Information on the Court of Justice of the European Communities

1979 – IV

I N F O R M A T I O N

on

THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

IV

1979

Information Office, Court of Justice of the European Communities,
P.O. Box 1406, Luxembourg.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

P.O. Box 1406, Luxembourg

Telephone	:	430 31
Telex (Registry)	:	2510 CURIA LU
Telex (Press and Legal Information Service)	:	2771 CJINFO LU
Telegrams	:	CURIA Luxembourg

CONTENTS

			page
COMPOSITION OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES			5
JUDGMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES			7
25 September 1979	Case 232/78	Commission of the European Communities v French Republic	8
27 September 1979	Case 230/78	SpA Eridania-Zuccherifici Nazionali and Another v Minister of Agriculture and Forestry	11
27 September 1979	Case 23/79	Geflügelschlachterei Freystadt GmbH & Co. KG v Hauptzollamt Hamburg-Jonas	15
4 October 1979	Opinion 1/78	International Agreement on Natural Rubber	17
4 October 1979	Case 141/78	French Republic v United Kingdom of Great Britain and Northern Ireland (Sea fishing)	26
4 October 1979	Case 238/78	Ireks-Arkady GmbH v Council and Commission of the European Communities	30
4 October 1979	Joined Cases 261 & 262/78	Interquell Stärke-Chemie GmbH & Co. KG and Diamalt AG v Council and Commission of the European Communities	33
4 October 1979	Joined Cases 241,242,245 to 250/78	DGV, Deutsche Getreideverwertung und Rheinische Kraftfutterwerke GmbH and Others v Council and Commission of the European Communities	36
4 October 1979	Joined Cases 64 & 113/76, 167 & 239/78, 27,28 & 45/79	P. Dumortier Frères S.A. and Others v Council of the European Communities	39
4 October 1979	Case 11/79	J. Cleton and Co. B.V. v Inspecteur der Invoerrechten en Accijnzen Rotterdam	42
11 October 1979	Case 225/78	Procureur de la République de Besançon v Bouhelier and Others	45
18 October 1979	Case 125/78	GEMA, Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte v Commission of the European Communities	47
18 October 1979	Case 5/79	Procureur Général v Buijs and Others and Denkavit France s.à.r.l.	50
25 October 1979	Case 159/78	Commission of the European Communities v Italian Republic	54
25 October 1979	Case 22/79	Greenwich Film Production v Société des Auteurs, Compositeurs et Editeurs de Musique (S.A.C.E.M.) and Société des Editions Labrador	57
6 November 1979	Case 10/79	G. Toffoli and Others v Regione Veneto ...	60
6 November 1979	Joined Cases 16 to 20/79	Openbaar Ministerie v Joseph Danis and Others	62

			page
8 November 1979	Case 251/78	Denkavit Futtermittel GmbH v Minister für Ernährung, Landwirtschaft und Forsten of North Rhine-Westphalia	65
8 November 1979	Case 15/79	P.B. Groenveld B.V. v Produktschap voor Vee en Vlees	70
13 November 1979	Case 25/79	Société Sanicentral GmbH v René Collin ...	72
15 November 1979	Case 36/79	Denkavit Futtermittel GmbH v Finanzamt Warendorf	74
20 November 1979	Case 162/78	Firma Wagner and Firma Schlüter & Maack v Commission of the European Communities .	76
5 December 1979	Cases 116 and 124/77	G.R. Amylum N.V. and Tunnel Refineries Ltd. v Council and Commission of the European Communities	79
5 December 1979	Case 143/77	Koninklijke Scholten-Honig N.V. v Council and Commission of the European Communities	81
6 December 1979	Case 47/79	Firma Städtereinigung K. Nehlsen KG v Freie Hansestadt Bremen	82
12 December 1979	Case 12/79	Firma H.O. Wagner GmbH Agrarhandel KG v Commission of the European Communities ...	84
13 December 1979	Case 42/79	Firma Milch- Fett- und Eierkontor GmbH v Bundesanstalt für Landwirtschaftliche Marktordnung	85
13 December 1979	Case 44/79	L. Hauer v Land Rheinland-Pfalz	88
14 December 1979	Case 34/79	Regina v Henn and Darby.....	94
14 December 1979	Case 93/79	Commission of the European Communities v Italian Republic	98

ANALYTICAL TABLE 99

INFORMATION ON THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 101

A. Information on current cases 101

B. Technical information and documentation 101

C. Legal information and documentation 102

D. Summary of types of procedure in the Court of Justice 104

E. Organization of public sittings at the Court 105

INFORMATION OFFICES OF THE EUROPEAN COMMUNITIES (Addresses) 107

COMPOSITION OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

for the judicial year 1978 to 1979

(from 15 July 1979 to 7 October 1979)

Order of precedence

H. KUTSCHER, President
J. MERTENS DE WILMARS, President of the First Chamber
LORD A.J. MACKENZIE STUART, President of the Second Chamber
F. CAPOTORTI, First Advocate General
P. PESCATORE, Judge
H. MAYRAS, Advocate General
M. SØRENSEN, Judge
J.-P. WARNER, Advocate General
G. REISCHL, Advocate General
A. O'KEEFFE, Judge
G. BOSCO, Judge
A. TOUFFAIT, Judge
T. KOOPMANS, Judge
A. VAN HOUTTE, Registrar

Composition of the First Chamber

J. MERTENS DE WILMARS, President
A. O'KEEFFE, Judge
G. BOSCO, Judge
T. KOOPMANS, Judge
H. MAYRAS, Advocate General
J.-P. WARNER, Advocate General

Composition of the Second Chamber

LORD A.J. MACKENZIE STUART, President
P. PESCATORE, Judge
M. SØRENSEN, Judge
A. TOUFFAIT, Judge
F. CAPOTORTI, Advocate General
G. REISCHL, Advocate General

COMPOSITION OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

for the judicial year 1979-1980

(from 8 October 1979)

Order of precedence

H. KUTSCHER, President of the Court and President of the Third Chamber
J.-P. WARNER, First Advocate General
A. O'KEEFFE, President of the First Chamber
A. TOUFFAIT, President of the Second Chamber
J. MERTENS DE WILMARS, Judge
P. PESCATORE, Judge
H. MAYRAS, Advocate General
Lord A.J. MACKENZIE STUART, Judge
G. REISCHL, Advocate General
F. CAPOTORTI, Advocate General
G. BOSCO, Judge
T. KOOPMANS, Judge
O. DUE, Judge
A. VAN HOUTTE, Registrar

First Chamber	Second Chamber	Third Chamber[1]
A. O'KEEFFE, President	A. TOUFFAIT, President	H. KUTSCHER, President
G. BOSCO, Judge	P. PESCATORE, Judge	J. MERTENS DE WILMARS, Judge
T. KOOPMANS, Judge	O. DUE, Judge	Lord MACKENZIE STUART, Judge

1 - Following an amendment to the Rules of Procedure, which came into effect on 8 October 1979, a Third Chamber was created which is presided over by the President of the Court of Justice, H. Kutscher.

J U D G M E N T S

of the

COURT OF JUSTICE

of the

EUROPEAN COMMUNITIES

Judgment of 25 September 1979

Case 232/78

Commission of the European Communities v French Republic

(Opinion delivered by Mr Advocate General Reischl on 4 July 1979)

1. Procedure - Application originating proceedings - Subject-matter of dispute - Alteration during proceedings - Prohibition
(Rules of Procedure, Art. 38)

2. Accession to Communities of new Member States - Act of Accession - Agriculture - Provisions on abolition of restrictions on intra-Community trade - Derogation in Article 60 (2) - Temporal application
(Act of Accession, Art. 60 (2))

3. Agriculture - Agricultural products not covered by a common organization - Transitional period - Expiration - Provisions on abolition of restrictions on intra-Community trade - Full effect - Maintenance of national market organization incompatible with Community law - Prohibition

4. Member States - Duties - Unilateral action - Prohibition

1. Under Article 38 (1) of the Rules of Procedure the parties are required to state the subject-matter of the dispute in the document originating the proceedings. It follows that even though Article 42 of the Rules of Procedure allows fresh issues to be raised in certain circumstances a party may not alter the actual subject-matter of the dispute during the proceedings.

2. Article 60 (2) of the Act concerning the Conditions of Accession and the adjustments to the Treaties ceased to have effect at the end of 1977.

3. After the expiration of the transitional period of the EEC Treaty, and, as far as the new Member States are concerned, after the expiration of the time-limits for the transition specifically provided for in the Act of Accession, a national organization of the market must no longer operate

in such a way as to prevent the Treaty provisions relating to the elimination of restrictions on intra-Community trade from having full force and effect. The expiration of the time-limits for the transition implies therefore that those matters and sectors specifically assigned to the Community are the responsibility of the Community so that, although it is still necessary to take special measures, a decision to adopt them can no longer be made unilaterally by the Member States concerned; they must be adopted within the Community system which is designed to guarantee that the general public interest of the Community is protected.

The fact that after the expiration of the periods referred to above the Community has not yet adopted measures intended to regulate the market in an agricultural product is not a sufficient justification for the maintenance by a Member State of a national organization of the market which includes features which are incompatible with the requirements of the Treaty relating to the free movement of goods.

4. A Member State cannot under any circumstances unilaterally adopt, on its own authority, corrective measures or measures to protect trade designed to prevent any failure on the part of another Member State to comply with the rules laid down by the Treaty.

NOTE There being no common organization of the market in mutton and lamb, the market is regulated in France on a national basis. In view of the considerable influence of imports on market price formation in France, stabilization of domestic prices is sought by means of a system of restrictions on the importation of meat from non-member countries and from the new Member States, including the United Kingdom.

Complaints from trade and official circles in Britain reveal that France has continued to apply these domestic import controls after the end of 1977 to imports of mutton and lamb from the United Kingdom.

This led the Commission to make an application to the Court on 25 October 1978 for a declaration that "the French Republic, by continuing after 1 January 1978 to apply its restrictive national system to the importation of mutton and lamb from the United Kingdom, has failed to fulfil its obligations under Articles 12 and 30 of the EEC Treaty."

The substance of the French Government's defence is that Article 60 (2) of the Act of Accession allows the import restrictions concerned to subsist as long as there exists no common organization of the market in mutton and lamb.

It is common ground that French imports of mutton and lamb are subject to a system of import restrictions, based on a "threshold price, protected by a system which prohibits imports and provides for 'reversements' /repayments/".

The French Government does not contest the fact that the system runs counter to the Treaty's provisions on the removal of obstacles to the free movement of goods within the Community, but offers three arguments in its defence. The grave economic and social consequences of dismantling the national organization of the markets on the economy of certain less favoured regions, the progress being made in establishing a common organization of the market in mutton and lamb, and the unequal conditions of competition which it would create between France and the United Kingdom, whose "deficiency payments" system subsidizes, in effect, exports of mutton and lamb to France.

The Court referred to its previous case-law in Charmasson, 2 December 1974, in which it emphasizes that after expiry of the transitional period laid down in the EEC Treaty and, where the new Member States are concerned, expiry of the transitional periods specified in the Act of Accession, the functioning of a national organization of the market must no longer prevent the provisions of the Treaty regarding the elimination of restrictions on intra-Community trade from having their full effect, since the needs of the market concerned will have been placed in the charge of the Community institutions.

Accordingly it is for the Community institutions and for them alone to adopt in due course the measures which are required in order to achieve a general solution, in the Community context, to the problem of the market in mutton and lamb and to the particular difficulties experienced by some areas in this respect.

If the French Republic considers that some elements in the present system of control in the sector of mutton and lamb are incompatible with Community law, there are steps which it can take either in the Council, or through the Commission, or by means of legal proceedings. But in no circumstances is a Member State authorized to adopt unilateral measures to correct or defend itself against them.

Accordingly, the Court declared that by continuing to apply after 1 January 1978 its restrictive national scheme to imports of mutton and lamb from the United Kingdom the French Republic has failed to fulfil its obligations under Articles 12 and 30 of the EEC Treaty.

Judgment of 27 September 1979

Case 230/78

S.p.A. Eridania and Another v Minister of Agriculture and Forestry and Others

(Opinion delivered by Mr Advocate General Warner on 26 June 1979)

1. Agriculture - Common agricultural policy - Regulations - Procedure for formulation - Distinction between basic regulations and implementing regulations

   (EEC Treaty, Art. 43)

2. Agriculture - Common organization of the markets - Sugar - System of quotas - Alteration of basic quotas - Member State's power recognized - Lawfulness - Conditions

   (Regulation No. 3330/74 of the Council, Art. 24 (2) and Regulation No. 3331/74 of the Council, Art. 2 (2))

3. Acts of the institutions - Regulations - Obligation to state reasons - Implementing regulation - Reference to the basic regulation

   (EEC Treaty, Art. 190)

4. Agriculture - Common organization of the markets - Discrimination between producers or consumers in the Community - Concept

5. Agriculture - Common organization of the markets - Amending regulation - Vested right of traders to continued enjoyment of previous advantages - Absence - Infringement of a fundamental right - Absence of such infringement

6. Agriculture - Common organization of the markets - Sugar - System of quotas - Alteration of basic quotas - Restructuring plans - Concept - Definition - Criteria

   (Regulation No. 3331/74 of the Council, Art. 2 (2))

7. Agriculture - Common organization of the markets - Sugar - System of quotas - Alteration of basic quotas - Member State's power recognized - Limits

   (Regulation No. 3331/74 of the Council, Art. 2 (2))

8. Acts of the institutions - Regulations - Direct applicability - Member State's implementing power recognized - Compatibility

   (EEC Treaty, Art. 189)

1. It cannot be a requirement that all the details of the regulations concerning the common agricultural policy be drawn up by the Council according to the procedure laid down in Article 43. It is sufficient for the purposes of that provision that the basic elements of the matter to be dealt with have been adopted in accordance with that procedure; on the other hand, the provisions implementing basic regulations may be adopted by the Council according to a procedure different from that under Article 43.

2. Although the power of the Italian Republic pursuant to Article 2 (2) of Regulation No. 3331/74 of the Council, regarding the allocation and alteration of the basic quotas for sugar, to alter the basic quotas fixed in accordance with Article 24 of Regulation No. 3330/74 is not subject to specific quantitative limits its exercise is nevertheless subject to the existence of restructuring plans and may not exceed what is necessary for the implementation of such plans. In those circumstances the power in question does not go beyond the limits of the implementation of the principles of the basic Regulation No. 3330/74.

3. The obligation to state reasons laid down in Article 190 of the Treaty is not breached if the statement of the reasons on which an implementing regulation is based refers to a factual situation the details of which are not contained in the statement of reasons set out in that regulation but in that contained in the basic regulation.

4. Discrimination within the meaning of the second subparagraph of Article 40 (3) of the Treaty cannot occur if inequality in the treatment of undertakings corresponds to an inequality in the situations of such undertakings.

5. An undertaking cannot claim a vested right to the maintenance of an advantage which it obtained from the establishment of the common organization of the market and which it enjoyed at a given time. Accordingly a reduction in such an advantage cannot be considered as constituting an infringement of a fundamental right.

6. The concept of "restructuring plans" within the meaning of Article 2 (2) of Regulation No. 3331/74 is to be defined by its objectives, which are to redress the imbalance between different agricultural regions and to adapt the sugar and beet sectors in Italy to the requirements of the common organization of the market, and also by its effect, which is to allow the competent authorities to undertake a redistribution of the basic quotas between several undertakings.

7. The power conferred by Article 2 (2) of Regulation No. 3331/74 to alter the basic quotas is limited not only by the requirements of restructuring plans but also by the objectives of the common organization of the market in sugar, in particular by the aim of protecting the interests of beet and cane producers, and by the general principles of Community law.

8. The fact that a regulation is directly applicable does not prevent the provisions of that regulation from empowering a Community institution or a Member State to take implementing measures. In the latter case the detailed rules for the exercise of that power are governed by the public law of the Member State in question; however, the direct applicability of the measure empowering the Member State to take the national measures in question will mean that the national courts may ascertain whether such national measures are in accordance with the content of the Community regulation.

NOTE The Tribunale Amministrativo Regionale [Regional Administrative Court], Lazio, referred to the Court of Justice for a preliminary ruling certain questions concerning the validity and interpretation of Regulation No. 3331/74 of the Council on the allocation and alteration of the basic quotas for sugar.

The questions were raised during an application by the company Eridania Zuccherifici Nazionali for the annulment of an Italian Ministerial Decree altering the basic quotas for sugar in application of the Council regulation mentioned above.

Eridania claims that the contested decree is unlawful for various reasons, among which it cites the illegality of the provision in Article 2 (2) of Regulation No. 3331/74, which forms the legal foundation of the impugned decree, and a misapplication of the provision by the Italian Ministers.

As to the validity of the regulation, the national court submitted a series of questions with reference to prior consultation with the European Parliament, failure to give grounds, discrimination between sugar producers within the Community and protection of basic rights.

After considering the arguments submitted the Court ruled that consideration of the questions raised had disclosed no factor of such a kind as to affect the validity of Regulation No. 331/74, and in particular Article 2 (2) thereof.

As to the interpretation of the regulation, the Italian court asks whether Regulation No. 3331/74, or Community law in general, contains specific criteria on which to assess the meaning of "restructuring plans", whether the confines of the power to alter the basic quotas of undertakings are dictated solely by the requirements for implementing restructuring plans, or whether other limitations are to be taken into account, and last, whether the direct applicability of Regulation No. 3331/74 in the Italian legal system under Article 189 of the Treaty is compatible with the provisions laid down by the Italian authorities for the execution of this regulation.

The Court of Justice ruled in answer to the three last questions as follows:

> The concept of "restructuring plan" within the meaning of Article 2 (2) of Regulation No. 3331/74 is to be defined by its objectives, which are to adjust the imbalance between different agricultural regions and to adopt the sugar and beet sector in Italy to the requirements of the common organization of the markets, and also by its effect which is to allow the competent authorities to take steps for a redistribution of the basic quotas between several undertakings.
>
> The power conferred by Article 2 (2) of Regulation No. 3331/74 to alter the basic quotas is limited not only by the requirements of restructuring plans but also by the objectives of the common organization of the market in sugar, in particular by the aim of protecting the interests of the beet and cane growers and by the general principles of Community law.
>
> There is no incompatibility between the direct applicability of a Community regulation and the exercise of the power conferred on a Member State to take implementing measures on the basis of that regulation.

Judgment of 27 September 1979

Case 23/79

Geflügelschlachterei Freystadt GmbH & Co. KG v Hauptzollamt Hamburg-Jonas

(Opinion delivered by Mr Advocate General Reischl on 13 September 1979)

1. EEC - Protocol on German Internal Trade - Objective - Conditions of application - Goods from the Federal Republic of Germany put directly into free circulation in the German Democratic Republic (EEC Treaty, Protocol on German Internal Trade, Paragraph 1)

2. Agriculture - Common organization of the markets - Export refunds - Exportation - Concept - Trade forming part of German internal trade - Exclusion

1. Paragraph I of the Protocol on German Internal Trade and Connected Problems, annexed to the EEC Treaty, is intended to relieve the Federal Republic of Germany of the obligation to apply the rules of Community law to German internal trade. It accords a special status to the German Democratic Republic as territory which does not form part of the Community but which is not a non-member country vis-à-vis the Federal Republic of Germany.

   For a transaction to form part of German internal trade within the meaning of the Protocol, it is necessary, and at the same time sufficient, that the goods are put into free circulation in the German Democratic Republic without having been in free circulation in a third country after having left the territory of the Federal Republic of Germany.

2. The concept of export within the context of the Community provisions concerning export refunds for agricultural products subject to the common organizations of the markets must be interpreted as meaning that it does not refer to trade forming part of German internal trade within the meaning of the Protocol on German Internal Trade.

NOTE

In the summer of 1973 the plaintiff in the main action exported some broiling chickens produced within the Community which were in free circulation in the Federal Republic of Germany. The goods were forwarded in transit through Austria and Czechoslovakia by the customs permit procedure (that is, without being released into free circulation) and subsequently delivered to customers in the German Democratic Republic.

The plaintiff applied to the defendant for an export refund in relation to the delivery of the goods in question, and on 24 July 1975 the customs office reclaimed the export refund and the monetary compensatory amounts on the ground that the goods had been offered to consumers on the territory of the Federal German Republic, which is not a third country within the meaning of the provisions on the common organization of the agricultural market.

The case prompted the Bundesfinanzhof [Federal Finance Court] to ask the Court for a preliminary ruling on the meaning of the word "export" as used in the provisions concerning the grant of export refunds.

The question is to discover whether, as the plaintiff in the main action claims, the goods must be considered as having been exported within the meaning of those provisions as soon as they have left the geographical territory of the Community, or whether, as the German authorities maintain, they must have been placed in free circulation in the third country which received them. In its second question the Bundesfinanzhof broaches the specific question of trade between the Federal Republic of Germany and the German Democratic Republic, and it refers in that context to the Protocol on German Internal Trade and Connected Problems of 25 March 1957 annexed to the EEC Treaty.

