l'Aménagement, nº 157675. Revue française de droit administratif, 1999, p. 896-897.

[8] Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing Financial Instruments (OJ L 193, 31.7.1993, pp. 5 to 19).

by the European Commission as Structural Funds commitment appropriations for the period 1994 to 1999 were to be divided among the regions concerned. While the *Conseil d'État* rejected the substance of the claimant's case, it followed the reasoning of the government advocate in recognising that it was admissible. Referring in his conclusions to the Court of Justice judgment of 3 December 1992 [1], the government advocate had argued that when a national administrative court is acting as a court of Community law, the objective of ensuring effective judicial control implies that, in this type of procedure, every act at the level of the Member State which intervenes between Commission decisions and has binding effects on the further course of events should be regarded as an act capable of adversely affecting third parties.

In its judgment of 24 February 1999 [2], the French *Conseil d'État* considered the action for annulment as *ultra vires* of Decree No 98/52 of 28 January 1998 on requirements for placing on the market of homeopathic medicines. The associations bringing the action claimed that the Decree was contrary to the aims of Directive 92/73/EEC [3] and also cited the failure to enact, regulatory measures to render applicable Article L. 601-4 of the Public Health Code, derived from Law No 94-43 of 18 January 1994, which transposes the Directive into French law. The *Conseil d'État* found that Article L. 601-4 of the Public Health Code was incompatible with the Directive in that it extended the scope of the simplified registration procedure beyond the objectives the Directive laid down. It held that the government was justified in not enacting regulatory measures to allow this Article to be implemented since, by giving precedence to the Community Directive, the government had duly complied with the requirements inherent in the hierarchy of statutes in the internal legal order, as derived from Article 55 of the Constitution.

In *Greece*, judgment 2245/1999 of the Sixth Chamber of the Council of State (*Symvoulio tis Epikrateias*) for the first time applied the principle of proportionality in assessing the level of an administrative fine imposed for importing goods of French origin to Greece. There was no doubt that the applicants had infringed the Customs Code by declaring a value lower than the true value of the goods on the invoices submitted at the time of importation. They had therefore been fined a sum equal to three times the value of the tax they would have paid if they had declared the true value. Irrespective of whether Article 95 of the Treaty (now Article 90) was applicable in this case, the *Symvoulio tis Epikrateias* cited the judgment of the Court of Justice of 16 December 1992 [4] and held that administrative penalties imposed for infringement of customs legislation should not exceed what was strictly necessary to accomplish the aim pursued and that disproportionate penalties represented a barrier to the exercise of the Community freedoms. On the grounds that the court trying the substantive issue had not made such an assessment of proportionality, the *Symvoulio tis Epikrateias* partly quashed the judgment of the Court of Appeal, which had found the level of the contested fine to be lawful.

In *Italy*, the Court of Cassation (*Corte di cassazione*) considered an appeal in cassation from a sales agent against the judgment of the Rome District Court (*Tribunale di Roma*) [5]. The latter, sitting as an appellate court, had dismissed his application to obtain payment of various sums claimed on the basis of an agency contract concluded with a company subject to private law. The *Tribunale di Roma* had taken the view that such a contract was void, since the sales agent was not entered in a register prescribed for this purpose by the law [6], and thus could not give rise to any payment. The *Corte de cassazione* granted this appeal, disapplying the national provision in question, which had been declared incompatible with Directive 86/653/EEC [7] by the Court of Justice judgment of 30 April 1998 in *Bellone* [8].

However, the *Corte di cassazione* did not merely apply the Court of Justice ruling but broadened the concept of a directive's vertical direct effect to allow individuals to rely on it even if neither the State nor a public body are parties to the action. It argued that the existence of vertical direct effects should not be assessed on purely formal grounds and held that such effects also arose in the instant case, since it turned on a national provision of an imperative nature imposing a specific requirement in order to safeguard interests which are the responsability of the public authorities. On this basis, since the only point to be verified is whether the national regulations are compatible with Community law, irrespective of the status of the parties to the dispute, the State would also be involved to the extent that these regulations protecting public interests relate to relationships between the State on the one hand and the agent and the companies concerned on the other. Such an action may thus be regarded as a dispute between a private individual and the State. However, the *Corte di cassazione* did not state what public interests are safeguarded by a law making the validity of an agency contract conditional on the agent's being entered in an appropriate register.