According to paragraph 1 of the Protocol, the Federal Republic of Germany does not need to apply the rules of Community law to German internal trade. It accords special treatment to the German Democratic Republic as being a country not belonging to the Community yet not considered as being a third country vis-à-vis the Federal Republic of Germany.

The Court ruled that the concept of exportation within the context of the Community provisions relating to export refunds in respect of agricultural products covered by a common organization of the market must be interpreted as meaning that it does not refer to trade forming part of German internal trade within the meaning of the Protocol on German internal trade and Connected Problems of 25 March 1957.

Opinion 1/78 of 4 October 1979

International Agreement on Natural Rubber

1. International agreements - Community agreements - Prior opinion of the Court - Compatibility with the EEC Treaty - Court's assessment - Scope
   (EEC Treaty, Second subparagraph of Art. 228 (1))

2. International agreements - Community agreements - Prior opinion of the Court - Request for opinion - Permissibility - Council's power of amendment to proposals from Commission - Absence of effect
   (EEC Treaty, Art. 149 and second subparagraph of Art. 228 (1))

3. International agreements - Community agreements - Prior opinion of the Court - Request for opinion - Permissibility - Conditions - Knowledge of subject-matter of agreement - Information available
   (EEC Treaty, second subparagraph of Art. 228 (1))

4. Common commercial policy - Concept - Restrictive interpretation - Not possible - Liberalization of trade - Regulating international trade - Inclusion
   (EEC Treaty, Art. 113)

5. Common commercial policy - Economic policy - Concepts - Demarcation
   (EEC Treaty, Arts. 6, 103 to 116, 145)

6. Common commercial policy - Concept - Organization of economic links with non-member countries - Building up of security stocks of a product - Powers of the Community - Powers of Member States in matters of economic policy - Absence of effect
   (EEC Treaty, Art. 113)

7. International agreements - Common commercial policy - Agreements negotiated within the framework of international organizations - Participation of the Community or common action by Member States - Respective spheres of application of the two procedures - Demarcation - Criteria - object of the negotiations
(EEC Treaty, Art. 113, 114, 116 and the first subparagraph of Art. 228 (1))

8. International agreements - Common commercial policy - Agreement involving obligation to provide finance - Powers of the Community - Necessity for Member States to participate - Appreciation dependent upon charges borne
(EEC Treaty, Art. 113)

9. International agreements - Community agreements - Dependent territories of a Member State which do not belong to the Community - Manner of participation in agreements - Representation by Member State concerned - No effect on division of powers between Community and Member States
(EEC Treaty, second subparagraph of Art. 228 (1))

1. Under the procedure of the second subparagraph of Article 228 (1), it is possible to consider all questions which concern the compatibility with the provisions of the Treaty of an agreement envisaged. In fact a judgment on the compatibility of an agreement with the Treaty may depend not only on provisions of substantive law but also on those concerning the powers, procedure or organization of the institutions of the Community.

2. Although Article 149 of the EEC Treaty empowers the Council, if it is unanimous, to amend a proposal from the Commission it cannot however be interpreted, nor can that method of decision be understood, as freeing the Council in such a case from observing the other rules of the Treaty, in particular those concerning the division of powers between the Community and the Member States. In case of doubt regarding that division of powers in the matter of the negotiation and conclusion of international agreements Article 149 cannot stand in the way of the right of the Commission or, according to the circumstances, of the Council itself or of the Member States to have recourse to the procedure provided in Article 228 for overcoming such doubts.

3. A request for an opinion in pursuance of Article 228 of the EEC Treaty is not premature simply because at the time when the matter is referred to the Court there are in the text of the agreement which is in course of negotiation a number of alternatives still open and differences of opinion on the drafting of given clauses.

A request for an opinion relating to the power to negotiate and conclude an agreement and intervening in such a situation is permissible once the subject-matter of the agreement is known, even before negotiations have been commenced, and once the Court has sufficient information to make it possible to form a sufficiently certain judgment on the question raised. When a question of powers is to be determined it is in the interests of all the States concerned, including non-member countries, for such a question to be clarified as soon as any particular negotiations are commenced.

4. It would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade. It is therefore not possible to lay down, for Article 113 of the EEC Treaty, an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade, in particular the liberalization of trade, to the exclusion of more highly developed mechanisms of such a kind as to bring about the organization on a world scale of the market in a basic product.

In empowering the Community to formulate a commercial "policy", based on "uniform principles" Article 113 shows that the question of external trade must be governed from a wide point of view and not only having regard to the administration of precise systems such as customs and quantitative restrictions. The same conclusion may be deduced from the fact that the enumeration in Article 113 of the subjects covered by commercial policy is non-exhaustive and must not, as such, close the door to the application in a Community context of any other process intended to regulate external trade. A restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries.

5. With regard to the demarcation within the structure of the EEC Treaty of the concepts of "economic policy" and "commercial policy", it may be noted that although certain provisions, such as Articles 6 and 145, consider economic policy as a question of national interest, others envisage it as being a matter of common interest; such is the position in particular with Articles 103 to 116, which are grouped together in a title devoted to the "economic policy" of the Community. The chapter devoted to the common commercial policy forms part of that title.

As international co-operation in the economic field comes, at least in part, under the common commercial policy it could not, under the name of general economic policy, be withdrawn from the competence of the Community.

6. Having regard to the specific nature of the provisions of the EEC Treaty relating to commercial policy in so far as they concern relations with non-member countries and are founded, according to Article 113, on the concept of a common policy, their scope cannot be restricted in the light of more general provisions relating to economic policy and based on the idea of mere co-ordination. Consequently, where the organization of the Community's economic links with non-member countries may have repercussions on certain sectors of economic policy such as the supply of raw materials to the Community or price policy, as is the case with the regulation of international trade in commodities, that consideration does not constitute a reason for excluding such objectives from the field of application of the rules relating to the common commercial policy. Similarly, the fact that a product may have a political importance by reason of the building up of security stocks is not a reason for excluding that product from the domaine of the common commercial policy.

7. Articles 113 and 116 of the Treaty contribute to the same end inasmuch as their objective is the realization of a common policy in international economic relationships, but as a basis for action the two articles are founded on different premises and consequently apply different ideas. According to Article 113 the common commercial policy is determined by the Community, independently, that is to say, acting as such, by the intervention of its own institutions; in particular, agreements entered into under that provision are, in the terms of Article 114, "concluded ... on behalf of the Community" and accordingly negotiated according to the procedures set out in those provisions and in Article 228. Article 116 on the other hand was conceived with a view to evolving common action by the Member States in international organizations of which the Community is not part; in such a situation the only appropriate means is concerted, joint action by the Member States as members of the said organizations.

To demarcate the sphere of application of Articles 113 and 114 of the EEC Treaty on the one hand and Article 116 on the other, from the point of view of the participation of the Community and its Member States in an international agreement negotiated within the framework of an international organization, the essential point is to determine whether negotiations undertaken within such a framework are intended to lead to an agreement within the meaning of Article 228, that is to say to an "undertaking entered into by entities subject to international law which has binding force". In such a case it is the provisions of the Treaty relating to the negotiation and conclusion of agreements, in other words Articles 113, 114 and 228, which apply and not Article 116.

8. With regard to an international agreement forming part of the commercial policy within the meaning of Article 113 of the EEC Treaty and involving an obligation to contribute to the financing of a buffer stock, the powers of the Community to negotiate and conclude such an agreement may depend on the system of financing. If the financial burdens fall upon the Community budget the powers will belong to the Community; if the burdens are charged directly to the budgets of the Member States their participation, together with the Community, will be necessary.

   As long as the question of the distribution of the charges has not been settled the Member States must be allowed to participate in the agreement.

9. The "dependent territories", whose representation in international relations is undertaken by a Member State, but which remain outside the sphere of application of the EEC Treaty, are, as regards the Community, in the same situation as non-member countries. Hence, the position of the Member State which is reponsible for their international relations must be defined, in relation to an agreement to be concluded by the Community, in a dual capacity: in so far as it is a member of the Community and in so far as it represents the said territories internationally. The position of such a State as a member of the Community is not affected by the fact that it acts as the international representative of the territories concerned. It is however in that capacity and not as a Member State of the Community that it is called upon to participate in the agreement. That special position cannot therefore affect the solution of the problem relating to the demarcation of spheres of competence within the Community.

NOTE

The Commission asked the Court to give its opinion on the compatibility with the EEC Treaty of the draft International Agreement on Natural Rubber which is the subject of negotiations in the United Nations Conference on Trade and Development (hereinafter referred to as "UNCTAD").

The Commission took that step following a divergence of view between itself and the Council on the question of the delimitation of the respective powers of the Community and of the Member States to negotiate and conclude the agreement in question.

According to the Commission, the agreement envisaged comes within the context of Article 113 of the EEC Treaty relating to the common commercial policy and therefore within the Community's exclusive powers.

According to the Council the subject-matter of the agreement falls outside the framework of commercial policy and thus calls for a division of powers between the Community and the Member States so that the agreement must be concluded according to the technique of the so-called "mixed-type" agreement, that is to say, by the Community and the Member States jointly.

At the beginning of 1978 UNCTAD decided to open negotiations for the conclusion of an International Agreement on Natural Rubber. These were the first negotiations undertaken under the Nairobi Resolution on the "Integrated Programme".

For the purposes of these negotiations on 5 October 1978 the Commission put to the Council a "recommendation" under which the Commission was to be authorized to conduct, on behalf of the Community, negotiations in accordance with the directives laid down by the Council.

After considering that recommendation the Council approved a procedural decision prepared by the Committee of Permanent Representatives under which the Community and the Member States were to be represented in the negotiations on natural rubber by a Community delegation and by nine national delegations.

The recommendation presented by the Commission was thus by implication rejected and the Commission therefore immediately lodged with the Court a request for an opinion in pursuance of Article 228 so as to clarify the divergence of views between it and the Council.

It is first necessary to determine the economic objectives and the structure of the agreement. The purpose of the agreement is to achieve a balanced growth between the supply and demand for natural rubber with a view to stabilizing its prices around their long-term trend.

That objective is to be realized by building up a buffer stock, the purpose of which is to purchase surpluses of rubber at a time when prices are declining and to sell the stocked rubber when prices are rising so as to contain the price within a margin of fluctuation determined in advance.

The question of financing the operations of the buffer stock has not been settled. Two trends are discernible: some propose a system of financing by levies on trade in natural rubber, whilst others prefer financing by means of public funds provided by the contracting parties.

Admissibility of the request

The Council expressed doubts as to whether the request made by the Commission does not constitute an incorrect use of the procedure in Article 228 inasmuch as its aim was to obtain from the Court a solution of questions which lay outside that procedure. Referring to previous decisions the Court emphasized that under the procedure of Article 228 of the EEC Treaty, like that of Article 103 of the EAEC Treaty, it is possible to deal with all questions which concern the compatibility with the provisions of the Treaty of an agreement envisaged (Opinion 1/75, Opinion 1/76, Ruling 1/78).

The Council also raised an objection as to the alleged premature nature of the request. In fact at the time when the Commission lodged its request for an opinion the negotiations were still not in an advanced stage.

The Court ruled that it should not be overlooked that the Commission had an interest in lodging its request immediately after its disagreement with the Council as regards the question of powers to negotiate and conclude the agreement envisaged had become apparent. It is clear that questions of powers must be clarified as soon as any particular negotiations are commenced.

The subject-matter and the objectives of the agreement envisaged

The problem of competence which had been submitted to the Court must be examined from two aspects:

> The first question is whether the agreement envisaged, by reason of its subject-matter and objectives, comes within the concept of common commercial policy referred to in Article 113 of the Treaty.
>
> The second question - but only if the first question is answered in the affirmative - is whether, by reason of certain specific arrangements or special provisions of the agreement concerning matters coming within the powers of the Member States, the participation of the latter in the agreement is necessary.

The central question raised by the Commission's request was whether the International Agreement on Rubber came within the sphere of the "common commercial policy" referred to in Article 113 of the Treaty. It was not disputed that the agreement envisaged was closely connected with commercial policy but, in the Commission's view, the agreement was a characteristic measure for regulating external trade and thus an instrument of commercial policy while, in the Council's view, there was a close interrelation between the powers of the Community and those of the Member States, since it was difficult to distinguish between international economic relations and international political relations.

In these circumstances the Council took the view that the agreement envisaged came not only under Article 113 of the Treaty but also under Article 116 relating to common action by Member States within the framework of international organizations of an economic character to which they belong.

The agreement's links with commercial policy and development problems

The agreement in question is distinguished from classical commercial agreements inasmuch as it is a more structured instrument in the form of an organization of the market on a world scale. Consideration must be given to the question whether the link which exists between the agreement envisaged and the development problems to which the Council refers may perhaps exclude the agreement from the sphere of the common commercial policy as defined by the Treaty.

The Nairobi Resolution shows that commodity agreements have complex objectives. Whilst stressing the needs of the developing countries the resolution does not overlook the needs of the industrialized countries. It seeks to establish a fair balance between the interests of the producer countries and those of the consumer countries. It seems that it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade.

Article 113 empowers the Community to formulate a commercial "policy", based on "uniform principles". A restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries.

The agreement's links with general economic policy

The Council raised the problem of the interrelation within the structure of the Treaty of the concepts of "economic policy" and "commercial policy" which in effect makes it necessary to determine the connexion between Article 113 and 116 in the context of the common commercial policy. The two provisions contribute to the same end inasmuch as their objective is the realization of a common policy in international economic relationships but, as a basis for action, they differ: according to Article 113 the common commercial policy is determined by the Community, independently, that is to say, acting as such, by the intervention of its own institutions whereas Article 116 was conceived with a view to evolving common action by the Member States in international organizations of which the Community is not part and in such a situation the only appropriate means is concerted, joint action by the Member States as members of the said organizations.

In this case the agreements on commodities are being negotiated within UNCTAD. The Court has already stressed in its Opinion 1/75 (OECD) that what counts with regard to the application of the Treaty is the question whether negotiations undertaken within the framework of an international organization are intended to lead to an "undertaking entered into by entities subject to international law which has binding force". In such a case Articles 113, 114 and 228 apply and not Article 116.

Problems raised by the financing of the agreement and by other specific provisions

Consideration must still be given to the question whether the detailed arrangements for financing the buffer stock, or certain specific clauses of the agreement, concerning technological assistance, research programmes etc. lead to a negation of the Community's exclusive competence. The Court took the view that the financial provisions occupy a central position in the structure of the agreement and raise a more fundamental difficulty as regards the demarcation between the powers of the Community and those of the Member States. The Commission had proposed that the application of the financial clauses of the agreement on natural rubber should be effected by the Community itself with a direct contribution from the Community budgets whereas the Council expressed a preference for financing by the Member States. However, no formal decision has yet been taken on this question. Moreover, there is no certainty as regards the attitude of the various Member States on this particular question.

Having regard to that uncertainty the conclusion must be drawn that if the financing of the agreement is a matter for the Community the necessary decisions will be taken according to the appropriate Community procedures. If on the other hand the financing is to be by the Member States that will imply the participation of those States in the decision-making machinery or, at least, their agreement with regard to the arrangements for financing envisaged.

The exclusive competence of the Community could not be evisaged in such a case.

The Court gave the following opinion:

1. The Community's powers relating to commercial policy within the meaning of Article 113 of the Treaty establishing the European Economic Community extend to the International Agreement on Natural Rubber which is in the course of negotiation within the United Nations Conference on Trade and Development.

2. The question of the exclusive nature of the Community's powers depends in this case on the arrangements for financing the operations of the buffer stock which it is proposed to set up under that agreement.

   If the burden of financing the stock falls upon the Community budget the Community will have exclusive powers.

   If on the other hand the charges are to be borne directly by the Member States that will imply the participation of those States in the agreement together with the Community.

3. As long as that question has not been settled by the competent Community authorities the Member States must be allowed to participate in the negotiation of the agreement.

Judgment of 4 October 1979

Case 141/78

French Republic v United Kingdom of Great Britain and Northern Ireland

(Opinion delivered by Mr Advocate General Reischl on 11 September 1979)

1. Fishing - Conservation of the resources of the sea - Powers of the EEC - Legal basis - Scope
(EEC Treaty, Arts. 3 (d) and 38; Act of Accession, Art. 102)

2. Fishing - Conservation of the resources of the sea - Temporary powers of Member States - Conditions for exercise - Duty of co-operation
(EEC Treaty, Art. 5; Council Regulation No. 101/76, Arts. 2 and 3; Council Resolution of 3 November 1976, Annex VI)

3. Fishing - Conservation of the resources of the sea - Temporary powers of Member States - Conditions for exercise - Duty of consultation - Application to national implementing measures of an international obligation
(Council Resolution of 3 November 1976, Annex VI)

1. The powers of the Community in fishing matters are based on Article 3 (d) of the Treaty in conjunction with Article 38 et seq. relating to agriculture, including Annex II to the Treaty, which includes fisheries within the sphere of the common agricultural policy. The Community's powers were confirmed by Article 102 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties.

Those powers cover all questions relating to the protection of the fishing grounds and the conservation of the biological resources of the sea both in the Community's internal relations and in its relations with non-member States. Consequently the measures adopted in this matter by the Member States are subject to all the relevant provisions of Community law.

2. In adopting measures in the sphere of conservation of fishery resources the Member States must observe on the one hand Articles 2 and 3 of Council Regulation No. 101/76 laying down a common structural policy for the fishing industry, under which all laws and administrative rules and regulations determining the rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction must be notified to the other Member States and the Commission, together with any alterations which it is intended to make in the fishery rules so laid down, and on the other hand, Annex VI to the Resolution on fishing adopted by the Council at The Hague on 30 October 1976 and formally approved on 3 November 1976. That resolution, in the particular field to which it applies, makes specific the duties of co-operation which the Member States assumed under Article 5 of the EEC Treaty when they acceded to the Community. Performance of these duties is particularly necessary in a situation in which it has appeared impossible, by reason of divergences of interest which it has not yet been possible to resolve, to establish a common policy and in a field such as that of the conservation of the biological resources of the sea in which worthwhile results can only be attained thanks to the co-operation of all the Member States.

Thus the institution of measures of conservation by a Member State must first be notified to the other Member States and to the Commission; a Member State proposing to bring such measures into force is required to seek the approval of the Commission, which must be consulted at all stages of the procedure.

3. Annex VI to The Hague Resolution in the words of which "the Member States will not take any unilateral measures in respect of the conservation of resources", except in certain circumstances and with due observance of certain requirements, must be understood as referring to any measures of conservation emanating from the Member States and not from the Community authorities. The duty of consultation arising under that resolution thus covers also measures adopted by a Member State to comply with one of its international obligations in this matter.

NOTE

By an application of 14 June 1978 the French Republic, in pursuance of Article 170 of the EEC Treaty, asked the Court to declare that by adopting on 9 March 1977 the Fishing Nets (North-East Atlantic) Order 1977 (Statutory Instrument 1977 No. 440), the United Kingdom has failed to fulfil its obligations under the EEC Treaty. This is the first judgment pursuant to Article 170 of the Treaty concerning a State's failure to fulfil its obligations.

The order prohibits the carrying, in a specified area of the Atlantic and the Arctic Oceans and seas adjacent thereto, in any British or foreign fishing boat within British fishery limits, of certain small-mesh nets. It authorizes the carriage of small-mesh nets for taking certain unprotected species, including prawns; however, such authorization does not apply when the protected species represent more than 20% of the catch involved.

The action brought by the French Republic originates in an incident at sea which occurred on 1 October 1977 when the French trawler "Cap Caval" which was fishing for prawns within United Kingdom fishery limits was boarded by British fishery protection officers. The ship's hold contained approximately 2.9 tonnes of white fish (protected) and 1.8 tonnes of prawns.

The master of the trawler was convicted by a British court of an offence contrary to the order in question, in particular for having used nets of a mesh smaller than the minimum authorized by the order.

The French Republic claims in particular that the disputed order, which was adopted in a matter reserved for the competence of the Community, was brought into force in disregard of the requirements set out in Annex VI to the resolution adopted by the Council at The Hague at its meeting on 30 October and 3 November 1976, under which, pending the implementation of the appropriate Community measures, Member States might, as an interim measure, adopt unilateral measures to ensure the protection of fishery resources on condition that they had first consulted the Commission and sought its approval. As these requirements were not observed by the Government of the United Kingdom the measure adopted is contrary to Community law, argues the French Republic. The position of the French Government was supported by the Commission, which intervened in the dispute.

The Government of the United Kingdom, without challenging the binding nature of Annex VI to the Hague Resolution, claims that the order in question cannot be described as a "unilateral" measure within the meaning of that resolution since it was adopted in pursuance of the North-East Atlantic Fisheries Convention signed in London on 24 January 1959 (United Nations Treaty Series, 1964 p.159).

For that reason the order in question did not need to be subjected to the consultation procedure laid down in the Hague Resolution.

The French Government stated, correctly, that the order in dispute was adopted in a field which comes within the powers of the Community. Those powers are based on Articles 3 and 38 of the EEC Treaty and also on a series of regulations of the Council, including Regulations Nos. 100 and 101/76 of 19 January 1976 and on the judgments of the Court of Justice of 14 July 1976 (Joined Cases 3, 4 and 6/76, Kramer and Others), of 16 February 1978 (Case 61/77, Commission v Ireland) and of 3 July 1979 (Joined Cases 185 to 204/78, Van Dam and Others).

The Commission, for its part, claims that the Hague Resolution, which states that "pending the implementation of the Community measures (to ensure the protection of the resources situated in the fishing zones along their coastlines), the Member States will not take any unilateral measures in respect of the conservation of the resources", makes specific the duties of co-operation which the Member States assumed under Article 5 of the EEC Treaty when they acceded to the Community.

It is common ground that these requirements have not been satisfied in this case. It follows that, by not previously notifying the other Member States and the Commission of the measure adopted and seeking the approval of the Commission, the United Kingdom has failed to fulfil its obligations under Article 5 of the EEC Treaty, Annex VI to the Hague Resolution and Articles 2 and 3 of Regulation No. 101/76.

The Court:

1. Declares that, by bringing into force on 1 April 1977 the Fishing Nets (North-East Atlantic)Order 1977, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under the EEC Treaty;

2. Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.

Judgment of 4 October 1979

Case 238/78

Ireks-Arkady GmbH v Council and Commission of the European Communities

(Opinion delivered by Mr Advocate General Capotorti
on 12 September 1979)

1. Action for damages - Capacity to bring legal proceedings - Assignment of right to compensation - Action brought by assignee - Admissibility
(EEC Treaty, Art. 178 and second paragraph of Article 215)

2. Action for damages - Subject-matter - Compensation for damage arising from the abolition of refunds - Plea of inadmissibility based on the failure to bring an action for payment of the refunds in the national courts - Rejection of that plea
(EEC Treaty, Art. 178 and second paragraph of Art. 215)

3. Action for damages - Action for payment of amounts due under Community law - Inadmissibility
(EEC Treaty, Art. 178 and second paragraph of Art. 215)

4. Action for damages - Independent nature - Action for annulment - Action for failure to act - Different subject-matter
(EEC Treaty, Arts. 173 and 175 and second paragraph of Art. 215)

5. Non-contractual liability - Legislative measure involving choices of economic policy - Liability of the Community - Conditions - Sufficiently serious breach of a superior rule of law for the protection of the individual - Unusual and special nature of damage
(EEC Treaty, second paragraph of Art. 215)

6. Non-contractual liability - Damage - Assessment - Criteria - Damage passed on to other traders - Taken into account
(EEC Treaty, second paragraph of Art. 215)

7. Non-contractual liability - Damage - Compensation - Claim for interest - Admissibility
(EEC Treaty, second paragraph of Art. 215)

1. In the absence of any abuse, there is no reason to prevent a right to compensation from being claimed and enforced in legal proceedings under Article 178 and the second paragraph of Article 215 of the EEC Treaty by an assigneee action by subrogation from another trader.

2. An action for damages brought under Article 178 and the second paragraph of Article 215 of the EEC Treaty, seeking compensation for the damage arising from the abolition of refunds, cannot be met by a plea of inadmissibility based on the argument that the applicant should have brought an action for payment of the said refunds against the competent national bodies in a national court, since such an action cannot be classed as a claim for the payment of amounts due under the Community rules and since it is moreover settled that a national court could not have upheld an action for the payment of such sums in the absence of any provision of Community law authorizing the national bodies to pay the amounts claimed.

3. An action for payment of amounts due under the Community regulations may not be brought under Article 178 and the second paragraph of Article 215 of the EEC Treaty.

4. There is no foundation for an objection of inadmissibility pleaded against an action for damages and based on an argument to the effect that the real object of the action could be achieved only by the adoption of a new regulation and that, since the applicant may not pursue such an objective by means of the actions provided for by Articles 173 and 175 and the EEC Treaty, it cannot do so by means of an action under Article 178 and the second paragraph of Article 215 either. In fact, as the latter action was set up as an independent remedy, the Court may consider a claim for damages, if it is well founded, without its being necessary for the institution concerned to adopt new legislative measures.

5. The findings that a legal situation resulting from a legislative measure of the Community is unlawful is not sufficient in itself to give rise to the liability of the Community under the second paragraph of Article 215 of the EEC Treaty. When such a measure implies choices of economic policy it is further necessary that it be vitiated by a sufficiently serious breach of a superior rule of law for the protection of the individual.

In the context of Community provisions in which one of the chief features is the exercise of a wide discretion essential for the implementation of the Common Agricultural Policy the Community may incur liability only in exceptional cases, namely where the institution concerned manifestly and gravely disregarded the limits on the exercise of its powers.

Such may be the case if that institution has acted contrary to the principles of equality embodied in particular in the second subparagraph of Article 40 (3) of the EEC Treaty, if the disregard of that principle affected a limited and clearly defined group of commercial operators, if the damage thus caused goes beyond the bounds of the economic risks inherent in the activities in the sector concerned and finally if the said institution ended the equality of treatment existing prior to the adoption of the contested measure without sufficient justification.

6. In the context of an action for damages, in order to decide upon the existence or extent of the damage alleged by the applicant, it is necessary to take into account, in an appropriate case, the fact that the applicant was able to pass on in his selling prices the disadvantages for which he claims compensation.

7. It follows from the principles common to the legal systems of the Member States, to which the second paragraph of Article 215 of the EEC Treaty refers, that in the context of an action for damages a claim for interest is generally admissible.

NOTE In these cases, as in Cases 261/78 and 262/78 (see pages 33 to 35), the applicants claim that the European Economic Community should be ordered to compensate them for the damage which they claim to have sustained as a result of the abolition of production refunds for quellmehl following Regulation No. 1125/74 of the Council of 29 April 1974. The damage consists in the fact that they did not receive sums corresponding to the amounts of the refunds which would have been paid to them if quellmehl (used in the manufacture of bread) had benefited from the same refunds as cereal starch.

The Court ruled in favour of these claims also and ordered the European Economic Community to pay damages plus interest at 6% as from the date of the judgment.

Judgment of 4 October 1979

Joined Cases 261 and 262/78

Interquell Stärke-Chemie GmbH & Co. KG and Diamalt AG v Council and Commission of the European Communities

(Opinion delivered by Mr Advocate General Capotorti on 12 September 1979)

1. Action for damages - Subject-matter - Compensation for damage arising from the abolition of refunds - Plea of inadmissibility based on the failure to bring an action for payment of the refunds in the national courts - Rejection of that plea
(EEC Treaty, Art. 178 and second paragraph of Art. 215)

2. Action for damages - Action for payment of amounts due under Community law - Inadmissibility
(EEC Treaty, Art. 178 and second paragraph of Art. 215)

3. Action for damages - Independent nature - Action for annulment - Action for failure to act - Different subject-matter
(EEC Treaty, Arts. 173 and 175 and second paragraph of Art. 218)

4. Non-contractual liability - Legislative measure involving choices of economic policy - liability of the Community - Conditions - Sufficiently serious breach of a superior rule of law for the protection of the individual - Unusual and special nature of damage
(EEC Treaty, second paragraph of Art. 215)

5. Non-contractual liability - Damage - Assessment - Criteria - Damage passed on to other traders - Taken into account
(EEC Treaty, second paragraph of Art. 215)

6. Non-contractual liability - Damage - Compensation - Claim for interest - Admissibility
(EEC Treaty, second paragraph of Art. 215)

1. An action for damages brought under Article 178 and the second paragraph of Article 215 of the EEC Treaty, seeking compensation for the damage arising from the abolition of refunds, cannot be met by a plea of inadmissibility based on the argument that the applicant should have brought an action for payment of the said refunds against the competent national bodies in a national court, since such an action cannot be classed as a claim for the payment of amounts due under the Community rules and since it is moreover settled that a national court could not have upheld an action for the payment of such sums in the absence of any provision of Community law authorizing the national bodies to pay the amounts claimed.

2. An action for payment of amounts due under the Community regulations may not be brought under Article 178 and the second paragraph of Article 215 of the EEC Treaty.

3. There is no foundation for an objection of inadmissibility pleaded against an action for damages and based on an argument to the effect that the real object of the action could be achieved only by the adoption of a new regulation and that, since the applicant may not pursue such an objective by means of the actions provided for by Articles 173 and 175 and the EEC Treaty, it cannot do so by means of an action under Article 178 and the second paragraph of Article 215 either. In fact, as the latter action was set up as an independent remedy, the Court may consider a claim for damages, if it is well founded, without its being necessary for the institution concerned to adopt new legislative measures.

4. The findings that a legal situation resulting from a legislative measure of the Community is unlawful is not sufficient in itself to give rise to the liability of the Community under the second paragraph of Article 215 of the EEC Treaty. When such a measure implies choices of economic policy it is further necessary that it be vitiated by a sufficiently serious breach of a superior rule of law for the protection of the individual.

In the context of Community provisions in which one of the chief features is the exercise of a wide discretion essential for the implementation of the Common Agricultural Policy the Community may incur liability only in exceptional cases, namely where the institution concerned manifestly and gravely disregarded the limits on the exercise of its powers.

Such may be the case if that institution has acted contrary to the principles of equality embodied in particular in the second subparagraph of Article 40 (3) of the EEC Treaty, if the disregard of that principle affected a limited and clearly defined group of commercial operators, if the damage thus caused goes beyond the bounds of the economic risks inherent in the activities in the sector concerned and finally if the said institution ended the equality of treatment existing prior to the adoption of the contested measure without sufficient justification.

5. In the context of an action for damages, in order to decide upon the existence or extent of the damage alleged by the applicant, it is necessary to take into account, in an appropriate case, the fact that the applicant was able to pass on in his selling prices the disadvantages for which he claims compensation.

6. It follows from the principles common to the legal systems of the Member States, to which the second paragraph of Article 215 of the EEC Treaty refers, that in the context of an action for damages a claim for interest is generally admissible.

NOTE For the note on these cases, see Case 238/78 (page 32).

Judgment of 4 October 1979

Joined Cases 241, 242, 245 to 250/78

DGV, Deutsche Getreideverwertung und Rheinische Kraftfutterwerke GmbH and Others v Council and Commission of the European Communities

(Opinion delivered by Mr Advocate General Capotorti on 12 September 1979)

1. Action for damages - Subject-matter - Compensation for damage arising from the abolition of refunds - Plea of inadmissibility based on the failure to bring an action for payment of the refunds in the national courts - Rejection of that plea
(EEC Treaty, Art. 178 and second paragraph of Art. 215)

2. Action for damages - Action for payment of amounts due under Community law - Inadmissibility
(EEC Treaty, Art. 178 and second paragraph of Art. 215)

3. Action for damages - Independent nature - Action for annulment - Action for failure to act - Different subject-matter
(EEC Treaty, Arts. 173 and 175 and second paragraph of Art. 215)

4. Non-contractual liability - Legislative measure involving choices of economic policy - Liability of the Community - Conditions - Sufficiently serious breach of a superior rule of law for the protection of the individual - Unusual and special nature of damage
(EEC Treaty, second paragraph of Art. 215)

5. Non-contractual liability - Damage - Assessment - Criteria - Damage passed on to other traders - Taken into account
(EEC Treaty, second paragraph of Art. 215)

6. Non-contractual liability - Damage - Compensation - Claim for interest - Admissibility
(EEC Treaty, second paragraph of Art. 215)

1. An action for damages brought under Article 178 and the second paragraph of Article 215 of the EEC Treaty, seeking compensation for the damage arising from the abolition of refunds, cannot be met by a plea of inadmissibility based on the argument that the applicant should have brought an action for payment of the said refunds against the competent national bodies in a national court, since such an action cannot be classed as a claim for the payment of amounts due under the Community rules and since it is moreover settled that a national court could not have upheld an action for the payment of such sums in the absence of any provision of Community law authorizing the national bodies to pay the amounts claimed.

2. An action for payment of amounts due under the Community regulations may not be brought under Article 178 and the second paragraph of Article 215 of the EEC Treaty.

3. There is no foundation for an objection of inadmissibility pleaded against an action for damages and based on an argument to the effect that the real object of the action could be achieved only by the adoption of a new regulation and that, since the applicant may not pursue such an objective by means of the actions provided for by Articles 173 and 175 and the EEC Treaty, it cannot do so by means of an action under Article 178 and the second paragraph of Article 215 either. In fact, as the latter action was set up as an independent remedy, the Court may consider a claim for damages, if it is well founded, without its being necessary for the institution concerned to adopt new legislative measures.

4. The findings that a legal situation resulting from a legislative measure of the Community is unlawful is not sufficient in itself to give rise to the liability of the Community under the second paragraph of Article 215 of the EEC Treaty. When such a measure implies choices of economic policy it is further necessary that it be vitiated by a sufficiently serious breach of a superior rule of law for the protection of the individual.

In the context of Community provisions in which one of the chief features is the exercise of a wide discretion essential for the implementation of the Common Agricultural Policy the Community may incur liability only in exceptional cases, namely where the institution concerned manifestly and gravely disregarded the limits on the exercise of its powers.

Such may be the case if that institution has acted contrary to the principles of equality embodied in particular in the second subparagraph of Article 40 (3) of the EEC Treaty, if the disregard of that principle affected a limited and clearly defined group of commercial operators, if the damage thus caused goes beyond the bounds of the economic risks inherent in the activities in the sector concerned and finally if the said institution ended the equality of treatment existing prior to the adoption of the contested measure without sufficient justification.

5. In the context of an action for damages, in order to decide upon the existence or extent of the damage alleged by the applicant, it is necessary to take into account, in an appropriate case, the fact that the applicant was able to pass on in his selling prices the disadvantages for which he claims compensation.

6. It follows from the principles common to the legal systems of the Member States, to which the second paragraph of Article 215 of the EEC Treaty refers, that in the context of an action for damages a claim for interest is generally admissible.

NOTE The applicants in these cases and in Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 (pages 39 to 41) are undertakings which manufacture maize groats and meal which they sell to the brewing industry and which are used in the manufacture of beer.

They claim that the European Economic Community should be ordered, pursuant to the second paragraph of Article 215 of the EEC Treaty, to compensate them for the damage which they claim to have sustained as a result of the abolition of the production refunds for maize groats and meal (gritz), under Regulation No. 665/75 of the Council of 4 March 1975.

The purpose of the applicants' claims is to obtain compensation for the damage which they sustained as a result of the absence of refunds during the period from 1 August 1975, on which date Regulation No. 665/75 was first applied, to 19 October 1977.

The damage consists, as regards all the applicants, in the fact that they did not receive the sums corresponding to the amounts of the refunds which would have been paid to them if maize gritz had benefited from the same refunds as cereal starch.

The Court ruled in favour of these claims and ordered the European Economic Community to pay damages, plus 6% interest as from the date of the judgment (4 October), the amount of the damage to be calculated within 12 months.

Judgment of 4 October 1979

64 and 113/76, 167 and 239/78, 27, 28 and 45/79

P. Dumortier Frères S.A. and Others v Council of the European Communities

(Opinion delivered by Mr Advocate General Capotorti on 22 September 1977 and 12 September 1979)

1. Action for damages - Subject-matter - Compensation for damage arising from the abolition of refunds - Plea of inadmissibility based on the failure to bring an action for payment of the refunds in the national courts - Rejection of that plea
(EEC Treaty, Art. 178 and second paragraph of Art. 215)

2. Action for damages - Action for payment of amounts due under Community law - Inadmissibility
(EEC Treaty, Art. 178 and second paragraph of Art. 215)

3. Action for damages - Parallel action before the national courts - Different subject-matter and legal basis - Plea of lis alibi pendens - Inadmissibility
(EEC Treaty, Art. 178 and second paragraph of Art. 215)

4. Non-contractual liability - Legislative measure involving choices of economic policy - Liability of the Community - Conditions - Sufficiently serious breach of a superior rule of law for the protection of the individual - Unusual and special nature of damage
(EEC Treaty, second paragraph of Art. 215)

5. Non-contractual liability - Damage - Assessment - Criteria - Damage passed on to other traders - Taken into account
(EEC Treaty, second paragraph of Art. 215)

6. Non-contractual liability - Damage as a result of an unlawful legislative measure - Compensation - Conditions - Direct nature of damage
(EEC Treaty, second paragraph of Art. 215)

7. Non-contractual liability - Damage - Compensation - Claim for interest - Admissibility
(EEC Treaty, second paragraph of Art. 215)

1. An action for damages brought under Article 178 and the second paragraph of Article 215 of the EEC Treaty, seeking compensation for the damage arising from the abolition of refunds, cannot be met by a plea of inadmissibility based on the argument that the applicant should have brought an action for payment of the said refunds against the competent national bodies in a national court, since such an action cannot be classed as a claim for the

payment of amounts due under the Community rules and since it is moreover settled that a national court could not have upheld an action for the payment of such sums in the absence of any provision of Community law authorizing the national bodies to pay the amounts claimed.

2. An action for payment of amounts due under the Community regulations may not be brought under Article 178 and the second paragraph of Article 215 of the EEC Treaty.

3. The principles applicable to concurrency of proceedings, recognized in the national systems of legal procedure, may not be relied on in order to contest, by reason of a parallel action brought before a national court by the same applicant, the admissibility of an action brought before the Court of Justice, since the subject-matter and legal basis are different.

Such is the case when a person brings an action before the Court under Article 178 and the second paragraph of Article 215 of the EEC Treaty seeking compensation for the damage which he claims to have suffered as a result of the abolition of a refund and also brings an action before a national court for the annulment of the competent national body's refusal to pay that refund. In fact the latter court has no jurisdiction to rule on the non-contractual liability of the Community.

4. The findings that a legal situation resulting from a legislative measure of the Community is unlawful is not sufficient in itself to give rise to the liability of the Community under the second paragraph of Article 215 of the EEC Treaty. When such a measure implies choices of economic policy it is further necessary that it be vitiated by a sufficiently serious breach of a superior rule of law for the protection of the individual.

In the context of Community provisions in which one of the chief features is the exercise of a wide discretion essential for the implementation of the Common Agricultural Policy the Community may incur liability only in exceptional cases, namely where the institution concerned manifestly and gravely disregarded the limits on the exercise of its powers.

Such may be the case if that institution has acted contrary to the principles of equality embodied in particular in the second subparagraph of Article 40 (3) of the EEC Treaty, if the disregard of that principle affected a limited and clearly defined group of commercial operators, if the damage thus caused goes beyond the bounds of the economic risks inherent in the activities in the sector concerned and finally if the said institution ended the equality of treatment existing prior to the adoption of the contested measure without sufficient justification.

5. In the context of an action for damages, in order to decide upon the existence or extent of the damage alleged by the applicant, it is necessary to take into account, in an appropriate case, the fact that the applicant was able to pass on in his selling prices the disadvantages for which he claims compensation.

6. In the field of non-contractual liability of public authorities for legislative measures, the principles common to the laws of the Member States to which the second paragraph of Article 215 of the EEC Treaty refers cannot be relied on to deduce an obligation to make good every harmful consequence, even a remote one, of unlawful legislation; the damage alleged must be a sufficiently direct consequence of the unlawful conduct of the institution concerned.

7. It follows from the principles common to the legal systems of the Member States, to which the second paragraph of Article 215 of the EEC Treaty refers, that in the context of an action for damages a claim for interest is generally admissible.

Judgment of 4 October 1979

Case 11/79

J. Cleton and Co. B.V. v Inspecteur der Invoerrechten en Accijnzen Rotterdam

(Opinion delivered by Mr Advocate General Warner on 13 September 1979)

1. Common Customs Tariff - Tariff headings - Interpretation - Explanatory Notes of the Customs Co-operation Council - Authority

2. Common Customs Tariff - Tariff headings - Interpretation - Explanatory Notes of the Customs Co-operation Council - Authority - Influence on the Explanatory Notes to the Common Customs Tariff

3. Common Customs Tariff - Tariff headings - Machines "for changing the temperature and humidity of air" within the meaning of heading 84.12 - Concept

4. Common Customs Tariff - Tariff headings - Machines "for changing the temperature and humidity of air" within the meaning of heading 84.12 - Humidity - Concept - Relative humidity

1. The explanatory Notes drawn up by the Customs Co-operation Council are, in the absence of specific provisions of Community law, an authoritative source for interpreting the headings to the Common Customs Tariff.

2. The notice which precedes the Explanatory Notes to the Customs Tariff of the European Communities states that they are not intended to replace the Explanatory Notes of the Customs Co-operation Council but only to supplement them. Consequently, the former must be interpreted in the light of the latter.