In *Portugal*, a noteworthy judgment was handed down on 22 June 1999 by the First Chamber of the Supreme Administrative Court (*Supremo Tribunal Administrativo*) in Cases 44.140/44.197 [9]. Essentially, this judgment recognises the vertical direct effect of Articles 18, 24, 26 and 29 of Directive 93/37/EEC on public works contracts [10], since these provisions had not been correctly transposed into national

(1) Case C-97/91 Oleificio Borelli v Commission [1992] ECR I-6313.

(2) Conseil d'État, 24 February 1999, Association des patients de la médecine d'orientation anthroposophique et autres, nº 195354; Revue française de droit administratif. 1999. p. 437-439; L'actualité juridique, droit administratif, 1999, p. 823-824.

(3) Council Directive 92/73/EEC of 22 September 1992 widening the scope of Directives 65/65/EEC and 75/319/EEC on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products and laying down additional provisions on homeopathic medicinal products (OJ L 297, 13.10.1992, pp 8 to 11).

(4) Case C-210/91 Commission of the European Communities v Hellenic Republic [1992] ECR I-6735.

(5) Corte di cassazione, Sezione Lavoro, 18 May 1999, nº 4817. Il massimario del Foro italiano, 1999, Col. 575-576; Il Foro italiano, 1999, I, Col. 2542-2550.

(6) Law No 204 of 3 May 1985, Gazzetta Ufficiale della Repubblica Italiana No 119 of 22 May 1985, p. 3623.

(7) Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ L 382, 31.12.1986, p. 17).

(8) Case C-215/97 [1998] ECR I-2191.

(9) Acórdãos Doutrinais do Supremo Tribunal Administrativo, XXXVIII, Nº 455, pages 1380 to 1390.

(10) Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199, 9.8.1993, p. 54).

law. The applicant had asked for annulment of the decision of 8 July 1998 of the President of the Assembly of the Republic, awarding a competitor the contract for finishing work on the new extension to the Assembly's premises. This decision had been taken on the basis of Decree-Law No 405/93 of 10 December, which did not distinguish clearly between the two phases: checking of applicants' economic, financial and technical suitability and assessment of the bids submitted by tenderers. The national legislation in force at the time of the events failed to transpose correctly the pertinent provisions of the Directive. In the case in point, the decision of the bid assessment panel, which was endorsed by the defendant authority, had been based on criteria including tenderers' suitability, and in particular their economic, financial and organisational capacity. The *Supremo Tribunal Administrativo* referred to the principle of the primacy of Community law and explicitly concluded that this implied the possibility of invoking the vertical direct effect of clear, complete, precise and unconditional provisions contained in a directive which has been incorrectly transposed into national law. In the light of the factual and legal arguments presented, the *Supremo Tribunal Administrativo* accepted the applicant's argument based on infringement of Articles 18, 24, 26 and 29 of the Directive and quashed the contested decision on this basis without considering any of the other arguments for annulment which had been advanced.

In the *United Kingdom*, in *Gibson* v *East Riding of Yorkshire District Council* [1], an hourly-paid swimming instructor employed by a local authority had no contractual right to paid annual leave. At the time of the events, Directive 93/104/EEC [2] on the organisation of working time had not yet been transposed in the United Kingdom, since this was accomplished only by the Working Time Regulations 1998, which entered into force on 1 October 1998. The lower tribunal had concluded that the claimant could not invoke the Directive since it did not meet the criteria laid down in the Court of Justice case-law for it to have direct effect, given that the text was complex and provided for exceptions and derogations which were also complex. On appeal, the Employment Appeal Tribunal found that the claimant was entitled to four weeks' annual paid holiday by virtue of Article 7 of the Directive [3]. It reviewed the principles applying and held that Article 7 was sufficiently precise and unconditional to have direct effect and that the claimant could rely on it against the defendant. While the contract in question did not confer the right to paid leave, the contractual rights of the person concerned had been altered by the Directive. Had the Directive been transposed within the period allowed, the claimant would have been entitled to paid holiday. As an emanation of the State, the defendant could not take advantage of the failure to transpose the Directive in order to reject its employee's request.