3. It follows from both the Explanatory Notes of the Customs Co-operation Council and the Explanatory Notes to the Common Customs Tariff that heading 84.12 of the Common Customs Tariff applies only to machines which include elements designed both to alter the surrounding temperature in a given space and to regulate the degree of humidity of the air in that space, or which are at least intended and make it possible to adjust the level of humidity which is merely the

automatic result of the temperature selected. It does not apply to machines made solely for the purpose of changing the temperature of the surrounding atmosphere, where the degree of humidity of that atmosphere changes only as an automatic result, which can neither be regulated nor adjusted, of the temperature.

4. In so far as the concept of relative humidity corresponds to that of the degree of humidity, the expression "for changing the temperature and humidity of air" means changing the relative humidity.

NOTE

The questions referred to the Court for a preliminary ruling by the Tariefcommissie concerning the interpretation of heading 84.12 of the Common Customs Tariff arose in the course of an action between the parties to the main action concerning the tariff classification of machines called "Thermo-King Transport Refrigeration Units", imported from a non-member country. These machines are used mostly for cooling or heating the load compartments in lorries, containers and other means of transport.

The plaintiff in the main action declared the machines under subheading B of tariff heading 84.15 which reads as follows: "Refrigerators and refrigerating equipment (electrical and other): A. Evaporators and condensers; B. Other ...", and gives rise to a conventional rate of duty of 5%. The competent inspector amended the declaration, however, and classified the machines under heading 84.12: "Air-conditioning machines, self-contained, comprising a motor-driven fan and elements for changing the temperature and humidity of air". This heading gives rise to a conventional rate of duty of 8%.

The plaintiff in the main action disputed this classification, claiming that the machines were designed purely to regulate the temperature inside the compartments and not the degree of humidity of the air. It is it adds, that owing to the laws of physics any change in temperature in the surrounding atmosphere alters the degree of humidity of the air, but so far as the machines in question are concerned this is an unsought effect, which is even considered undesirable, and which the machines in question are not capable of regulating.

The question asked was therefore: "should heading 84.12 of the tariff be interpreted as meaning that the words 'air-conditioning' in conjunction with the words 'changing the temperature and humidity of air' also include the maintenance of a pre-selected temperature, coupled with a change in the humidity which is not intended and cannot be regulated" and, if the reply to the first question were in the negative, "what is then to be understood under the term 'humidity' used in heading 84.12? Is the term to be understood as meaning relative humidity or absolute humidity?".

The Court is of the opinion that the words "for changing the temperature and humidity" exclude from the ambit of heading 84.12 an apparatus which is only designed to regulate temperature, if the alteration

in the degree of humidity of the air in the surrounding atmosphere is merely the result of temperature changes in that atmosphere which is automatic, unsought, and which cannot be regulated. Moreover this interpretation is confirmed by the Explanatory Notes drawn up by the Customs Co-operation Council and by the Explanatory Notes to the Customs Tariff of the European Communities.

The Court's reply to the questions referred to it by the Tariefcommissie was as follows:

1. Heading 84.12 of the Common Customs Tariff applies only to machines which include elements designed both to alter the surrounding temperature in a given space and to regulate the degree of humidity of the air in that space, or which are at least intended and make it possible to adjust the level of humidity which is merely the automatic result of the temperature selected. It does not apply to machines made solely for the purpose of changing the temperature of the surrounding atmosphere, where the degree of humidity of that atmosphere changes only as an automatic result, which can neither be regulated nor adjusted, of the temperature.

2. In so far as the concept of relative humidity to which the national court has referred corresponds to that of the degree of humidity, the expression "for changing the temperature and humidity of air" means changing the relative humidity.

Judgment of 11 October 1979

Case 225/78

Procureur de la République de Besançon v Bouhelier and Others

(Opinion delivered by Mr Advocate General Capotorti on 5 July 1979)

International agreements - Agreements of the Community - Agreements with Greece, Spain and Austria - National measures having an effect equivalent to quantitative restrictions on exports to those countries - Export licences or standards certificates required in 1972 - Compatibility with the said agreements

(Association Agreement between the EEC and Greece, Arts. 6 and 28; Agreement between the EEC and Spain, Art. 12; Interim Agreement between the EEC and Austria, Arts. 10 and 16)

The application during 1972 of the rules of a Member State requiring for the export of certain goods to non-member countries a licence or alternatively a standards certificate, which may be refused if the quality is not in accordance with certain provisions laid down by the authority issuing the certificate and which does not give rise to the imposition of any charge was not incompatible with the Agreement establishing an Association between the Community and Greece concluded on 9 July 1961, or with the Agreement between the Community and Spain concluded on 29 June 1970, or with the Interim Agreement concluded between the Community and Austria on 22 July 1972.

NOTE

The Tribunal Correctionnel, Besançon, referred to the Court of Justice several questions relating to the interpretation of three agreements and conventions concluded between the European Community and Greece, Spain and Austria arising in the context of criminal proceedings against Mr Bouhelier and others on charges of forgery and the uttering of forged documents and customs offences.

It will be recalled that the same court previously referred questions to the Court of Justice asking whether the standards certificate issued by CETEHOR, a French public utility institution, for watches intended for export constituted a measure having effects equivalent to a quantitative restriction as prohibited by Article 34 of the Treaty.

The Court replied in the affirmative (judgment of 3 February 1977) and the prosecution against Mr Bouhelier and others who had been charged with forgery of those standards certificates was discharged.

However the accused had also been charged with forging documents in respect of the export of watches to Greece, Spain and Austria.

That circumstance led the national court to ask the Court of Justice whether national rules could constitute, in respect of those non-member countries, an arbitrary discrimination or disguised restriction on trade.

The Court ruled that the application in 1972 of rules in a Member State requiring for the export of certain goods towards non-member countries a licence or a standards certificate in place thereof which may be refused if the quality of the goods does not conform to the standards laid down by the body issuing the certificate and where such certificate does not give rise to the imposition of a charge was not incompatible with the Association Agreement concluded on 9 July 1961 between the European Community and Greece, or with the Agreement concluded on 29 June 1970 between the Community and Spain or with the Interim Agreement concluded on 25 September 1972 between the Community and Austria.

Judgment of 18 October 1979

Case 125/78

GEMA, Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte v Commission of the European Communities

(Opinion delivered by Mr Advocate General Capotorti on 11 July 1979)

1. Competition - Administrative proceedings - Initiation on application by natural or legal person - Commission's duty to arrive at a decision within the meaning of Article 189 of the Treaty - Non-existent - Communication referred to in Article 6 of Regulation No. 99/63 - Effects
   (Regulation No. 17 of the Council, Art. 3 (2) (b); Regulation No. 99/63 of the Commission, Art. 6)

2. Action for failure to act - Notice to the institution - Defining position within the meaning of the second paragraph of Article 175 of the Treaty - Concept
   (EEC Treaty, Art. 175, second paragraph)

3. Procedure - Raising fresh issue in course of proceedings - Scope - Fresh conclusions - Exclusion - Substitution of application for annulment for application on grounds of failure to act - Not permissible
   (Rules of Procedure, Art. 42 (2), first subparagraph)

1. As is shown by the phrase "... shall inform the applicants of its reasons", the communication referred to in Article 6 of Regulation No. 99/63 of the Commission only seeks to ensure that an applicant within the meaning of Article 3 (2) (b) of Regulation No. 17 of the Council be informed of the reasons which have led the Commission to conclude that on the basis of the information obtained in the course of the inquiry there are insufficient grounds for granting the application. Such a communication implies the discontinuance of the proceedings without, however, preventing the Commission from re-opening the file if it considers it advisable, in particular where, within the period allowed by the Commission for that purpose in accordance with the provisions of Article 6, the applicant puts forward fresh elements of law or of fact. The argument that a person putting forward such an application is entitled to obtain from the Commission a decision within the meaning of Article 189 of the Treaty on the existence of the alleged infringement cannot therefore be accepted.

Moreover, even assuming that such a communication may be in the nature of a decision capable of being contested by way of Article 173 of the Treaty, that in no way implies that the applicant within the meaning of Article 3 (2) of Regulation No. 17 is entitled to require from the Commission a final decision as regards the existence or non-existence of the alleged infringement. In fact the Commission cannot be obliged to continue the proceedings whatever the circumstances up to the stage of a final decision. A contrary interpretation would remove all meaning from Article 3 of Regulation No. 17 which in certain circumstances allows the Commission the opportunity of not adopting a decision to compel the undertakings concerned to put an end to the infringement established.

2. A letter, by which the Commission, in accordance with Article 6 of Regulation No. 99/63, replies to a person who has made an application under Article 3 (2) (b) of Regulation No. 17, stating reasons, fixing a time-limit for the applicant to submit any comments, and explaining that the information obtained does not permit a finding of the existence of an infringement of Article 85 or 86 of the EEC Treaty, constitutes a defining of its position under the second paragraph of Article 175 of the Treaty.

3. The first subparagraph of Article 42 (2) of the Rules of Procedure allows an applicant, in exceptional circumstances, to raise fresh issues in order to support conclusions set out in the document instituting the proceedings. However, that provision does not in any way provide for the possibility of an applicant's introducing fresh conclusions or, a fortiori, of transforming an application on grounds of failure to act into an application for annulment.

According to that objection, Radio Luxembourg concluded contracts through the intermediary of RMI with publishers of popular music established in the Federal Republic of Germany whereby RMI was to receive half of the royalties on musical works published jointly by the latter and the said publishers in return for the repeated broadcast of such compositions on the German-language transmission station of Radio Luxembourg at peak listening hours.

This practice meant that Radio Luxembourg, as a member of GEMA, obtained excessive royalties. In fact since the applicant, the sole performing-right society in the Federal Republic of Germany, must distribute all the royalties which it receives on the basis of fixed proportions, the above-mentioned practice adversely affects the other publishers of popular music who are also members of GEMA.

The Commission acted on the applicant's objection, notifying the complaints to the three above-mentioned undertakings by a letter of 23 January 1974. By a letter of 31 January 1978 the applicant called on the Commission to take "a formal decision in the investigation of the matter" within a period of two months, failing which it would institute proceedings for failure to act.

The Commission replied by letter of 22 March 1978 in which it maintained that "its most recent information" did not justify acceding to the applicant's claim for a decision finding that there had been an abuse of a dominant position by Radio Luxembourg and the other undertakings in question.

The Commission in that letter also indicated that the applicant might use other means of combating the distortion of competition arising from the practice of Radio Luxembourg and it proposed a meeting with its employees.

NOTE

The German performing-right company GEMA raised an objection with the Commission, requesting it to establish infringements of the rules on competition by the Luxembourg television broadcasting undertaking (Radio Luxembourg), its subsidiary Radio Music International (RMI), both established in Luxembourg, and the undertaking Radio Tele Music (RTM), established in Berlin-Wilmersdorf.

On 31 May 1978 the applicant instituted proceedings to establish that the Commission's failure to act was unlawful since it considered that the Commission, in merely sending the letter of 22 March 1978, had not fulfilled its obligations under Regulation No. 17/62.

On 19 March 1979 the applicant submitted additional conclusions whereby it claimed in the alternative that, if the Court considered that the application for failure to act was inadmissible, the decision contained in the letter of 22 March not to continue the procedure initiated against Radio Luxembourg should be annulled.

Admissibility

(a) Application for failure to act

It must be established whether the letter of 22 March 1978 means that the Commission has "defined its position" within the meaning of the second paragraph of Article 175 of the Treaty.

Article 6 of Regulation No. 99/63/EEC shows that where the Commission, having received an application, considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform the applicants of its reasons.

In so informing the applicant, the Commission suspends the procedure but is not prevented from re-opening the matter if it considers it appropriate. The applicant's argument that an applicant is entitled to obtain from the Commission a decision within the meaning of Article 189 of the Treaty as to the existence of the alleged infringement accordingly cannot be sustained.

Even if it is supposed that such communication was in the nature of a decision the Commission is not obliged in all situations to continue the procedure until a final decision is reached.

It is accordingly clear from these considerations that the Commission, in replying by its letter of 22 March 1978, fulfilled the requirements of Community law, addressing to the applicant an act which constitutes a definition of its position within the meaning of the second paragraph of Article 175 of the Treaty.

The application for failure to act must accordingly be dismissed as inadmissible.

(b) Application for annulment

The applicant maintains in support of its application that that application constitutes the production of fresh evidence as to law which did not emerge until the end of the written procedure and that it must accordingly be admissible pursuant to Article 42 of the Rules of Procedure. That provision in fact permits an applicant as an exception to rely to rely on fresh evidence in support of conclusions submitted in the document instituting proceedings. It makes no provision for an applicant to put forward fresh conclusions or a fortiori to transform an application for failure to act into an application for annulment.

The application for annulment submitted in the alternative must accordingly be dismissed as inadmissible.

The Court accordingly ruled that the application must be dismissed as inadmissible.

Judgment of 18 October 1979

Case 5/79

Procureur Général v Buijs and Others and Denkavit France s.à.r.l.

(Opinion delivered by Mr Advocate General Warner on 19 September 1979)

1. Agriculture - Common organization of the market - Milk and milk products - Matters covered - Milk feed products for calves having a high milk-powder content - Inclusion
(Regulation No. 804/68 of the Council, Art. 1)

2. Agriculture - Monetary compensatory amounts - Application - Condition
(Regulation No. 974/71 of the Council, Art. 1 (2) (a) and (b))

3. Agriculture - Common organization of the market - Price formation - National measures - Incompatibility with Community rules - Criteria - Assessment - Competence of the national court

4. Agriculture - Common organization of the market - Milk and milk products - National rules freezing prices - Incompatibility with Community rules - Criteria
(Regulation No. 804/68 of the Council)

5. Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Price systems - Price freezing - Not permissible - Criteria
(EEC Treaty, Art. 30)

6. Competition - Community rules - Article 85 of the Treaty - Matters covered - National price rules - Exclusion
(EEC Treaty, Art. 85 (1))

1. Milk-feed products for calves having a high milk-powder content and otherwise containing other agricultural products, the majority of which are covered by Regulation No. 804/68 of the Council, are milk products within the meaning of Article 1 of that regulation and are, as such, covered by the common organization of the market in milk and milk products established by that regulation.

2. It is clear from Article 1 (2) (a) and (b) of Regulation No. 974/71 that the fact that agricultural products are subject to a common organization of the market is not a consequence of the application to them of the system of monetary compensatory amounts established by that regulation, but on the contrary is in principle one of the conditions precedent for the application of that system.

3. In sectors covered by a common organization of the market - even more so when that organization is based on a common price system - Member States can no longer interfere through national provisions taken unilaterally in the machinery of price formation as established under the common organization. However, the provisions of a Community agricultural regulation establishing a price system which is applicable at the production and wholesale stages leave Member States free - without prejudice to other provisions of the Treaty - to take the appropriate measures relating to price formation at the retail and consumption stages, on condition that they do not jeopardize the aims or functioning of the common organization of the market in question.

In every case it is for the national court to decide whether the nationa measures taken in relation to prices which it is called upon to consider produce such effects as to make them incompatible with the Community provisions on the matter. In that connexion the particular nature of the organization of the markets in the sector in question must be taken into account.

4. The constituent elements of the common organization established by Regulation No. 804/68 show it to be based upon a system of Community prices which are closely linked to one another. The proper functioning of the organization presupposes that none of those prices shall be distorted, as regards the conditions under which they are formed, by the effect of measures adopted unilaterally by a Member State.

Therefore that regulation must be interpreted as prohibiting national rules imposing a price freeze at the distribution stage for milk-feed products for calves coming under the common organization of the market in question where the application of such rules endangers the objectives or the functioning of that organization, in particular of its price rules.

5. Although price-freeze rules applicable without distinction to domesti and imported products do not in themselves constitute a measure havin an effect equivalent to a quantitative restriction, they may have such an effect, however, when prices are fixed at a level such that the sale of imported products becomes either impossible or more

difficult than that of domestic products. That is in particular the case of national price-freeze rules which, by preventing increases in the prices of imported products from being passed on in selling prices, freeze prices at such a low level that, having regard to the general situation of imported products compared to that of domestic products, dealers wishing to import the products in question into the Member State concerned can do so only at a loss or, in the light of the level of the frozen prices of national products, are induced to give preference to the latter.

6. Having regard to its material sphere of application, Article 85 of the EEC Treaty does not relate to national price-freeze rules.

If the application of such rules by a Member State to products subject to a common organization of the market contravenes the principle laid down in the second paragraph of Article 5 of the Treaty by jeopardizing the objectives or the functioning of that common organization the assessment of the compatibility of those rules with Community law does not depend on the provisions of Article 85 of the Treaty but rather on the provisions governing the said organization.

NOTE

The Cour d'Appel, Rouen, submitted to the Court of Justice a series of questions on the interpretation of a number of regulations on certain measures of conjunctural policy to be taken in agriculture, in particular in the dairy sector, following the temporary widening of the margins of fluctuation for the currencies of certain Member States. The undertaking Denkavit, which produces feeding-stuffs, and four of its managers were prosecuted by the judicial authorities in France for an infringement of the ministerial decree of 22 September 1976 freezing at the production stage the prices of goods other than fresh agricultural or fishery products.

It appears from the file that Denkavit increased the prices of six milk feed products for calves and that it continued to apply that increase to sales effected after the entry into force of the ministerial decree freezing prices. The defendants in the main action maintained that Denkavit is a supplier of feeding-stuffs which it produces exclusively for wholesalers who resell them to farmers. Furthermore, the products in question have a high milk product content, in particular powdered milk. Denkavit claims that its product is covered by the common organization of the agricultural markets, in particular the market in milk products, and that the French ministerial decree cannot apply to such products without infringing the provisions of the Treaty on the free movement of goods and the rules on competition of the common market. The public prosecutor maintains that milk feed products for calves have never been considered as coming within the category of products whose prices are governed by Community provisions.

The dispute led the Cour d'Appel, Rouen, to request the Court of Justice to give a ruling on the applicability and scope of various Community provisions.

The Court of Justice replied with a ruling that

1. Milk feed products for calves of the nature and composition referred to in the main action constitute milk products within the meaning of Article 1 of Regulation No. 804/68 of the Council of 27 June 1968 and are therefore subject to the rules of the common organization of the market established by that regulation.

2. The milk feed products in question were subject, at the time of the application of the national measures in question freezing prices, to the arrangements concerning monetary compensatory amounts established by Regulation No. 974/71.

3. Regulation No. 804/68 of the Council of 27 June 1968 must be interpreted as prohibiting national provisions, such as those referred to by the national court, freezing prices at the distribution stage of milk feed products for calves coming under the common organization of the market established by that regulation where the application of such provisions jeopardizes the objectives and operation of the said organization, in particular its system of prices.

4. The rules on the free movement of goods laid down in Articles 30 to 34 of the EEC Treaty prohibit the application to milk feed products for calves covered by the common organization of the market established by Regulation No. 804/68 of national rules freezing prices which prevent increases in the purchase prices of raw materials or finished products imported from another Member State from being passed on in selling prices where, as a result of such freezing, the level of prices is such that the marketing of imported products becomes impossible or more difficult than that of national products.

5. Article 85 of the EEC Treaty, having regard to its material scope, does not cover national rules freezing prices.

Judgment of 25 October 1979

Case 159/78

Commission of the European Communities v Italian Republic

(Opinion delivered by Mr Advocate General Warner on 11 July 1979)

1. Free movement of goods - Frontier controls - Permissibility - Conditions

2. Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Restrictions on the representation of owners of goods for the purpose of customs declarations - Permissibility - Conditions
(EEC Treaty, Art. 30)

3. Member States - Obligations - Failure to fulfil - Maintenance of a national provision infringing Community law

1. Since all customs duties on imports and exports and all charges having equivalent effect and all quantitative restrictions on imports and exports and measures having equivalent effect had to be abolished, pursuant to Title I of the Treaty, by the end of the transitional period at the latest, customs controls properly so-called have lost their raison d'être as regards such trade. Frontier controls remain justified only in so far as they are necessary either for the implementation of the exceptions to free movement referred to in Article 36 of the Treaty; or for the levying of internal taxation within the meaning of Article 95 of the Treaty when the crossing of the frontier may legitimately be assimilated to the situation which, in the case of domestic goods, give rise to the levying of the tax; or for transit controls; or finally when they are essential in order to obtain reasonably complete and accurate information on movement of goods within the Community. These residuary controls must nevertheless be reduced as far as possible so that trade between Member States can take place in conditions as close as possible to those prevalent on a domestic market.

2. The fact that the owner cannot employ an attorney who neither has possession of the goods nor is in a position to present them to the customs but that in this case the owner has to have recourse to a self-employed or employee customs agent cannot constitute a measure having effect equivalent to a quantitative restriction since the other means of making the declaration offer him an effective and reasonable choice allowing him, if he thinks it is

in his interest, to avoid having to have recourse to a professional customs agent.

3. The maintenance, without amendment, in the legislation of a Member State of a provision which is incompatible with the Treaty gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law. A Member State which maintains such a provision is therefore failing to fulfil its obligations under the EEC Treaty.

NOTE Under Article 56 of the consolidated text of the Italian customs law the customs declaration in respect of goods which are to be imported or exported and the other customs transactions must be carried out by the owner of the goods.

Article 40 of the consolidated text, however, authorizes the owner to "act through an agent" who must be either a customs agent whose name appears on the professional register or an agent whose name is not entered on the register if he is an employee of the owner. The name of the employee agent is entered on an ad hoc list kept by the competent local committee of the professional customs agents.

Under Article 47 the status of customs agent is conferred, for both types of agent, by a licence issued by the Minister of Finance on condition in particular that the applicant passes an examination. A customs agent must have his residence in a commune included in the district for which he has been appointed.

Article 48 finally provides that the licence for a customs agent shall be issued, without prejudice to the other necessary conditions, to Italian citizens or citizens of a foreign country that grants equal treatment in the matter to Italian citizens.

On 25 January 1978 the Commission issued its reasoned opinion within the meaning of Article 169 of the Treaty in which it stated that the Italian Republic has failed to comply with its obligations under Articles 30, 34 and 52 of the EEC Treaty "by failing to permit the owner of goods to be represented for the purposes of customs formalities, the carrying out of specific tasks, the fulfilment of particular obligations or observation of particular rules or the exercise of specific rights, by any person whatsoever to whom he has given due authorization to act in his name and on his behalf, and by regulating in a discriminatory manner the conditions for obtaining a licence as a customs agent".

The Court rejected the action in so far as it concerns the alleged failure to fulfil obligations under Articles 30 to 34 of the EEC Treaty (measures having an effect equivalent to quantitative restrictions).

The Court ruled that the distinction drawn by a national authority between the rules relating to the liability of persons engaged in an occupation which is regulated and subject to requirements relating to professional qualifications and those applied to persons submitting customs declarations who did not satisfy such conditions cannot be regarded as going beyond what a government may treat as justified in order to ensure the correct application of the obligations relating to customs declarations. Furthermore the Commission has failed to show in what manner that distinction is capable of constituting even a potential barrier to the free movement of goods.

The Commission takes the view that the Italian law infringes Article 52 of the Treaty under which freedom of establishment includes the right to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

The Italian Government contests that point of view and argues that the condition of reciprocity referred to in Article 48 necessarily relates only to citizens of non-member countries and not to citizens of other Member States. It is quite clear that no condition of reciprocity can be envisaged at the present time for the provision of services in relations between Member States and no doubt exists in the minds of the commercial operators concerned.

Nevertheless the Court found that the text was ambiguous.

The Court ruled:

1. By maintaining without change Article 48 (a) of the Testo Unico delle disposizioni legislative in materia doganale, approved by Decree No. 43 of the President of the Republic of 23 January 1973, without laying down an exception in respect of nationals of other Member States regarding the condition of reciprocity, the Italian Republic has failed to fulfil its obligations under Article 52 of the EEC Treaty.

2. For the rest the application is dismissed.

3. Each party shall bear its own costs.

Judgment of 25 October 1979

Case 22/79

Greenwich Film Production v Société des Auteurs, Compositeurs et Editeurs de Musique (S.A.C.E.M.) and Société des Editions Labrador

(Opinion delivered by Mr Advocate General Warner on 4 October 1979)

1. Competition - Dominant position - Abuse - Effect on trade between Member States - Criteria - Incidence on the structure of competition in the Common Market
(EEC Treaty, Art. 86)

2. Competition - Dominant position - Abuse - Association exploiting copyrights - Performance in non-member countries of contracts entered into on the territory of a Member State - Applicability of Community provisions - Conditions
(EEC Treaty, Art. 86)

1. In deciding whether trade between Member States may be affected by the abuse of a dominant position in the market in question it is necessary to take into consideration the consequences for the effective competitive structure in the Common Market. In this matter there is no reason to distinguish between production intended for sale within the Common Market and that intended for export. That interpretation also applies mutatis mutandis to the provision of services such as the management of copyrights.

2. Where an association exploiting composers' copyrights is to be regarded as an undertaking abusing a dominant position within the Common Market or in a substantial part of it, the fact that such abuse, in certain cases, relates only to the performance in non-member countries of contracts entered into on the territory of a Member State by parties within the jurisdiction of that State does not preclude the application of Article 86 of the Treaty.

NOTE

The main action is between the Société des Auteurs, Compositeurs et Editeurs de Musique ("SACEM") on the one hand and Greenwich Film Production S.A. and Société des Editions Labrador on the other.

SACEM is exclusively entitled to authorize or prohibit the public performance and mechanical reproduction of the work of its members and to settle the royalties from the use of such works.

It brought an action against Greenwich Film before the Tribunal de Grande Instance, Paris, for payment of royalties for the rights of public performance of the music of those two films.

The court ruled that the composers of the music in the two films in question had joined SACEM and had assigned to it the exclusive right throughout the whole world to permit or prohibit the public performance of their works. For its part Greenwich Film, in order to ensure the collaboration of the two composers of the two films which it produced, concluded contracts with Labrador, the publisher of the two composers and itself a member of SACEM.

Greenwich argued that it held the copyright to the music of the two films as it had acquired the rights from Labrador which had obtained them directly from the composers.

The file on the main action also shows that as regards the royalties payable for the public performance of film music a distinction must be drawn between the countries where SACEM draws the fees directly and the countries where that is not the case, the latter being referred to by SACEM as "non statutory" countries.

On the basis of those facts the court ordered Greenwich to pay the royalties owing to SACEM for the public performance of the music of the two films in question in the "non statutory" countries (which are all outside the European Community).

Greenwich appealed against that judgment arguing that SACEM's activities constitute an abuse of a dominant position on the market and should therefore be prohibited by Article 86 of the EEC Treaty.

The French Cour d'Appel held that it had not been alleged that the contractual relationship between the various undertakings in question was such as to affect trade between the Member States and that the Community rules were not relevant to the dispute between the parties.

On appeal on a point of law Greenwich Film challenged that decision and alleged that Articles 86 and 177 of the Treaty had been infringed; this caused the French Cour de Cassation to ask the Court of Justice to deliver a preliminary ruling on the application of Article 86 of the Treaty to the performance in non-member countries of contracts concluded in the territory of a Member State by parties within the jurisdiction of that State.

It is for the French courts to ascertain whether, in this case, SACEM can be regarded as abusing a dominant position in the Common Market or in a substantial part thereof.

It is well known that in certain Member States the administration of the copyright of composers is normally entrusted to performing rights societies. The possibility cannot be ruled out that such societies may be set up in such a way that they have the effect of dividing up the Common Market and thus forming a barrier to the freedom to provide services which is one of the objectives of the Treaty.

The Court ruled that if a society for exploiting the copyright of composers is held to be an undertaking abusing a dominant position in the Common Market or in a substantial part thereof the fact that in certain cases that exploitation only related to the performance in non-member countries of contracts concluded in the territory of a Member State by parties within the jurisdiction of that State does not prevent Article 86 of the Treaty being applicable.

Judgment of 6 November 1979

Case 10/79

G. Toffoli and Others v Regione Veneto

(Opinion delivered by Mr Advocate General Reischl on 20 September 1979)

Agriculture - Common organization of the markets - Milk and milk products - Producer price for milk - Unilateral fixing by a Member State - Incompatibility with Community rules - Absence of sanctions for failure to comply with the price - No justification

National legislation designed to promote and encourage, by any method, the establishment of a uniform producer price for milk, by agreement or by authority, at the national or regional level, is, by its nature, outside the bounds of the powers given to Member States and runs contrary to the principle established by Regulation No. 804/68, in particular Article 3 thereof, of attaining a target producer price for the milk sold by Community producers during the milk year on the Community market and on external markets. The absence of sanctions for failure to comply with the price laid down in accordance with such legislation does not affect the incompatibility of the legislation with the common organization of the market.

NOTE The Tribunale amministrative regionale per il Veneto /Regional Administrative Court for Veneto/ asked the Court whether, in view of the existence of a common organization of the market, a Member State can confer by law upon its administrative authorities power to fix the producer price for milk.

According to Article 3 (1) of Regulation No. 804/68 on the common organization of the market in milk and milk products, a target price for milk is fixed for the Community before 1 August of each year in respect of the milk year beginning the following year. This target price is, according to Article 3 (2), the price for milk which it is aimed to obtain for the aggregate of producers' milk sales on the Community market and on external markets during the milk year. In accordance with the procedure provided for in Article 43 (2) of the Treaty it is applicable to milk containing 3.7% fat content delivered to dairy (Article 3, paragraphs (3) and 4)).

The file on the case shows that the Italian Law of 8 July 1975, which includes inter alia rules for determining the producer price for milk, provides in Article 2 that the production and sale of milk by associations of producers are subject to the rules and procedures laid down by the association. In addition, producers in the association are obliged to sell the milk through the association. The producer price for milk, for whatever use the milk is intended, is fixed according to Article 8 for each agricultural year and for each region by means of collective negotiation with the participation of the various parties affected (producers, associations, processors and dairy centres).

In support of their application in the national courts the applicants in the main proceedings claim that the above-mentioned law is incompatible with Regulation No. 804/68 of the Council.

According to the established case-law of the Court, in sectors covered by a common organization of the market, and especially when that organization is based on a common price system, Member States can no longer take action, through national provisions taken unilaterally, affecting the machinery of price formation at the production and marketing stages established under the common organization. It follows that a national measure designed to promote and encourage, by any method, the establishment of a uniform producer price for milk, by agreement or by legislative authority, at the national or regional level, is, by its nature, outside the bounds of the powers given to Member States and runs contrary to the principle established by Regulation No. 804/68, in particular Article 3 thereof, of achieving a target producer price for the milk sold by Community producers during the milk year on the Community market and on external markets.

In its reply the Court held that it is incompatible with the common organization of the market in milk and milk products established by Regulation No. 804/68 for a Member State to fix by direct or indirect means the producer price for milk.

Judgment of 6 November 1979

Joined Cases 16 to 20/79

Openbaar Ministerie v Joseph Danis and Others

(Opinion delivered by Mr Advocate General Mayras on 20 September 1979)

1. Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Price systems - Price freeze - Prohibition - Criteria (EEC Treaty, Art. 30)

2. Agriculture - Common organization of the market - Price formation - National measures - Incompatibility with Community rules - Criteria

3. Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Price systems - Compulsory notification of price increases - Prohibition - Criteria - Application to products subject to a common organization of the market - Incompatibility with Community rules - Conditions (EEC Treaty, Art. 30; Regulation No. 120/67 of the Council)

1. Whilst rules imposing a price freeze which are applicable equally to national products and to imported products do not amount in themselves to a measure having an effect equivalent to a quantitative restriction, they may in fact produce such an effect when prices are at such a level that the marketing of imported products becomes either impossible or more difficult than the marketing of national products. That is especially the case where national rules, while preventing the increased prices of imported products from being passed on in sale prices, freeze prices at a level so low that - taking into account the general situation of imported products in relation to that of national products - traders wishing to import the products in question into the Member State concerned can do so only at a loss, or, having regard to the level at which prices for national products are frozen, are impelled to give preference to the latter products.

2. In sectors covered by a common organization of the market, and a fortiori when that organization is based on a common price system, Member States can no longer take action, through national provisions adopted unilaterally, affecting the machinery of price formation as established under the common organization. However, the provisions of a Community agricultural regulation which comprise a price system applicable at the production and wholesale stages of the products covered by the rules of the market concerned leave Member States free - without prejudice to other provisions of the Treaty - to take unilateral measures relating to price formation at the retail and consumption stages, on condition that they do not jeopardize the aims or functioning of the common organization of the market in question, in particular its price system.

3. National rules which

> impose on all producers and importers the obligation to give at least two months' notice of any price increases which they intend to apply on the national market, and which
>
> empower the authorities in the Member State concerned to delay beyond reasonable limits - and in practice necessarily do so delay - the passing on of increases in the prices of imported products,

constitute a measure having an effect equivalent to a quantitative restriction on imports, which is prohibited by Article 30 of the EEC Treaty, to the extent to which they make the marketing of products imported from another Member State either impossible or more difficult than that of national products or have the effect of favouring the marketing of national products to the detriment of imported

products. Such national rules are, moreover, incompatible with the common organization of the market, which has been established for cereals by Regulation No. 120/67 of the Council, in so far as they apply to the prices of products covered by that regulation at the production and wholesale stages. Furthermore, they are incompatible with that organization if, in the opinion of the national court, by applying at subsequent stages of the distribution process, they jeopardize the objectives and functioning of that common organization.

NOTE

The Belgian Cour de Cassation referred to the Court five identical questions which arose in the course of prosecutions brought before the Belgian courts by the Openbaar Ministerie /Public Prosecutor/ against the defendants in the main proceedings, who are producers of or traders in animal feeding-stuffs and who were accused of increasing their prices on a number of occasions without first notifying the Minister for Economic Affairs in accordance with the conditions laid down by the Belgian Ministerial Order of 22 December 1971.

The object of the question is to discover whether Article 30 of the EEC Treaty, with its prohibition against measures having an effect equivalent to a quantitative restriction, includes national rules such as the legislation in question, which, without distinguishing between imported and domestic products, necessarily delay the impact of price increases on imported products, especially in the case of producers of animal feeding-stuffs, for an unreasonable length of time by reason of the administrative procedures imposed.

The Court has ruled that national rules of this kind, even if they are confined to requiring the producer or importer to "notify" proposed price increases before they are applied, have the effect of a price freeze, since the prices quoted by the producer prior to his notification are, in fact, "frozen" for at least the length of the waiting period. Whilst rules imposing a price freeze which are applicable equally to national products and to imported products do not amount in themselves to a measure having an effect equivalent to a quantitative restriction, such an effect may in fact occur. Thus where, as in the present case, products are subject to a common organization of the agricultural markets, any assessment of whether or not national price control measures are compatible therewith must take into account the requirements of that organization.

On those grounds the Court ruled that a national system of price control such as that referred to by the national court constitutes a measure having an effect equivalent to a quantitative restriction on imports, prohibited by Article 30 of the EEC Treaty to the extent to which it makes the marketing of products imported from another Member State either impossible or more difficult than that of national products or has the effect of favouring the marketing of national products to the detriment of imported products. Such national rules are, moreover, incompatible with the common organization of the market which has been established, for cereals, by Regulation No. 120/67 of the Council of 13 June 1967 in so far as they apply to the prices for products covered by that regulation at the production and wholesale stages. Furthermore they are incompatible with that organization to the extent to which, in the opinion of the national court, they jeopardize the objectives and functioning of that common organization because they apply at stages subsequent to the distribution stage.

Judgment of 8 November 1979

Case 251/78

Denkavit Futtermittel GmbH v Minister für Ernährung, Landwirtschaft und Forsten of North Rhine-Westphalia

(Opinion delivered by Mr Advocate General Warner on 8 September 1979)

1. Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Veterinary and public health inspections - Double check - Obligation to produce a certificate of the exporting Member State accompanied by a fresh veterinary and public health inspection on importation - Prohibition - Possibility of derogating from the system - Absence of effect
   (EEC Treaty, Art. 30)

2. Free movement of goods - Derogations - Article 36 of the Treaty - Objective - Existence of harmonizing directives - Inapplicability of Article 36
   (EEC Treaty, Art. 36)

3. Free movement of goods - Derogartions - Protection of human and animal health - Conditions of admissibility - Veterinary and public health inspections - Double check - Need for co-operation between the authorities of the Member States
   (EEC Treaty, Art. 36)

4. Free movement of goods - Derogations - Protection of human and animal health - Veterinary and public health inspections - Discretionary power of the national authority to derogate - Conditions for the exercise thereof - Review by the national court
   (EEC Treaty, Art. 36)

5. Free movement of goods - Customs duties - Charges having equivalent effect - Charge for a veterinary and public health inspection - Prohibition - Admissibility of inspection - Absence of effect
   (EEC Treaty, Art. 9)

1. The concept of measure having an effect equivalent to quantitative restrictions, within the meaning of Article 30 of the Treaty applies to systematic veterinary and public health inspections carried out at the intra-Community frontiers and also to the obligations imposed on a trader to apply to be exempted or to derogate from a domestic measure which is itself a quantitative restriction or a measure having equivalent effect.

The following domestic measures thus fall within the prohibition in Article 30 of the Treaty unless they come within the exception provided for in Article 36:

those which only permit the importation of certain animal feeding-stuffs if two conditions are fulfilled, first that when they are imported a certificate from the competent authorities in the exporting country is produced confirming that the goods have undergone a process to destroy certain bacteria and secondly that the said feeding-stuffs shall be subject upon importation to a fresh inspection by veterinary experts of the importing country, their importation only being possible when it has been established that they are free from such bacteria;

those which provide that the competent authority may grant exemptions from such provisions, especially as regards systematic inspection at the frontier, and may grant those exemptions upon certain conditions.

2. Article 36 is not designed to reserve certain matters to the exclusive jurisdiction of Member States but only permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article. Consequently, when, in application of Article 100 of the Treaty, Community directives provide for the harmonization of the measures necessary to guarantee the protection of animal and human health and when they establish procedures to check that they are observed, recourse to Article 36 is no longer justified and the appropriate checks must be carried out and the protective measures adopted within the framework outlined by the harmonizing directives.

3. A double check of imports of animal feeding-stuffs of animal origin consisting, on the one hand, of the requirement to produce a certificate from the competent authority of the exporting country to the effect that those feeding-stuffs have undergone a process to destroy certain bacteria and, on the other hand, of a systematic inspection at the frontier by virtue whereof importation is only permitted after confirmation that the goods do not contain those bacteria is more than Article 36 permits if the health and life of humans and animals can be protected as effectively by measures which are not so restrictive of intra-Community trade.

   If co-operation between the authorities of the Member States makes it possible to facilitate and simplify frontier checks, which continue to be permissible by virtue of the exception provided for by Article 36 of the Treaty, the authorities responsible for veterinary and public health inspections must ascertain whether the substantiating documents issued as part of such co-operation do not raise a presumption that the imported goods comply with the requirements of national veterinary and public health legislation intended to simplify the checks carried out when the goods pass from one Member State to another.

4. Article 36 of the Treaty cannot be interpreted as meaning that it forbids in principle a national authority, which has imposed by a general rule veterinary and public health restrictions on imports of animal feeding-stuffs, from providing that it will be possible to derogate therefrom by individual measures left to the discretion of the administration if such derogations assist the simplification of the restrictions imposed by the general rules and if this power of derogation does not give rise to arbitrary discrimination between traders of different Member States.

   Nevertheless it does not automatically follow that each of the conditions to which the national authority subjects the grant of such authorization itself complies with what is permitted by Article 36. It is in each case for the national courts to determine whether these conditions are necessary for attainment of the objective which Article 36 permits to be sought.

5. A pecuniary charge levied for reasons connected with veterinary and public health checks, even if such checks take the form of a system of individual import licences and even if this system is justified within the meaning of Article 36 of the Treaty is a charge having an effect equivalent to a customs duty and prohibited by the Treaty.

E The Verwaltungsgericht [Administrative Court] Münster referred to the Court for a preliminary ruling a question on the interpretation of certain Treaty provisions on the free movement of goods in relation to a national measure which makes the importation of feeding-stuffs of animal origin from another Member State subject, in respect of each consignment, to a certificate from the competent authority in the exporting country showing that the animal feeding-stuffs have undergone a process to destroy salmonellae and, in addition, authorizes the importation only if the competent national authority in the importing country has established by bacteriological examination that the goods contain no salmonellae, and which leaves special licences granting exemption from this to the discretion of the competent authority and thereby gives that authority the power to grant those special licences provided that: "the licence is granted only for a limited period; a certificate from the veterminary authority of the exporting country as to the composition and method of processing of the feeding-stuffs to be imported must be produced in respect of each individual consignment; importation in plastic bags is only permitted if the bags are new and are destroyed after being emptied, and an administration fee of not less than DM 5 and not more than DM 50 is charged in respect of each licence".

Denkavit Futtermittel GmbH, the plaintiff in the main action, questioned the compatibility of these rules (the Viehseuchenverordnung 1957 of the Land North Rhine-Westphalia) with Articles 30 and 36, and with Article 9, of the Treaty concerning the prohibition of measures having an equivalent effect to quantitative restrictions and charges having equivalent effect to customs duties on imports in trade within the Community.

The Court ruled in reply that: "the concept of a measure having an effect equivalent to quantitative restrictions covers national measures such as those introduced by Articles 1, 2 and 9 of the North Rhine-Westphalian regulation of 18 September 1957 relating to health measures applicable on the importation and transit of feeding-stuffs containing products of animal origin from abroad. Such measures are forbidden by Article 30 of the EEC Treaty unless they fall within the exception provided for by Article 36 of the EEC Treaty.