In the case *R* v *Secretary of State for Health and others ex parte Imperial Tobacco Ltd and others* [4], the Court of Appeal lifted the injunction granted by the High Court [5] forbidding the Government of the United Kingdom to enact provisions transposing Directive 98/43/EC [6] until the Court of Justice had ruled on its validity [7]. However, the Court of Appeal granted the tobacco companies a stay of execution of its decision until the House of Lords had ruled on their application for leave to appeal [8]. The Government had argued that the appeal raised basic constitutional issues and that the High Court injunction jeopardised an important national and Community policy, namely ending the advertising and sponsoring of tobacco products. The tobacco companies argued that the Directive was unlawful since its main aim was to align the legislation of the Member States in the field of public health although the Treaty conferred no such power on the Community legislator. By a majority ruling, the Court of Appeal found that the High Court had been wrong to set aside the Community approach to interim measures and in particular the conditions for stay of execution of a national measure as set out in the Zuckerfabrik judgment [9]. As regards the first condition — the existence of serious doubts as to the validity of the Directive — the Court of Appeal thought it could not encroach upon the prerogatives of the Court of Justice when considering an application for interim relief, although it did recognise that the tobacco companies had strong grounds for arguing that the Directive was invalid. As regards the second condition — the need to establish that there is a threat of serious and irreparable damage — the Court of Appeal held that, while the High Court had rightly taken the view that the damage was probably not irreparable, it had not given this consideration the importance it ought to have in accordance with Community case-law, since it had not regarded it as a prerequisite for granting interim relief. Since the existence of a threat of serious and irreparable damage had not been established, the requirements for granting an injunction were not satisfied. The Court of Appeal also considered that an injunction such as had been granted by the High Court prevented the government from exercising its freedom of action in the field of public health.

Again in the United Kingdom, in *Marks & Spencer* v *Commissioners of Customs and Excise* [10], the Court of Appeal ruled on the sixth VAT

(1) Employment Appeal Tribunal, 3 February 1999. Gibson v East Riding of Yorkshire District Council, Industrial Cases Reports, 1999, 622-630.

(2) Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ L 307, 13.12.1993, p. 18).

(3) Article 7(1) of Directive 93/104/EEC provides that Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

(4) Court of Appeal (England and Wales), 16 December 1999, R v Secretary of State for Health and others ex parte Imperial Tobacco Ltd and others. The Times Law Reports 1999, 874-875. We do not yet have the full text of the judgment.

(5) High Court (England and Wales), 29 October 1999, R v Secretary of State for Health and others, ex parte Imperial Tobacco Ltd and others. The Times Law Reports 1999, 792-793.

(6) Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 213, 30.7.1998, p. 9).

(7) The Court of Appeal refers to a High Court reference of 2 February 1999 for a preliminary ruling, R v Secretary of State for Health and others, ex parte Imperial Tobacco Ltd and others, Case C-74/99, pending.

(8) The House of Lords subsequently granted the tobacco companies leave to appeal and extended the stay of execution of the Court of Appeal's decision until further notice.

(9) Joined Cases C-143/88 and C-92/89 Zuckerfabrik [1991] ECR 1-415, judgment of 21 February 1991.

(10) Simon's Tax Cases 1999, 205.

Directive [1]. Most of the points of law at issue related to provisions of the sixth Directive which had been correctly transposed but had then been wrongly applied. When this was recognised by the authorities, the United Kingdom adopted regulations which had retroactive consequences for taxpayers. Marks & Spencer argued that the United Kingdom had levied a VAT in breach of the sixth Directive and that the existence of adverse retroactive effects for the taxpayer was contrary to the general principles of Community law. The Court of Appeal rejected this argument on the basis of the reasoning put forward by the tax authorities: once a directive has been correctly transposed, it ceases to represent an independent legal source. Marks & Spencer could therefore not invoke the sixth Directive directly, nor, in consequence, the general principles of Community law. The Court of Appeal nonetheless decided to request preliminary rulings on a number of issues unrelated to these arguments.

***Question 4***

In *Germany*, the Bonn Regional Court (*Landgericht Bonn*) gave judgment on 16 April 1999 in the course of an action for damages, holding that an action for annulment of a directive has no effect on the obligation to transpose it [2]. The Federal Republic of Germany was being sued by an investor for the damages he claimed to have sustained as a result of the lack of a deposit-guarantee scheme as required by Directive 94/19/EC [3]. The Federal Republic argued that the action for annulment of the Directive brought before the Court of Justice (which has since led to the judgment of 13 May 1997 in *Germany* v *Parliament and Council* [4]) suspended the obligation to transpose the Directive pending judgment by the Court. The *Landgericht* rejected this argument on the grounds that Article 189 of the EC Treaty (now Article 249) did not provide for any suspensive effect. The *Landgericht* also stated that any difficulties of restitution which might result from the annulment of a directive already implemented were a matter for the internal legal order of the Member State concerned. According to the settled case-law of the Court of Justice, and in particular the judgment of 8 October 1996 in *Dillenkofer* [5], such issues did not affect the duty to transpose. Finally, the *Landgericht* did not consider it necessary to refer to the Court of Justice since the point at issue was not the interpretation of the EC Treaty but its application.

The Brussels Court of First Instance (*Rechtbank van eerste aanleg Brussel*) [6] awarded damages against the *Belgian* State for its failure to transpose fully Article 7 of Directive 90/314/EEC [7] on package travel, package holidays and package tours. This requires travel organisers to have adequate security for the refund of money paid over and for repatriation of the consumer in the event of insolvency. The *Rechtbank* found that at the time when the organiser with whom the claimants had contracted was declared bankrupt, the Belgian State had not fulfilled its obligation to transpose Article 7 of the Directive correctly, fully and effectively. While the law of 16 February 1994 transposing the Directive had been adopted, the Royal Decree laying down the practical surety arrangements had not yet been issued. Referring to the Court of Justice judgment in *Francovich* [8], the *Rechtbank* found that the failure to enact a measure transposing the directive by the due date is in itself a breach of Community law and entitles the injured parties to compensation in so far as it is possible to determine the effect of the measures prescribed by the Directive on the rights of individuals and there is a causal relationship between the State's failure to fulfil its obligations and the injury. Finally, the *Rechtbank* stated that the State's responsibility is based on Community law, which prevails over national law.

In a series of judgments [9], the *French*. Court of Cassation (*Cour de cassation*) found that Article L. 190, third paragraph, of the Code of Tax Procedures (*Livre des procédures fiscales*). setting a time limit for complaints [10], is compatible with the Community legal order and can thus be relied on by the tax authorities to refuse applications for reimbursement of registration charges paid on the basis of Articles 812 (1) (1) and 816 (1) (2) of the General Tax Code. These provisions had been found to be partly incompatible with Directive 69/335/EEC [11] in a Court of Justice judgment of 13 February 1996 [12], whose effects the Court of Justice had declined to limit in

(1) Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ L 145, 13.6.1977, p. 1).

(2) Landgericht Bonn, judgment of 16 April 1999, 1 O 186/98, Zeitschrift für Wirtschaftsrecht 1999, 959-965 (= Wertpapier-Mitteilungen 1999, 1972-1978; Europäische Zeitschrift für Wirtschaftsrecht 1999, 732-736).

(3) Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ L 135, 31.5.1994, p. 5).

(4) Case C-233/94 [1997] ECR I-2405.

(5) Case C-178/94 [1996] ECR I-4845.

(6) Rechtbank van eerste aanleg Brussel, 9 September 1999, Consumentenrecht 1999, pp. 305-317.

(7) OJ L 158, 23.6.1990, p. 59.

(8) Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357, judgment of 19 November 1991.

(9) Cour de cassation, chambre commerciale, judgments of 19 October 1999. Directeur général des impôts v Sologest SA. No 1560 P: Société nationale des etablissements Piot pneu SA v Services fiscaux de l'Isère. No 1558 P; Directeur général des impôts et ministère de l'économie, des finances et de l'industrie v SA Belun, No 1561 D. Cour de cassation, chambre commerciale, 14 December 1999, Societe Chauvin Arnoux v Direction générale des impôts, No 2021 D.

(10) This provision relates to complaints based on non-conformity of the rule of law applied to set the tax with a rule of law which takes precedence, when this non-conformity has been established by a court decision.

(11) Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ L 269, 28.10.1969, p. 12).