Conditions making it impossible for Member States to justify having recourse to the exceptions permitted by Article 36 of the EEC Treaty were not present when the events occurred which gave rise to the main action relating to compound animal feeding-stuffs of animal origin, as regards in particular measures against pathogenic agents.

A double safeguard of the kind described in the question submitted is more than Article 36 of the EEC Treaty permits if the health and life

of humans and animals can be protected as effectively by measures which are not so restrictive of intra-Community trade.

If co-operation between the authorities of the Member States makes it possible to facilitate and simplify frontier checks, which continue to be permissible by virtue of the exception provided for by Article 36 of the EEC Treaty, the authorities responsible for veterminary and public health inspections must ascertain whether the substantiating documents issued as part of such co-operation do not raise a presumption that the imported goods comply with the requirements of national veterinary and public health legislation intended to simplify the checks carried out when the goods pass from one Member State to another.

Article 36 of the EEC Treaty cannot be interpreted as meaning that it forbids in principle a national authority, which has imposed by a general rule veterinary and public health restrictions on imports of animal feeding-stuffs, from providing that it will be possible to derogate therefrom by individual measures left to the discretion of the administration if such derogations assist the simplification of the restrictions imposed by the general rules and if this power of derogation does not give rise to arbitrary discrimination between traders of different Member States. Nevertheless it does not automatically follow that each of the conditions to which the national authority subjects the grant of such authorization itself complies with what is permitted by Article 36 of the EEC Treaty.

It is in each case for the national courts to apply these criteria in the light of all the circumstances relating to the actions brought before them taking into account the fact that it must always be the duty of a national authority relying on Article 36 of the EEC Treaty to prove that the measures which it enforces satisfy these criteria.

Article 9 of the EEC Treaty must be interpreted as meaning that a pecuniary charge levied for reasons connected with veterminary and public health checks, even if such checks take the form of a system of individual import licences and even if this system is justified within the meaning of Article 36 of the EEC Treaty is a charge having an effect equivalent to a customs duty and consequently prohibited".

Judgment of 8 November 1979

Case 15/79

P.B. Groenveld B.V. v Produktschap voor Vee en Vlees

(Opinion delivered by Mr Advocate General Capotorti on 27 September 1979)

1. Free movement of goods - Quantitative restrictions on exports - Measures having equivalent effect - Concept

(EEC Treaty, Art. 34)

2. Free movement of goods - Quantitative restrictions on exports - Measures having equivalent effect - Prohibition of manufacture of meat products based on horsemeat - Permissibility - Conditions

(EEC Treaty, Art. 34)

1. Article 34 of the Treaty concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States.

2. In the absence of specific Community rules a national measure prohibiting all manufacturers of meat products from having in stock or processing horsemeat is not incompatible with Article 34 of the Treaty if it does not discriminate between products intended for export and those marketed within the Member State in question.

NOTE

The College van Beroep voor het Bedrijfsleven referred to the Court a preliminary question on the interpretation of Article 34 of the EEC Treaty in order to establish whether a provision in the Verordening Be- en Verwerking Vlees 1973 [Processing and Preparation of Meat Regulation 1973] which prohibits, subject to express exceptions, any manufacturer of sausages from having in stock or processing horsemeat, is compatible with Community law. That question was raised in the course of proceedings instituted by a wholesaler of horsemeat, who wishes to extend his operations to the manufacture of sausages from horsemeat, against the refusal of the Produktschap voor Vee en Vlees to exempt him from the prohibition set out in the above-mentioned regulation.

Article 34 of the Treaty provides that "quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States".

The national measures considered by the Court as falling within the terms of that provision are described in paragraph (1) of the summary given above. They do not include the case of a prohibition like that in question which is applied objectively to the production of goods of a certain kind without drawing a distinction depending on whether such goods are intended for the national market or for export.

The foregoing appreciation is not affected by the circumstance (referred to in the order making the reference) that the regulation in question has as its objective the safeguarding of the reputation of the national production of meat products in certain export markets within the Community and in non-member countries where there are obstacles of a psychological or legislative nature to the consumption of horsemeat when the same prohibition is applied identically to the product in the domestic market of the State in question.

In answer to the question referred to it the Court ruled that in the present state of Community law a national measure prohibiting all manufacturers of meat products from having in stock or processing horsemeat is not incompatible with Article 34 of the Treaty if it does not discriminate between products intended for export and those marketed within the Member State in question.

Judgment of 13 November 1979

Case 25/79

Société Sanicentral GmbH v René Collin

(Opinion delivered by Mr Advocate General Capotorti on 24 October 1979)

1. Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments - Field of application - Employment law - Inclusion (Convention of 27 September 1968, Art. 1)

2. Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments - Object - Precedence over national laws

3. Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments - Transitional provisions - Judicial proceedings instituted after the coming into force of the Convention - Prior clauses conferring jurisdiction which according to national rules in force at the time of agreement were void - Validity (Convention of 27 September 1968, Arts. 17 and 54)

1. Employment law comes within the substantive field of application of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968.

2. As the Brussels Convention seeks to determine the jurisdiction of the courts of the contracting States in the intra-Community legal order in regard to matters of civil jurisdiction, the national procedural laws applicable to the cases concerned are set aside in the matters governed by the Convention in favour of the provisions thereof.

3. Articles 17 and 54 of the Brussels Convention must be interpreted to mean that, in judicial proceedings instituted after the coming into force of the Convention, clauses conferring jurisdiction included in contracts of employment concluded prior to that date must be considered valid even in cases in which they would have been regarded as void under the national law in force at the time when the contract was entered into.

NOTE

The question referred to the Court arose during the course of a dispute concerned with the breach - on 8 December 1971 - of a contract of employment containing a clause conferring jurisdiction on a German court and taking place between a French worker, resident in France, and a German company which had engaged him to work in the Federal Republic of Germany independently of any establishment. The contract of employment had been concluded on 27 October 1971 and the judicial proceedings were commenced on 27 November 1973. In these circumstances, the French Cour de Cassation questioned whether a clause conferring jurisdiction was applicable in the case of contracts of employment concluded prior to the Convention or whether "in so far as they concern the protection of employed workers, those provisions relate to the very substance of agreements and must be given effect only in relation to subsequent contracts".

It is appropriate to note that the Cour de Cassation properly accepted that employment law forms part of the subject-matter of the Convention and that disputes arising out of a contract of employment concluded after 1 February 1973 are subject to the said Convention.

In view of those dates (contract of employment of 27 October 1971 and the initiation of judicial proceedings on 27 November 1973, that is, after the entry into force of the Convention) the Cour de Cassation questioned the scope of Article 54 which provides that "the provisions of this Convention shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after its entry into force" and asked whether the clause in the contract of employment conferring jurisdiction, which could have been regarded under French legislation prior to 1 February 1973 as being void, recovered its validity at the date of the entry into force of the Convention.

It has to be noted that, on the one hand, the Convention is not concerned with rules of substantive law and, on the other hand, that national procedural law is set aside by and in favour of the provisions of the Convention.

By its nature a clause in writing conferring jurisdiction and occurring in a contract of employment is an election for a jurisdiction which election only produces consequences when judicial proceedings are set in motion. Consequently the Court, in answering the question referred to it by the French Cour de Cassation, ruled that "Articles 17 and 54 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted to mean that, in judicial proceedings commenced after the entry into force of the Convention, clauses conferring jurisdiction stipulated in contracts of employment concluded prior to that entry into force shall be held to be valid even in cases where they would have been regarded as void under the national law in force at the time when the contract was entered into."

Judgment of 15 November 1979

Case 36/79

Denkavit Futtermittel GmbH v Finanzamt Warendorf

(Opinion delivered by Mr Advocate General Reischl on 23 October 1979)

1. Reference for preliminary ruling - Jurisdiction of the Court - Limits - Assessment of the facts of the case - Inadmissibility (EEC Treaty, Art. 177)

2. Agriculture - Common Agricultural Policy - Revaluation of national currency - Compensation for losses of income by agricultural producers - Grant of direct aid by a Member State - Recipient - Selection on the basis of the burden of revaluation - Discrimination between producers or consumers within the Community - Absence (EEC Treaty, Art. 40 (3), second paragraph; Regulation No. 2464/69 of the Council, Art. 1)

3. Agriculture - Common Agricultural Policy - Revaluation of national currency - Compensation for losses of income by agricultural producers - Grant of direct aid by a Member State - Recipient - Exclusion of industrial livestock fatteners - Admissibility (Regulation No. 2464/69 of the Council, Art. 1)

1. The Court cannot, within the framework of proceedings brought under Article 177 of the Treaty, settle a dispute concerning the facts. Such a dispute, like any other assessment of the facts involved, is within the province of the national court.

2. It follows from the statement of reasons on which Regulation No. 2464/69 of the Council on measures to be taken in agriculture as a result of the revaluation of the German mark is based that the direct aid to German agricultural producers which it contemplates falls within the perspective of considerations of a social nature corresponding to the requirement of Article 39 (2) (a) of the EEC Treaty of taking account of the particular nature of agricultural activity, which results from the social structure of agriculture. For the purpose of granting aid as compensation for the effects of the effects of the revaluation, this nature justifies the Federal Republic of Germany in giving priority to the sectors of the agricultural economy which suffered most directly losses of income as a result of the revaluation, that is to say the sectors concerned with working the soil. Since such preference is not arbitrary it cannot be regarded as discrimination between producers prohibited by the second subparagraph of Article 40 (3) of the Treaty.

3. Neither the EEC Treaty nor Article 1 of Regulation No. 2464/69 of the Council nor the Council Decision of 21 January 1974, which was notified to the Federal Republic of Germany and extends and amends Article 1 (3) of the said regulation, forbade that Member State to exclude industrial calf fatteners from the aid referred to in the regulation.

NOTE

The reason for the main action is the rejection by the Finanzamt Warendorf, the defendant in the main action, of an application for aid under the Aufwertungsausgleichgesetz (Law on compensation for the effects of revaluation), which was enacted pursuant to Regulation No. 2464/69 of the Council on measures to be taken in agriculture as a result of the revaluation of the German mark. This application was made by the plaintiff company in the main action, whose business, apart from the production of animal feed, is the fattening of calves with milk-based substitute feeding-stuffs which it produces itself. The defendant in the main action based its refusal to grant the aid applied for by the plaintiff company on the fact that, since the company did not have any agricultural land for the purpose of fattening its calves, it constituted not an agricultural undertaking within the meaning of German tax law, to which the previously mentioned Law refers, but rather an industrial or commercial undertaking.

The question referred to the Court by the Finanzgericht Münster for a preliminary ruling was as follows:

> Do the EEC Treaty, Article 1 of Regulation (EEC) No. 2464/69, the Council Decision of 21 January 1974 or any other provision of Community law forbid the Federal Republic of Germany to exclude "industrial" calf fatteners from aid under the aforementioned regulation if "agricultural" calf fatteners use the same industrially produced feeding-stuffs for fattening calves as "industrial" calf fatteners?"

In reply the Court ruled that neither the EEC Treaty nor Article 1 of Regulation No. 2464/69 of the Council nor the Council Decision of 21 January 1974 forbade the Federal Republic of Germany to exclude industrial calf fatteners from the aid referred to in the said regulation.

Judgment of 20 November 1979

Case 162/78

Firma Wagner and Firma Schlüter & Maack v
Commission of the European Communities

(Opinion delivered by Mr Advocate General Warner on 3 October 1979)

1. Actions for annulment - Natural or legal persons - Acts of direct and individual concern to them - Decision adopted in the form of a regulation - Purpose of instituting proceedings
(EEC Treaty, second para. of Art. 173)

2. Acts of the institutions - Legal nature - Regulation or decision - Distinction - Criteria
(EEC Treaty, Art. 189)

3. Agriculture - Monetary compensatory amounts - Refunds on exports of sugar awarded in national currency - Application of the monetary coefficient - Purpose
(Commission Regulations (EEC) Nos. 1182/78, 1392/78 and 1837/78)

1. The specific purpose of the second paragraph of Article 173 of the EEC Treaty is to prevent the Community institutions from being able to bar proceedings instituted by an individual against a decision of direct and individual concern to him by simply choosing the form of a regulation.

2. Under the second paragraph of Article 189 the test for distinguishing between a regulation and a decision is to ascertain whether the measure in question has general application or not.

3. Commission Regulations (EEC) Nos. 1182/78, 1392/78 and 1837/78 laying down detailed rules for the application of the monetary coefficient to refunds, the amount of which has been set in a national currency in the statement of award following an invitation to tender for the purpose of exportation, with particular reference to sugar, do not in fact reduce the refunds awarded but, by applying the coefficient to the refunds, merely adjust the monetary compensatory amount by reducing it in the case of revalued currencies and by increasing it in the case of devalued currencies. The application of the coefficient is only a technical way of adjusting, in trade with non-member

is fixed at a uniform level calculated on the basis of Community prices. The basic monetary compensatory amount has therefore to be reduced by an amount calculated by applying to the refund the coefficient determined by the revaluation or devaluation, so that the reduction or the refund itself is not affected.

NOTE

The applicants are sugar exporters to whom were allotted prior to 1 June 1978 and following on a partial acceptance of tenders, sugar export licences in which the refunds had been fixed in national currency and who considered that their interests had been prejudiced by a series of Community regulations containing rules for the application of monetary compensatory amounts.

The applicants claimed to have suffered loss as a result of the calculation of compensatory amounts fixed in terms of units of account, subject to a weighting. That weighting was also applied to refunds and levies allocated in national currency in the context of an invitation to tender.

The applicants, considering that the conditions necessary for the bringing of an action for annulment were satisfied, requested the Court to declare invalid a series of provisions in the regulations. In essence, they contended that the regulations impugned affected them directly and individually. What was involved was a retroactive reduction in the refunds which they had been conclusively awarded and not just a simple modification of the monetary compensatory amounts. The regulations had the character of decisions addressed to specified persons.

According to the applicants, in so far as they concerned refunds awarded prior to 1 June 1978 the regulations affected a small number of exporters who were finally ascertained at the date mentioned.

The Commission objected to the admissibility of the application. According to the Commission, if the applicants were directly concerned by the contested regulation they were not concerned individually. The regulations were framed in general and abstract terms and were of concern not to a well defined group but to an indeterminate number of traders.

According to the Commission, the circumstance upon which the applicants founded their belief that they were individually concerned lay in their belonging to a group of exporters who had become successful tenderers before a specified date. The fact that the applicants belong, within the compass of an indeterminate group of those concerned, to a sub-group defined by a particular factual situation did not mean, for all that, that they were particularized by the regulation itself.

In order to decide on the admissibility of the application it is thus necessary to ascertain whether the instruments under challenge are regulations or decisions within the meaning of Article 173 of the Treaty, the criterion for the distinction between a regulation and a decision being determined by whether the instrument in question was or was not of general scope.

Bids submitted by tenderers in the framework of an invitation to tender are expressed in national currency but at the level of the Commission the whole of the costing operation is carried out in units of account. For purposes of comparison tenders submitted are converted into units of account using the "green" exchange rate. Tenders are not accepted without account being taken of the maximum sum fixed in terms of units of account, comparison being made therewith. Basing acceptance of tenders on the maximum sum fixed in terms of units of account means that the refunds awarded, expressed in national currency using the "green" exchange rates, already reflect the impact of the revaluation or the devaluation of the currency concerned which the monetary compensatory amounts are designed to correct.

The levying or granting of the whole monetary compensatory amount fixed for intra-Community trade would thus result in a double incidence of monetary compensation on that portion of the Community guarantee price which the export refund represents. The application of the weighting at the time of the granting or levying of the monetary compensatory amount allows that double incidence to be avoided.

The effect of the regulations at issue is not to reduce the refunds which have been fixed but only to correct, by means of the application of the weighting to the refunds, the monetary compensatory amounts by reducing them in the case of revalued currencies and increasing them in the case of devalued currencies. The mechanism of applying the weighting to refunds applies to all successful tenderers, whatever the date of acceptance of the tender, provided that exportation takes place before 1 June 1978.

The regulations in question are truly legislative measures.

The Court therefore ruled that the application should be dismissed as inadmissible.

Judgment of 5 December 1979

Cases 116 and 124/77

G.R. Amylum N.V. and Tunnel Refineries Ltd. v
Council and Commission of the European Communities

(Opinions delivered by Mr Advocate General Reischl on 20 June 1978 and 23 October 1979)

Non-contractual liability - Legislative measure involving choices of economic policy - Liability of Community - Conditions - Sufficiently serious breach of a superior rule of law for the protection of the individual - Safeguard of legal protection not affected

(EEC Treaty, second paragraph of Art. 215)

A finding that a legal situation resulting from a legislative measure by the Community involving choices of economic policy is illegal is insufficient by itself to involve the Community in liability under the second paragraph of Article 215 of the EEC Treaty; in addition the measure must be vitiated by a sufficiently serious breach of a superior rule of law for the protection of the individual. In the context of Community legislation in which one of the chief features is the exercise of a wide discretion essential in particular for the implementation of the Common Agricultural Policy, the liability of the Community can arise only exceptionally, that is to say, in cases in which the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers. Grave disregard is to be understood as meaning conduct verging on the arbitrary.

This concept is confirmed in particular by the fact that, even though an action for damages under Article 178 and the second paragraph of Article 215 of the Treaty constitutes an independent action, it must nevertheless be assessed having regard to the whole of the system of legal protection of individuals set up by the Treaty. If an individual takes the view that he is injured by a Community legislative measure which he regards as illegal he has the opportunity, when the implementation of the measure is entrusted to national authorities, to contest the validity of the measure, at the time of its implementation, before a national court in an action against the national authority. Such a court may, or even must, in pursuance of Article 177 of the Treaty, refer to the Court of Justice a question on the validity of the Community measure in question. The existence of such an action is by itself of such a nature as to ensure the efficient protection of the individuals concerned.

NOTE

The applicants in these cases are producers of isoglucose, a substitute product in direct competition with liquid sugar. They are seeking compensation from the European Economic Community for the damage which they claim to have suffered as a result of the imposition of a production levy on isoglucose in pursuance of a Council regulation of 17 May 1977.

This regulation, which gave as the reason for setting up a production levy system the "economic advantage" enjoyed by isoglucose which made it necessary to export corresponding quantities of sugar to third countries, was the subject-matter of a reference for a preliminary ruling made by the High Court of Justice, Queen's Bench Division, in 1977. In its reply the Court ruled that the regulation in question is invalid to the extent that it imposes a certain production levy on isoglucose because it offends against the general principle of equality of which the prohibition on discrimination is a specific expression, but that the Council was, however, free to take any necessary measures compatible with Community law for ensuring the proper functioning of the market in sweeteners.

The question which has arisen in the present cases is whether that illegality is such as to involve the Community in liability, something which, according to the consistent case-law of the Court, can only be conformed, in the case of a legislative measure which involves choices of economic policy, if a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred.

The Court found that such a breach had not occurred - even though the fixing of the levy at a certain number of units of account was vitiated by errors, it must nevertheless be pointed out that, having regard to the fact that an appropriate levy was fully justified, these were not errors of such gravity that it might be said that the conduct of the defendant institutions was verging on the arbitrary. It should also be recalled that the regulation in question was adopted to deal with an emergency situation characterized by growing surpluses of sugar.

It follows that the Council and the Commission did not disregard the limits which they were required to observe in the exercise of their discretion in the context of the Common Agricultural Policy to a sufficiently serious degree, and the applications were dismissed as unfounded.

Judgment of 5 December 1979

Case 143/77

Koninklijke Scholten-Honig N.V. v

Council and Commission of the European Communities

(Opinions delivered by Mr Advocate General Reischl on 20 June 1978 and 23 October 1979)

Non-contractual liability - Legislative measure involving choices of economic policy - Liability of Community - Conditions - Sufficiently serious breach of a superior rule of law for the protection of the individual - Safeguard of legal protection not affected

(EEC Treaty, second paragraph of Art. 215)

A finding that a legal situation resulting from a legislative measure by the Community involving choices of economic policy is illegal is insufficient by itself to involve the Community in liability under the second paragraph of Article 215 of the EEC Treaty; in addition the measure must be vitiated by a sufficiently serious breach of a superior rule of law for the protection of the individual. In the context of Community legislation in which one of the chief features is the exercise of a wide discretion essential in particular for the implementation of the Common Agricultural Policy, the liability of the Community can arise only exceptionally, that is to say, in cases in which the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers. Grave disregard is to be understood as meaning conduct verging on the arbitrary.

This concept is confirmed in particular by the fact that, even though an action for damages under Article 178 and the second paragraph of Article 215 of the Treaty constitutes an independent action, it must nevertheless be assessed having regard to the whole of the system of legal protection of individuals set up by the Treaty. If an individual takes the view that he is injured by a Community legislative measure which he regards as illegal he has the opportunity, when the implementation of the measure is entrusted to national authorities, to contest the validity of the measure, at the time of its implementation, before a national court in an action against the national authority. Such a court may, or even must, in pursuance of Article 177 of the Treaty, refer to the Court of Justice a question on the validity of the Community measure in question. The existence of such an action is by itself of such a nature as to ensure the efficient protection of the individuals concerned.