(12) Case C-197/94 Société Bautiaa [1996] ECR I-505. See also the judgment of 9 July 1996 of the Cour de cassation, chambre commerciale in Direction générale des impôts v SA Etablissements Touillet, declaring Article 812, §1(1) of the General Tax Code partly incompatible with Directive 65/335. In two other cases, the Cour de cassation partly quashed the judgments rendered by the courts trying the substantive issues, which had ordered reimbursement of the 3 % registration charge levied under Article 812 §1(1) of the General Tax Code, whereas Directive 69/335 allows capital duty to be levied at not more than 1 % [Cour de cassation, chambre commerciale, judgments of 23 February 1999 in Direction générale des impôts v Société Thelu and 12 January 1999 in Direction générale des impôts v Société financière atlantic (SOFIA)].

time. The *Cour de cassation* rejected these appeals, referring to a judgment of 15 September 1998 [1], in which the Court of Justice stated that the fact that it had given a preliminary ruling on the interpretation of a provision of Community law, without limiting its effects in time, did not affect the right of a Member State to rely on a peremptory time limit as a defence against actions for recovery of taxes levied in breach of this provision.

The *Cour de cassation*, also referred to the judgment of 2 December 1997 [2], in which the Court of Justice had pointed out that it was for the internal legal order of each Member State to regulate the procedural arrangements for actions to recover charges unduly levied, provided these arrangements are not less favourable than for similar claims under domestic law and do not make it virtually impossible or excessively difficult to assert the rights conferred by Community law, even if by definition the expiry of the time limits causes the action brought to be dismissed in whole or in part [3].

In *Italy*, the Milan Magistrate's Court (*Pretura di Milano*) found in favour of a worker seeking compensation when the business he worked for was transferred within the meaning of Directive 77/187/EEC [4] on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. The claimant sought payment by the Italian State of the sums he would have received from the transferee had the Directive been transposed by the due date. Because the Directive had not been transposed at the time when the business was transferred, although this had occurred after the transposal deadline, the claimant had been dismissed instead of retaining the rights arising from the employment relationship as safeguarded by the Directive.

While the operative part of this judgment [5] requires the Italian State to pay the applicant the damages and interest claimed for non-transposal of a directive, the grounds for the judgment indicate that the *Pretura di Milano* does not explicity base its conclusions on the *Francovich* judgment of the Court of Justice but simply notes that the Directive had not been transposed at the time of the events [6] and that the national provisions since adopted were not in conformity with it.

In the *United Kingdom*, in *R* v *Secretary of State for Transport, ex parte Factortame and others* [7], the House of Lords upheld a High Court decision on the Government's responsability for a breach of Community law. The claimants were the Spanish owners and operators of fishing vessels. They had established before the British courts [8] and the Court of Justice [9] that the Merchant Shipping Act 1988, which made registration of a fishing vessel in the United Kingdom dependent on conditions with regard to the nationality, residence and domicile of the vessel's owners, charterers and operators, breached the Community principle that there should be no discrimination based on nationality. The claimants subsequently sued the United Kingdom Government before the High Court for the injury caused them by this Act.

The High Court [10] regarded the breach of Community law as sufficiently serious, in the light of the Court of Justice case-law [11], to entitle the claimants to compensation for the damage suffered. The Secretary of State's appeal against this decision had been rejected by the Court of Appeal [12]. This decision was appealed in turn to the House of Lords, which upheld the High Court's decision, considering that the deliberate enactment of legislation instituting nationality-based discrimination which inevitably breached Article 52 of the EC Treaty (now Article 43) is a manifest and injustifiable breach of the Treaty, which is thus sufficiently serious to give rise to a right to compensation.

Again in the United Kingdom, the claimant in *R* v *Department of Social Security ex parte Scullion* [13] was a 63-year-old woman who in 1986 had been refused the invalid care allowance. To be eligible, the person concerned had to have been entitled to this benefit before reaching retirement age: 60 years for women and 65 for men. Together with other persons in the same position, she appealed against this decision. In the meantime, following the Court of Justice ruling in Thomas [14] that such discrimination could not be justified under Article 7(1)(a) of Directive 79/77/EEC [15] unless necessarily and objectively linked

(1) Case C-231/96 Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze [1998] ECR I-4951, judgment of 15 September 1998.

(2) Case C-188/95 Fantask [1997] ECR I-6783.

(3) In connection with an appeal on the time limits for repayment, the Bethune Regional Court (Tribunal de Grande Instance de Béthune) has referred to the Court of Justice for a preliminary ruling on the lawfulness of Article L. 190 of the Code of Tax Procedures (Case C-88/99 SA Roquette Frères v Direction des services fiscaux, pending).

(4) Council Directive 77/187/EEC of 14 February 1977 (OJ L 61, 5.3.1977, p. 26).

(5) Judgment of 14 July 1998 of the Pretura di Milano, Foderetti v Presidenza del Consiglio dei Ministri, Orientamenti della Giurisprudenza dei Lavoro, 1999, p. 133-135.

(6) The Italian Republic gave effect to Directive 77/187/EEC by Article 47 of Law No 428 of 29 December 1990 (GURI, 12.1.1991, Suppl. ord.) enacting measures for the fulfilment of the obligations resulting from Italy's membership of the European Communities (the 'Legge comunitaria').

(7) House of Lords, 28 October 1999, R v Secretary of State for Transport, ex parte Factortame and others, The Weekly Law Reports, 1999. Vol. 3, 1062-1090.

(8) House of Lords, 9 July 1990, R v Secretary of State for Transport, ex parte Factortame and others. The Law Reports, Appeal Cases, 1991, Vol. 1, p. 503.

(9) Judgments of 4 October 1991, Case C-246/89 Commission v United Kingdom of Great Britain and Northem Ireland [1991] ECR I-4585 and 25 July 1991, Case C-221/89 R v Secretary of State for Transport, ex parte Factortame Ltd and others [1991] ECR I-3905.

(10) High Court (England and Wales), 31 July 1997, R v Secretary of State for Transport, ex parte Factortame, Common Market Law Reports, 1998. Vol. I. 1353-1429.

(11) Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029, judgment of 5 March 1996.

(12) Court of Appeal (England and Wales), 8 April 1998, R v Secretary of State for Transport, ex parte Factortame. Common Market Law Reports, 1998. Vol. 3, 912-918.

(13) High Court (England and Wales), 30 July 1999, R v Department of Social Security, ex parte Scullion, Common Market Law Reports. 1999. Vol. 3. 798-819.

(14) Case C-328/91 Thomas et al. [1993] ECR I-1247, judgment of 30 March 1993.

(15) Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ L 6, 10.1.1979, p. 24). Article 7(1)(2) provides that the Directive is without prejudice to the right of Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.

to the difference in retirement ages, the House of Lords [1] had upheld a finding by the Court of Appeal [2] that the age difference for men and women provided for by the national regulations with respect to this benefit was contrary to the Directive. The Social Security Appeal Tribunal therefore reviewed the applications in the *Scullion* case and decided that the claimant was entitled to this benefit as from 1985. However, since she was already receiving an old-age pension, the national regulations on simultaneous payment of benefits meant that she was not entitled to receive the invalid care allowance at the same time but was entitled to the carer's premium introduced in 1990. The claimant therefore sought compensation from the Secretary of State for the injury suffered as a result of his breach of his duty to transpose the Directive. She was paid premium arrears as from 1990. However, since the Secretary of State refused to pay interest on this sum, an application for judicial review was made before the High Court.

The High Court stated that various factors should be taken into account within an overall approach to determine whether the breach was sufficiently serious. Firstly, there was no indication that the Government had sought legal advice as to whether the age difference for entitlement to the benefit fell within the scope of Article 7(1) of the Directive. Secondly, the principle of equal treatment set out in the Directive was of basic importance. Thirdly, the benefit in question targeted a particularly vulnerable group of persons and the Government could therefore have foreseen the injury done to the claimant and to other persons in the same position. Fourthly, despite the Commission's position and the case-law of the Court of Justice, the Government had not asked for a formal opinion from the Commission. Finally, while Article 7(1)(a) of the Directive allowed the Member States a measure of discretion, this applied only to determination of pensionable age and not to other benefits. This being so, the High Court found that the breach of the Directive was sufficiently serious and that since the other conditions giving right to compensation were met, the Secretary of State should pay the interest on the premium arrears. This judgment had major financial implications because of the number of persons concerned.

Again in the United Kingdom, in *Re Burns's Application for Judicial Review* [3], the claimant, under threat of redundancy, had agreed to work on a night shift and subsequently asked to be transferred to a day shift. When her employer refused, she resigned on medical grounds. Having established that the claimant was to be regarded as a night worker, the High Court decided, in accordance with the judgment in *Dillenkofer* [4], that failure to transpose Directive 93/104/EEC on the organisation of working time automatically constituted a serious breach of Community law, with the result that the United Kingdom had a duty to compensate the claimant for any resulting injury. In the instant case, however, she had not established that she would have been able to force her employer to transfer her to day work and thus keep her job if she had been able to rely on provisions transposing the rights conferred by the Directive into national law.