NOTE

For the note on this case, please see the note on the preceding cases, 116 and 124/77, Amylum and Tunnel Refineries v Council and Commission (page 80).

Judgment of 6 December 1979

Case 47/79

Firma Städtereinigung K. Nehlsen KG v Freie Hansestadt Bremen

(Opinion delivered by Mr Advocate General Warner on 6 November 1979)

Transport - Common policy - Social provisions - Regulation No. 543/69 of the Council - Material scope - Vehicles of public authorities - Exclusion - Vehicles of a private undertaking used to perform a public service - Inclusion

(Regulation No. 543/69 of the Council, Art. 4 (4), as amended by Regulation No. 2827/77)

Pursuant to Article 4 (4) of Regulation No. 543/69 of the Council on the harmonization of certain social legislation relating to road transport, as amended by Regulation No. 2827/77, that regulation does not apply to carriage by " ... vehicles which are used by other public authorities for public services". That expression must be understood as covering only vehicles which are owned by or under the control of the public authority and does not extend to vehicles belonging to a private undertaking and used by the latter to perform a public service or a service in the public interest which it has undertaken to provide under a contract governed by private law.

NOTE

The Oberverwaltungsgericht Bremen referred to the Court of Justice some questions on the interpretation of Regulation No. 543/69 of the Council of 25 March 1969 on the harmonization of certain social legislation relating to road transport.

These questions were raised in the course of an action between an undertaking which has a private contract with the responsible authorities of the City of Bremen to collect refuse, and the industrial inspection service of the City of Bremen which ascertained that the undertaking was failing to observe certain provisions in the above-mentioned regulation, especially those concerning the length of driving time. The undertaking claimed that as the service it was providing was a service which came within public law, the vehicles which it used to carry out this service should be considered as vehicles performing carriage within the meaning of Article 4 (4) of that regulation (vehicles used by the police, gendarmerie, armed forces, fire-brigades, civil defence, drainage or flood prevention authorities, water, gas or electricity services, highway authorities, telegraph or telephone services, by the postal authorities for the carriage of mail, by radio or television services or for the detection of radio or television transmitters or receivers, or vehicles which are used by other public authorities for public services and which are not in competition with professional road hauliers) and ought not therefore to be subject to the regulation.

The Court held that, as this is a provision which derogates from the general rules established in the field of road transport, its scope should be determined on the basis of the aim of the regulation and the legal context in which it was made. Paragraph 4 relates only to service vehicles mentioned in the first part thereof, and as far as "vehicles used by other public authorities for public services" are concerned, it covers only situations where competitive elements have no influence. The terms of this provision are not sufficiently explicit and well-defined to enable it to be interpreted as extending to vehicles belonging to a private undertaking used by the latter to carry out a service for the public or in the public interest which it has undertaken to perform under a contract concluded under private law.

On those grounds the Court held that:

"The expression vehicles which are used by other public authorities for public services within the meaning of Article 4 (4) of Regulation No. 543/69 of the Council of 25 March 1969, amended by Regulation No. 2827/77 of the Council of 12 December 1977, should be understood as covering only vehicles which are owned by or in the control of the public authority".

Judgment of 12 December 1979

Case 12/79

Firma H.O. Wagner GmbH Agrarhandel KG v
Commission of the European Communities

(Opinion delivered by Mr Advocate General Warner on 14 November 1979)

Action for damages - Independent nature - Action directed against national measures implementing Community law - Inadmissibility
(EEC Treaty, Arts. 178 and 215, second paragraph)

The action for damages provided for in Articles 178 and 215 of the Treaty was included as an independent form of action, with a particular purpose to fulfil within the system of legal remedies, and subject to conditions on its use arising out of its specific nature. Its purpose is not to enable the Court to examine the validity of decisions taken by national agencies responsible for the implementation of certain measures within the framework of the Common Agricultural Policy or to assess the financial consequences resulting from any invalidity of such decisions.

In consequence an action for damages alleging in substance the unlawfulness of a national measure adopted to implement a Community measure is inadmissible where the plaintiff has not made use of the possibility of bringing an action against the national measure before the national courts having jurisdiction and where necessary citing the unlawfulness or the wrongful application of the said Community measure. The position is also the same even where to bring such an action would have involved the plaintiff in considerable financial risk. In choosing to avoid such a risk the applicant has also deprived itself of the opportunity then open to it of correcting the illegality of which it complains.

[E

The applicant claims that the European Economic Community, represented by the Commission, should be ordered pursuant to the second paragraph of Article 215 of the Treaty to make good the damage caused to it by the refusal of its request for the annulment of the export licence for 500 tonnes of white sugar delivered to it following a partial invitation to tender within the context of a standing invitation to tender with a view to exportation prescribed by Regulation (EEC) No. 2101/75 of the Commission on a standing invitation to tender in order to determine a levy and/or refund on exports of white sugar.

The Court dismissed the application as inadmissible and ordered the applicant to pay the costs.

Judgment of 13 December 1979

Case 42/79

Firma Milch- Fett- und Eierkontor GmbH v Bundesanstalt für Landwirtschaftliche Marktordnung

(Opinion delivered by Mr Advocate General Capotorti on 15 November 1979)

1. Agriculture - Common organization of the markets - Milk and milk products - Butter in public storage - Sale at reduced price for exportation - Arrangements regarding securities - Resale to a third party for export - Failure of the third party to export - Forfeiture of the security lodged by the first purchaser.

   (Regulation No. 1308/68 of the Commission)

2. Agriculture - Common organization of the markets - Milk and milk products - Butter in public storage - Sale at reduced price for exportation - Arrangements regarding securities - Force majeure - Concept - Limits

   (Regulation No. 1308/68 of the Commission, first subparagraph of Article 4 (3))

1. Regulation (EEC) No. 1308/68 of the Commission on the sale of butter from public storage for exportation must be interpreted to mean that where the purchaser of butter from storage does not himself export the butter but resells it to a third party for export he is liable for any wrongful act on the part of the other contracting party and can recover his security only if the butter is actually exported within the period prescribed by the regulation.

2. Where the purchaser of the butter from storage referred to in Regulation No. 1308/68 of the Commission resells it to a third party for export in accordance with that regulation, the fact that it is impossible to export the butter because it has been diverted from its proper destination by the criminal acts of a duly authorized agent of that third party to the detriment of the latter does not constitute a case of force majeure within the meaning of the first subparagraph of Article 4 (3) of the said regulation and consequently does not lead to the release of the security provided in accordance with Article 4 (1) of that regulation in respect of consignments of butter which have not been exported.

NOTE

The questions referred to the Court by the Verwaltungsgericht Frankfurt am Main for a preliminary ruling were raised in the course of an action between the Bundesanstalt für Landwirtschaftliche Marktordnung, in its capacity as the German agricultural intervention agency in the market in milk and milk products, and the plaintiff in the main action which, in the period between 21 July and 14 October 1970, purchased from that intervention agency certain quantities of butter from public storage at a reduced price pursuant to Regulation No. 1308/68 of the Commission. The butter should have been exported within a period of 30 days after its sale by the intervention agency. The purchaser resold the butter in question to an undertaking which, however, failed to export it. In view of that the German agricultural intervention agency decided that the securities which had been provided by the first purchaser should be forfeit and it also claimed the reimbursement of the securities already released. The purchaser challenged that decision on the ground that the butter from storage had been diverted from its lawful destination by the duly authorized agent of the undertaking to which the butter had been resold and that, consequently, its diversion constitutes a case of force majeure which, pursuant to Article 4 (3) of the aforementioned regulation, means that the securities lodged must be released.

The national court submitted to the Court of Justice two questions which basically raise two problems: the first preliminary point is whether the said regulation must be interpreted to mean that a purchaser of butter from public storage at a reduced price can, when reselling that butter to a third party for exportation, transfer to the third party the obligations entered into by the purchaser vis à vis the agricultural intervention agency or if on the other hand the purchaser remains responsible to that agency with regard to the prescribed use of the goods and is accordingly liable for any wrongful conduct on the part of the undertaking with which he has entered into an agreement. The second problem is, more particularly, whether, where the exportation of the butter resold to a third party is rendered impossible by criminal offences committed by a duly authorized agent of that third party the first purchaser of the butter can rely on the principle of force majeure embodied in that regulation to recover his security.

As to the first problem, the Court has ruled that the effectiveness of the scheme would be seriously compromised if the acceptance of an obligation to export by a subsequent purchaser who was not himself under any legal obligation to the competent authority were regarded as sufficient to discharge an undertaking entered into by a purchaser against a security.

As to the second problem, the objectives and provisions of the relevant agricultural legislation show that the concept of force majeure must be understood as referring to absolute impossibility caused by abnormal circumstances unrelated to the purchaser of the butter from storage, the consequences of which could not have been avoided except at the cost of excessive sacrifices, despite the exercise of all due care.

The Court ruled that:

1. Regulation (EEC) No. 1308/68 of the Commission must be interpreted to mean that where the purchaser of butter from storage does not himself export the butter but resells it to a third party for export he is liable for any wrongful act on the part of the other contracting

party and can recover his security only if the butter is actually exported within the period prescribed by the regulation.

2. Where the purchaser of the butter from storage referred to in Regulation No. 1308/68 of the Commission of 28 August 1968 resells it to a third party for export in accordance with that regulation, the fact that it is impossible to export the butter because it has been diverted from its proper destination by the criminal acts of a duly authorized agent of that third party to the detriment of the latter does not constitute a case of force majeure within the meaning of the first subparagraph of Article 4 (3) of the said regulation and consequently does not lead to the release of the security provided in accordance with Article 4 (1) of that regulation in respect of consignments of butter which have not been exported.

Judgment of 13 December 1979

Case 44/79

L. Hauer v Land Rheinland-Pfalz

(Opinion delivered by Mr Advocate General Capotorti on 8 November 1979)

1. Agriculture - Common organization of the market - Wine - Prohibition on new plantings of vines - Council Regulation No. 1162/76 - Temporal application

   (Council Regulation No. 1162/76, Art. 2 (1), as amended by Regulation No. 2776/78)

2. Agriculture - Common organization of the market - Wine - Prohibition on new plantings of vines - Scope

   (Council Regulation No. 1162/76, Art. 2 (1))

3. Measures of the institutions - Validity - Infringement of fundamental rights - Assessment in the light of Community law alone - Community law - General legal principles - Fundamental rights - Observance ensured by the Court - Legislative points of reference - Constitutions of the Member States - International instruments

4. Community law - General legal principles - Fundamental rights - Right to property - Observance within the Community legal order

5. Community law - General legal principles - Fundamental rights - Right to property - Observance within the Community legal order - Limits - Restrictions on the new planting of vines - Permissible - Conditions

6. Agriculture - Common organization of the market - Wine - Prohibition on new plantings of vines - Temporary character - Objectives of general interest - Infringement of the right to property - None

   (Council Regulation No. 1162/76, Art. 2 (1))

7. Community law - General legal principles - Fundamental rights - Freedom to pursue a trade or profession - Observance within the Community legal order - Limits - Social function of the protected activities

1. By providing that the Member States shall no longer grant authorizations for new planting "as from the date on which this Regulation enters into force", the second subparagraph of Article 2 (1) of Council Regulation No. 1162/76 on measures designed to adjust wine growing potential to market requirements, as amended by Regulation No. 2776/78, rules out the possibility of taking into consideration the time at which an application was submitted and indicates the intention to give immediate effect to the regulation.

Regulation No. 1162/76 must therefore be interpreted as meaning that the second subparagraph of Article 2 (1) thereof also applies to applications for authorization of new planting of vines made before the entry into force of that regulation.

2. Article 2 (1) of Regulation No. 1162/76 must be interpreted as meaning that the prohibition laid down therein on the granting of authorizations for new planting - disregarding the exceptions specified in Article 2 (2) of the regulation - is of inclusive application, that is to say, is in particular unaffected by the question of the suitability or otherwise of a plot of land for wine growing, as determined by the provisions of a national law.

3. The question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community.

Fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the Court. In safeguarding those rights, the latter is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States are unacceptable in the Community. International treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can also supply guidelines which should be followed within the framework of Community law.

In these circumstances, the doubts evinced by a national court as to the compatibility of the provisions of an act of an institution of the Communities with the rules concerning the protection of fundamental rights formulated with reference to national constitutional law must be understood as questioning the validity of that act in the light of Community law.

4. The right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member

States, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights.

5. Taking into account the constitutional precepts common to the Member States, consistent legislative practices and Article 1 of the First Protocol to the European Convention for the Protection of Human Rights, the fact that an act of an institution of the Community imposes restrictions on the new planting of vines cannot be challenged in principle as being incompatible with due observance of the right to property. However, it is necessary that those restrictions should in fact correspond to objectives of general interest pursued by the Community and that, with regard to the aim pursued, they should not constitute a disproportionate and intolerable interference with the rights of the owner, such as to impinge upon the very substance of the right to property.

6. The prohibition on the new planting of vines laid down for a limited period by Regulation No. 1162/76 is justified by the objectives of general interest pursued by the Community, consisting in the immediate reduction of production surpluses and in the preparation, in the longer term, of a restructuring of the European wine industry. It does not therefore infringe the substance of the right to property.

7. In the same way as the right to property, the right of freedom to pursue trade or professional activities, far from constituting an unfettered prerogative, must be viewed in the light of the social function of the activities protected thereunder.

In particular, this being a case of the prohibition, by an act of an institution of the Communities, on the new planting of vines, it is appropriate to note that such a measure in no way affects access to the occupation of wine growing or the free pursuit of that occupation on land previously devoted to wine growing. Since this case concerns new plantings, any restriction on the free pursuit of the occupation of wine growing is an adjunct to the restriction placed upon the exercise of the right to property.

NOTE

Mrs Hauer is the owner of a plot of land within the administrative district of Bad Dürkheim, a German wine-growing district.

When on 6 June 1975 she applied to the competent authority for the Rheinland-Pfalz for an authorization to plant her land with vines it was refused on the ground that the land in question was not considered suitable for wine-growing.

Mrs Hauer challenged that decision and during those proceedings, on 17 May 1976, the Council adopted Regulation No. 1162/76, Article 2 of which prohibits all new planting of vines for a period of three years.

On 21 October 1976 the administration rejected her objection on the grounds of the unsuitable nature of the land and of the prohibition on planting under the Community regulation.

In the meantime Mrs Hauer had been informed by the administration that her land could have been considered suitable for wine-growing in accordance with the minimum requirements laid down by German law. Accordingly the administration declared that it was prepared to grant the authorization at the end of the period during which new planting was prohibited under the Community regulation.

The plaintiff in the main action considers that the authorization requested by her must be granted immediately because her request was submitted a considerable time before the entry into force of the contested regulation and even if that regulation were applicable to such request it should not be applied to the applicant since it infringes her right of property and her right freely to pursue economic activity which are guaranteed by Articles 12 and 14 of the Grundgesetz [Basic Law] of the Federal Republic of Germany.

In the foregoing situation the Verwaltungsgericht [Administrative Court] Neustadt an der Weinstrasse referred two preliminary questions to the Court of Justice.

The first question concerns the scope in time of Regulation No. 1162/76.

The plaintiff argues that her request, which was submitted on 6 June 1975, should in the normal course have resulted in a favourable decision before the entry into force of the Community regulation if the national administration had not delayed recognizing that her land was suitable for wine-growing. She maintains that that fact should have been taken into account with regard to the temporal scope of the Community regulation.

The Court, on examining the wording of the regulation, did not uphold the arguments advanced by the plaintiff. In fact, according to the wording of the regulation, "as from the date on which this regulation enters into force" Member States may no longer grant authorizations for new planting. That provision precludes taking into consideration the time when a request was submitted.

The regulation also states that the prohibition on new planting is required by an "undeniable public interest" which consists in limiting the progress of over-production of wine in the Community, re-establishing a balance on the market and preventing the formation of structural surpluses.

It is thus clear that Regulation No. 1162/76 imposes a restriction with immediate effect on the extension of the existing area under vine cultivation.

The Court accordingly rules in its reply to the first question that Council Regulation No. 1162/76 of 17 May 1976, as amended by Regulation No. 2776/78 of 23 November 1978, must be interpreted as meaning that Article 2 (1) thereof applies also to those applications for authorization of new planting of vineyards which were already made before the said regulation entered into force.

The second question concerns the substantive scope of Regulation No. 1162/76 - does the prohibition on new planting also apply to land considered suitable for wine-growing according to the criteria of national law ?

Article 2 contains an express prohibition on "all new planting" without drawing any distinction based on the quality of the land in question.

The Court accordingly replies with a ruling that the Community provision is of general application regardless of any consideration concerning the nature of the land.

The Guarantee of Basic Rights in the Community Legal System

The Verwaltungsgericht, in its order making the reference, states that if the regulation must be interpreted as laying down a prohibition of general scope the possibility must be considered that it is inapplicable in the Federal Republic of Germany because of the existence of doubt concerning its compatibility with the fundamental rights guaranteed by Articles 12 and 14 of the Grundgesetz concerning the right of property and the freedom to pursue economic activity.

In its previous judgments the Court has already emphasized that fundamental rights form an integral part of the general principles of law whose observance the Court is bound to ensure and that in so doing it is bound to have regard for the constitutional traditions common to the Member States.

The Right of Property

There is no doubt that the prohibition on the new planting of vines on an individual's land constitutes a restriction on the use of that property. Nevertheless, it must be found that the constitutional law and practice of the nine Member States permit the legislature to enact laws regulating the use of private property in the general interest.

More particularly, in all the wine-growing countries of the Community there is legislation restricting the planting of vines, the selection of varieties and the methods of cultivation. This category of restrictions is known and recognized to be in accordance with the constitutions of all the Member States.

It must further be considered whether the restrictions created constitute a disproportionate and intolerable interference in the rights of ownership.

It is common ground that the policy implemented by the Community in the market in wine is intended to attain a long-term balance with a level of prices which provides a profit for producers and is fair to consumers and to improve the quality of the wines put on the market.

The contested regulation fulfils a dual function: on the one hand, to bring about an immediate end to the continuously-increasing over-production (the 1974 harvest was particularly heavy) and, on the other, to give the Community institutions the time necessary to create a structural policy intended to favour high-quality products.

The Court accordingly considers that the restriction imposed on the use of property by the prohibition on the new planting of vines laid down for a limited period by Regulation No. 1162/76 is justified by the objectives of general interest pursued by the Community and does not constitute a substantial infringement of the right of property as it is known and guaranteed in the Community legal system.

The Freedom to Pursue Economic Activity

According to the plaintiff in the main action, the effect of the prohibition on the planting of new vines is to restrict the free exercise of her activity as owner of a vineyard. That right, which is guaranteed under the constitutions of various Member States, must also be considered with regard to the social function of the activities protected.

In the present case it should be noted that the contested Community measure does not affect in any way access to or freedom to exercise the activity of wine-growing on land at present given over to wine-growing. It follows from the foregoing that it is impossible to establish any factor of such a nature as to affect the validity of Regulation No. 1162/76 on the basis of an infringement by that regulation of the requirements of the protection of fundamental rights in the Community.

Judgment of 14 December 1979

Case 34/79

Regina v Henn and Darby

(Opinion delivered by Mr Advocate General Warner on 25 October 1979)

1. Free movement of goods - Quantitative restrictions - Concept - Prohibition on importation - Inclusion (EEC Treaty, Art. 30)

2. Free movement of goods - Derogations - Grounds of public morality - Determination - Powers of Member States - Prohibition on importation of articles having an indecent or obscene character - Application to whole of national territory - Differences between laws in force on territory of a single Member State - No effect (EEC Treaty, Art. 36)

3. Free movement of goods - Derogations - Article 36 of Treaty - Object of second sentence (EEC Treaty, Art. 36)

4. Free movement of goods - Derogations - Grounds of public morality - Absolute prohibition on importation - Complete illegality of internal trade in the goods in question - Arbitrary discrimination - Disguised restriction - None (EEC Treaty, Art. 36)

5. International agreements - Derogations - Agreements of Member States - Geneva Convention, 1923, for the suppression of traffic in obscene publications - Universal Postal Convention, renewed at Lausanne in 1974 - Incompatibility between obligations arising from those Conventions and those arising from the EEC Treaty - None (EEC Treaty, Arts. 36 and 234)

1. Article 30 of the EEC Treaty applies also to prohibitions on imports inasmuch as they are the most extreme form of restriction. The expression used in Article 30 must therefore be understood as being the equivalent of the expression "prohibitions or restrictions on imports" occurring in Article 36. Hence a law of a Member State prohibiting any importation of pornographic articles into that State constitutes a quantitative restriction on imports within the meaning of Article 30 of the Treaty.