***Question 5***

Finally, mention should be made in this review of two judgments of Community interest by the European Court of Human Rights (ECHR).

The first [5] relates to the concept of a 'fair and public hearing' within the meaning of Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. When assessing whether the length of civil proceedings before the Greek courts constituted a breach of this provision, the ECHR refused to take into account the time for which proceedings were stayed following a reference to the Court of Justice for a preliminary ruling in one of the cases (Case C-441/93 [6] *Panagis Pafitis and others* v *Trapeza Kentrikis Eliados A E and others*), in which the Court of Justice rendered judgment on 12 March 1996.

In paragraph 95 of its judgment, the ECHR states that:

'As regards the proceedings before the Court of Justice of the European Communities, the Court notes that the Athens District Court decided on 3 August 1993 to refer a question to the Court of Justice, which gave judgment on 12 March 1996. During the intervening period the proceedings in the actions concerned were stayed, which prolonged them by two years, seven months and nine days. The Court cannot, however, take this period into consideration in its assessment of the length of each particular set of proceedings: even though it may at first sight appear relatively long, to take it into account would adversely affect the system instituted by Article 177 of the EEC treaty and work against the aim pursued in substance in that Article'.

On 18 February 1999 [7], the ECHR found that, by complying with Annex II to the Act concerning the election of representatives of the European Parliament by universal direct suffrage (annexed to Council Decision 76/787/EEC) and thus failing to apply the Act to Gibraltar, the United Kingdom had breached Article 3 of the Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, by which the contracting parties undertake to organise 'free elections... by secret ballot' to 'the legislature'.

The ECHR states in paragraphs 32 and 33 that:

'... acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be "secured". Member States responsibility therefore continues even after such a transfer.

(1) House of Lords, 27 July 1993, Thomas and others v Secretary of State for Social Security.
(2) Court of Appeal (England and Wales), 31 July 1990, Thomas v Chief Adjudication Officer and another. The Law Reports; Queen's Bench Division. 1991. Vol. 2, p. 164-195.
(3) High Court (Northern Ireland), 15 March 1999. The Northern Ireland Law Reports, 1999, p. 175-182.
(4) Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer [1996] ECR I-4845, judgment of 8 October 1996.
(5) European Court of Human Rights, judgment of 26 February 1998, Pafitis v Greece, Revue universelle des droits de l'homme. 1998, p. 140 et seq.
(6) [1996] ECR I-1347.
(7) European Court of Human Rights. Matthews v United Kingdom. Journal des Tribunaux — Droit européen — 1999, p. 65 et seq.

In the present case, the alleged violation of the Convention flows from an Annex to the 1976 Act, entered into by the United Kingdom, together with the extension to the European Parliament's competences brought about by the Maastricht Treaty. The Council Decision, the 1976 Act and the Maastricht Treaty, with its changes to the EEC Treaty, all constituted international instruments which were freely entered into by the United Kingdom. Indeed, the 1976 Act cannot be challenged before the European Court of Justice for the very reason that it is not a "normal" act of the Community, but is a treaty within the Community legal order. The Maastricht Treaty, too, is not an act of the Community, but a treaty by which a revision of the EEC Treaty was brought about. The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible ratione materiae under Article 1 of the Convention and, in particular, under Article 3 of Protocol 1, for the consequences of that Treaty.'

The ECHR then finds that the United Kingdom is responsible under Article 1 of the Convention for securing the rights guaranteed by Article 3 of Protocol 1 in Gibraltar regardless of whether the elections were purely domestic or European (paragraph 35) and that the European Parliament is sufficiently involved in the specific legislative processes leading to the passage of legislation under Articles 189b and 189c of the EC Treaty, and is sufficiently involved in the general democratic supervision of the activities of the European Community, to constitute part of the 'legislature' of Gibraltar for the purposes of Article 3 of Protocol 1 (paragraph 54). The ECHR concludes that the failure to organise elections to the European Parliament in Gibraltar constitutes a breach of Article 3. Two judges submitted a joint dissenting opinion.