2. Under the first sentence of Article 36 of the EEC Treaty it is in principle for each Member State to determine in accordance with its own scale of values and in the form

selected by it the requirements of public morality in its territory.

Each Member State is entitled to impose prohibitions on imports justified on grounds of public morality for the whole of its territory, as defined in Article 227 of the Treaty, whatever the structure of its constitution may be and however the powers of legislating in regard to the subject in question may be distributed. The fact that certain differences exist between the laws enforced in the different constituent parts of a Member State does not thereby prevent that State from applying a unitary concept in regard to prohibitions on imports imposed, on grounds of public morality, on trade with other Member States.

The first sentence of Article 36 upon its true construction thus means that a Member State may, in principle, lawfully impose prohibitions on the importation from any other Member State of articles which are of an indecent or obscene character as understood by its domestic laws. Such prohibitions may lawfully be applied to the whole of its national territory even if, in regard to the field in question, variations exist between the laws in force in the different constituent parts of the Member State concerned.

3. The second sentence of Article 36 of the EEC Treaty is designed to prevent restrictions on trade based on the grounds mentioned in the first sentence of that article from being diverted from their proper purpose and used in such a way as either to create discrimination in respect of goods originating in other Member States or indirectly to protect certain national products.

4. If a prohibition on the importation of goods is justifiable on grounds of public morality and if it is imposed with that purpose the enforcement of that prohibition cannot, in the absence within the Member State concerned of a lawful trade in the same goods, constitute a means of arbitrary discrimination or a disguised restriction on trade contrary to Article 36 of the EEC Treaty.

5. In so far as a Member State avails itself of the reservation relating to the protection of public morality provided for in Article 36 of the EEC Treaty, the provisions of Article 234 of that Treaty do not preclude that State from fulfilling the obligations arising from the Geneva Convention, 1923, for the suppression of traffic in obscene publications and from the Universal Postal Convention (renewed at Lausanne in 1974, which came into force on 1 January 1976).

NOTE

Criminal proceedings were instituted against Mr Henn and Mr Darby for the importation into the United Kingdom of a consignment of obscene films and magazines coming from Denmark and transported by ferry from Rotterdam.

Henn and Darby appealed against their conviction and the case reached the House of Lords which considered it necessary to bring the matter before the Court of Justice as certain questions of Community law concerning quantitative restrictions on imports and restrictions on the free movement of goods on grounds of public morality (Articles 30 and 36 of the Treaty) were concerned.

The applicants maintained that in the United Kingdom there is no general policy of public morality concerning indecent or obscene material. In this connexion they maintained that there are differences existing in the United Kingdom between the laws of the various constituent territories of the United Kingdom.

They maintained that the general prohibition on the importation of indecent or obscene materials results in the application, at the time of importation, of more stringent provisions than those applicable within the country and accordingly constitutes an arbitrary discrimination within the meaning of Article 36 of the Treaty.

In fact in the United Kingdom there are various criteria relating to the concepts of indecency and offences against public morality. The sources of law are several, certain of them stemming from the common law and others from legislation.

The basic provisions concerning the importation of pornographic materials are contained in customs legislation. Those provisions state that indecent or obscene material is liable to confiscation and destruction on its arrival in the United Kingdom and that any person who wilfully endeavours to introduce such material is guilty of an offence.

The House of Lords submitted a series of preliminary questions to which the Court replied with the following ruling:

1. The law of a Member State which prohibits all importation of pornographic material into that State constitutes a quantitative restriction on imports within the meaning of Article 30 of the Treaty.

2. The first sentence of Article 36 must be interpreted as meaning that in principle a Member State may lawfully prohibit the importation from any other Member State of material of an indecent or obscene nature within the meaning of its domestic legislation and that such a prohibition may lawfully apply to all parts of its national territory, even if there exist in this matter differences between the law in force in the various constituent parts of the Member State in question.

3. Where a prohibition on the importation of goods may be justified on grounds of public morality and is imposed for that purpose, unless there exists a lawful trade in such goods within the Member State in question the application of that prohibition does not constitute a means of arbitrary discrimination or a disguised restriction on trade in breach of Article 36.

4. Where a Member State relies upon the exception concerning the safeguarding of public morality contained in Article 36 of the Treaty the provisions of Article 234 do not prevent the performance by such State of its obligations under the Geneva Convention of 1923 for the Suppression of the Circulation of and Traffic in Obscene Publications and under the Universal Postal Convention (which was renewed in Lausanne in 1974 and entered into force in that form on 1 January 1976).

Judgment of 14 December 1979

Case 93/79

Commission of the European Communities v
Italian Republic

(Opinion delivered by Mr Advocate General Mayras on 6 December 1979)

Member States - Obligations - Implementation of directives - Failure to fulfil - Justification - Not permissible

(EEC Treaty, Art. 169)

A Member State may not plead provisions, practices or circumstances existing in its internal system in order to justify a failure to comply with obligations and time-limits under Community directives.

The Commission, by an application which was received at the Court Registry on 14 June 1979, instituted proceedings before the Court under Article 169 of the EEC Treaty for a ruling that the Italian Republic had failed to fulfil an obligation under the Treaty consisting in its failure to enact within the prescribed period the provisions necessary to comply with Council Directive No. 75/410/EEC of 24 June 1975 on the approximation of the laws of the Member States relating to continuous totalizing weighing machines. The period of 18 months within which the Member States were required to comply with the directive expired on 27 December 1976.

In its ruling the Court declared that the Italian Republic, by its failure to enact within the prescribed period the provisions necessary to comply with Council Directive No. 75/410/EEC of 24 June 1975, has failed to fulfil an obligation under the Treaty.

The Italian Republic was ordered to pay the costs.

ANALYTICAL TABLE

		Judgment of	page
INTERNATIONAL AGREEMENTS			
Opinion 1/78	International Agreement on Natural Rubber (UNCTAD)	4 October 1979	17
Case 225/78	Procureur de la République de Besançon v Bouhelier and Others (Agreements with Greece, Spain, Austria)	11 October 1979	45
ACTS OF COMMUNITY INSTITUTIONS			
Case 162/78	Firma Wagner and Firma Schlüter & Maack v Commission of the European Communities	20 November 1979	76
Case 93/79	Commission of the European Communities v Italian Republic	14 December 1979	98
AGRICULTURE			
Case 232/78	Commission of the European Communities v French Republic (sheepmeat)	25 September 1979	8
Case 230/78	SpA Eridania-Zuccherifici Nazionali and Others v Minister of Agriculture and Forestry and Others (sugar market)	27 September 1979	11
Case 23/79	Geflügelschlachterei Freystadt GmbH & Co. KG v Hauptzollamt Hamburg-Jonas (German internal trade)	27 September 1979	15
Case 5/79	Procureur Général v Buijs and Others and Denkavit France s.à.r.l. (monetary compensatory amounts)	18 October 1979	50
Case 10/79	G. Toffoli and Others v Regione Veneto (milk)	6 November 1979	60
Case 36/79	Denkavit Futtermittel GmbH v Finanzamt Warendorf (revaluation of national currency - aid)	15 November 1979	74
Case 42/79	Firma Milch- Fett- und Eierkontor GmbH v Bundesanstalt für Landwirtschaftliche Marktordnung	13 December 1979	85
Case 44/79	L. Hauer v Land Rheinland-Pfalz (fundamental rights)	13 December 1979	88
COMPETITION			
Case 125/78	GEMA, Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte v Commission of the European Communities	18 October 1979	47
Case 22/79	Greenwich Film Production v Société des Auteurs, Compositeurs et Editeurs de Musique (S.A.C.E.M.) and Société des Editions Labrador	25 October 1979	57

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS		Judgment of	page
Case 25/79	Société Sanicentral GmbH v René Collin	13 November 1979	72
FREE MOVEMENT OF GOODS			
Case 159/78	Commission of the European Communities v Italian Republic	25 October 1979	54
Joined Cases 16 to 20/79	Openbaar Ministerie v Joseph Danis and Others	6 November 1979	62
Case 251/78	Denkavit Futtermittel GmbH v Minister für Ernährung, Landwirtschaft und Forsten of North Rhine-Westphalia	8 November 1979	65
Case 15/79	P.B. Groenveld B.V. v Produktschap voor Vee en Vlees	8 November 1979	70
Case 34/79	Regina v Henn and Darby	14 December 1979	94
FISHING			
Case 141/78	French Republic v United Kingdom of Great Britain and Northern Ireland	4 October 1979	26
NON-CONTRACTUAL LIABILITY - ACTION FOR DAMAGES			
Case 238/78	Ireks-Arkady GmbH v Council and Commission of the European Communities	4 October 1979	30
Joined Cases 261 and 262/78	Interquell Stärke-Chemie GmbH & Co. KG and Diamalt AG v Council and Commission of the European Communities	4 October 1979	33
Joined Cases 241,242,245 to 250/78	DGV, Deutsche Getreideverwertung und Rheinische Kraftfutterwerke GmbH and Others v Council and Commission of the European Communities	4 October 1979	36
Joined Cases 64 and 113/76, 167 and 239/78, 27,28 and 45/79	P. Dumortier Frères S.A. and Others v Council of the European Communities	4 October 1979	39
Cases 116 and 124/77	G.R. Amylum N.V. and Tunnel Refineries Ltd. v Council and Commission of the European Communities	5 December 1979	79
Case 143/77	Koninklijke Scholten-Honig N.V. v Council and Commission of the European Communities	5 December 1979	81
Case 12/79	Firma H.O. Wagner GmbH Agrarhandel KG v Commission of the European Communities	12 December 1979	84
COMMON CUSTOMS TARIFF			
Case 11/79	J. Cleton and Co. B.V. v Inspecteur der Invoerrechten en Accijnzen Rotterdam	4 October 1979	42
TRANSPORT			
Case 47/79	Firma Städtereinigung K. Nehlsen KG v Freie Hansestadt Bremen	6 December 1979	82

GENERAL INFORMATION ON THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

A. Information on current cases (for general use)

1. Calendar of the sittings of the Court

The calendar of public sittings is drawn up each week. It may be altered and is therefore for information only.

This calendar may be obtained free of charge on request from the Court Registry.

2. Judgments or orders of the Court and opinions of Advocates General

Orders for offset copies, provided some are still available, may be made to the Internal Services Branch of the Court of Justice of the European Communities, Boîte Postale 1406, Luxembourg, on payment of a fixed charge of Bfr 100 for each document. Copies may no longer be available once the issue of the European Court Reports containing the required judgment or opinion of an Advocate General has been published.

Anyone showing he is already a subscriber to the Reports of Cases Before the Court may pay a subscription to receive offset copies in one or more of the Community languages.

The annual subscription will be the same as that for European Court Reports, namely Bfr 2 000 for each language.

Anyone who wishes to have a complete set of the Court's cases is invited to become a regular subscriber to the Reports of Cases Before the Court (see below).

B. TECHNICAL INFORMATION AND DOCUMENTATION

I. Official publications

1. Reports of Cases Before the Court

The Reports of Cases Before the Court are the only authentic source for citations of judgments of the Court of Justice.

The volumes for 1954 to 1979 are published in Dutch, English, French, German and Italian.

The Danish edition of the volumes for 1954 to 1972 comprises a selection of judgments, opinions and summaries from the most important cases.

All judgments, opinions and summaries for the period 1973 to 1979 are published in their entirety in Danish.

The Reports of Cases Before the Court are on sale at the following addresses:

BELGIUM	Ets. Emile Bruylant, Rue de la Régence 67, 1000 Bruxelles
DENMARK	J.H. Schultz - Boghandel, Møntergade 19, 1116 København K
FEDERAL REPUBLIC OF GERMANY	Carl Heymann's Verlag, Gereonstrasse 18-32, 5000 Köln 1
FRANCE	Editions A. Pedone, 13 Rue Soufflot, 75005 Paris
IRELAND	Stationery Office, Beggar's Bush, Dublin 4
ITALY	CEDAM - Casa Editrice Dott. A. Milani, Via Jappelli 5, 35100 Padova (M 64194)
LUXEMBOURG	Office for Official Publications of the European Communities, Boîte Postale 1003, Luxembourg
NETHERLANDS	N.V. Martinus Nijhoff, Lange Voorhout 9, 's-Gravenhage
UNITED KINGDOM	Hammick, Sweet & Maxwell, 16 Newman Lane, Alton, Hants. GU 34 2PJ.
OTHER COUNTRIES	Office for Official Publications of the European Communities, Boîte Postale 1003, Luxembourg

2. Selected Instruments Relating to the Organization, Jurisdiction and Procedure of the Court (1975 edition)

   Orders, indicating the language required, should be addressed to the Office for Official Publications of the European Communities, Boîte Postale 1003, Luxembourg.

C. LEGAL INFORMATION AND DOCUMENTATION

I. Publications by the Information Office of the Court of Justice of the European Communities

Applications to subscribe to the following four publications may be sent to the Information Office, specifying the language required. They are supplied free of charge (Boîte Postale 1406, Luxembourg, Grand Duchy of Luxembourg).

1. Proceedings of the Court of Justice of the European Communities

   Weekly information sheet on the legal proceedings of the Court containing a short summary of judgments delivered and a brief description of the opinions, the oral procedure and the cases brought during the previous week.

2. Information on the Court of Justice of the European Communities

   Quarterly bulletin containing the summaries and a brief résumé of the judgments delivered by the Court of Justice of the European Communities.

3. Annual Synopsis of the work of the Court

   Annual publication giving a synopsis of the work of the Court of Justice of the European Communities in the area of case-law as well as of other activities (study courses for judges, visits, study groups, etc.). This publication contains much statistical information.

4. General information brochure on the Court of Justice of the European Communities

   This brochure provides information on the organization, jurisdiction and composition of the Court of Justice of the European Communities.

The above four publications are published in each official language of the Communities. The general information brochure is also available in Irish and Spanish.

II. Publications by the Documentation Branch of the Court of Justice

1. Synopsis of Case-Law on the EEC Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Brussels Convention")

   This publication, three parts of which have now appeared, is published by the Documentation Branch of the Court. It contains summaries of decisions by national courts on the Brussels Convention and summaries of judgments delivered by the Court of Justice in interpretation of the Convention. In future the Synopsis will appear in a new form. In fact it will form the D Series of the future Source Index of Community case-law to be published by the Court.

   Orders for the first three issues of the Synopsis should be addressed to the Documentation Branch of the Court of Justice, Boîte Postale 1406, Luxembourg.

2. Répértoire de la Jurisprudence Européenne - Europaïsche Rechtsprechung (published by H.J. Eversen and H. Sperl), has been discontinued.

   Extracts from cases relating to the Treaties establishing the European Communities published in German and French. Extracts from national judgments are also published in the original language.

   The German and French versions are on sale at: Carl Heymann's Verlag, Gereonstrasse 18-32, D-5000 Köln 1 (Federal Republic of Germany).

   Compendium of Case-law relating to the European Communities (published by H.J. Eversen, H. Sperl and J. Usher)

   In addition to the complete collection in French and German (1954 to 1976) an English version is now available for 1973 to 1976. The volumes of the English series are on sale at: Elsevier - North Holland - Excerpta Medica, P.O. Box 211, Amsterdam (Netherlands).

3. Bibliographical Bulletin of Community case-law

   This Bulletin is the continuation of the Bibliography of European Case-law of which Supplement No. 6 appeared in 1976. The layout of the Bulletin is the same as that of the Bibliography. Footnotes therefore refer to the Bibliography.

   It is on sale at the address shown at B 1 above (Reports of Cases Before the Court).

D. SUMMARY OF TYPES OF PROCEDURE BEFORE THE COURT OF JUSTICE

It will be remembered that under the Treaties a case may be brought before the Court of Justice either by a national court or tribunal with a view to determining the validity or interpretation of a provision of Community law, or directly by the Community institutions, Member States or private parties under the conditions laid down by the Treaties.

(a) References for preliminary rulings

The national court or tribunal submits to the Court of Justice questions relating to the validity or interpretation of a provision of Community law by means of a formal judicial document (decision, judgment or order) containing the wording of the question(s) which it wishes to refer to the Court of Justice. This document is sent by the Registry of the national court to the Registry of the Court of Justice, accompanied in appropriate cases by a file intended to inform the Court of Justice of the background and scope of the questions referred.

During a period of two months the Council, the Commission, the Member States and the parties to the national proceedings may submit observations or statements of case to the Court of Justice, after which they are summoned to a hearing at which they may submit oral observations, through their Agents in the case of the Council, the Commission and the Member State or through lawyers who are entitled to practise before a court of a Member State, or through university teachers who have a right of audience under Article 36 of the Rules of Procedure.

After the Advocate General has delivered his opinion, the judgment is given by the Court of Justice and transmitted to the national court through the Registries.

(b) Direct actions

Actions are brought before the Court by an application addressed by a lawyer to the Registrar (P.O. Box 1406, Luxembourg), by registered post.

Any lawyer who is entitled to practise before a court of a Member State or a professor occupying a chair of law in a university of a Member State, where the law of such State authorizes him to plead before its own courts, is qualified to appear before the Court of Justice.

The application must contain:

The name and permanent residence of the applicant;
The name of the party against whom the application is made;
The subject-matter of the dispute and the grounds on which the application is based;
The form of order sought by the applicant;
The nature of any evidence offered;
An address for service in the place where the Court of Justice has its seat, with an indication of the name of the person who is authorized and has expressed willingness to accept service.

The application should also be accompanied by the following documents:

The decision the annulment of which is sought, or, in the case of proceedings against an implied decision, by documentary evidence of the date on which the request to the institution in question was lodged;

A certificate that the lawyer is entitled to practise before a court of a Member State;

Where an applicant is a legal person governed by private law, the instrument or instruments constituting and regulating it, and proof that the authority granted to the applicant's lawyer has been properly conferred on him by someone authorized for the purpose.

The parties must choose an address for service in Luxembourg. In the case of the Governments of Member States, the address for service is normally that of their diplomatic representative accredited to the Government of the Grand Duchy. In the case of private parties (natural or legal persons) the address for service - which in fact is merely a "letter box" - may be that of a Luxembourg lawyer or any person enjoying their confidence.

The application is notified to the defendant by the Registry of the Court of Justice. It requires the submission of a statement of defence; these documents may be supplemented by a reply on the part of the applicant and finally a rejoinder on the part of the defendant.

The written procedure thus completed is followed by an oral hearing, at which the parties are represented by lawyers or agents (in the case of Community institutions or Member States).

After hearing the opinion of the Advocate General, the Court gives judgment. This is served on the parties by the Registry.

E. ORGANIZATION OF PUBLIC SITTINGS OF THE COURT

As a general rule sessions of the Court are held on Tuesdays, Wednesdays and Thursdays except during the Court's vacations - that is, from 22 December to 8 January, the week preceding and two weeks following Easter, and from 15 July to 15 September. There are three separate weeks during which the Court also does not sit : the week commencing on Carnival Monday, the week following Whitsun and the first week in November.

The full list of public holidays in Luxembourg set out below should also be noted. Visitors may attend public hearings of the Court or of the Chambers so far as the seating capacity will permit. No visitor may be present at cases heard in camera or during proceedings for the adoption of interim measures. Documentation will be handed out half an hour before the public sitting to visiting groups who have notified the Court of their intention to attend the sitting at least one month in advance.

Public holidays in Luxembourg

In addition to the Court's vacations mentioned above the Court of Justice is closed on the following days:

New Year's Day	1 January
Easter Monday	variable
Ascension Day	variable
Whit Monday	variable
May Day	1 May
Robert Schuman Memorial Day	9 May
Luxembourg National Day	23 June
Assumption	15 August
"Schobermesse" Monday	Last Monday of August or first Monday of September
All Saints' Day	1 November
All Souls' Day	2 November
Christmas Eve	24 December
Christmas Day	25 December
Boxing Day	26 December
New Year's Eve	31 December

This Bulletin is distributed free of charge to judges, advocates and practising lawyers in general on application to one of the Information Offices of the European Communities at the following addresses:

I. COUNTRIES OF THE COMMUNITY

BELGIUM

1040 Brussels (Tel.7350040)
Rue Archimède 73

DENMARK

1004 Copenhagen . (Tel. 144140)
Gammel Torv 4
Postbox 144

FEDERAL REPUBLIC OF GERMANY

5300 Bonn (Tel. 238041)
Zitelmannstrasse 22

1000 Berlin 31 (Tel. 892 40 28)
Kurfürstendamm 102

FRANCE

75782 Paris CEDEX 16 (Tel. 5015885)
Rue des Belles Feuilles 61

IRELAND

Dublin 2 (Tel. 712244)
39 Molesworth Street

ITALY

00187 Rome (Tel. 689722)
Via Poli 29

LUXEMBOURG

Luxembourg-Kirchberg (Tel. 430111)
Centre Européen
Jean Monnet Building

NETHERLANDS

The Hague (Tel. 469326)
Lange Voorhout 29

UNITED KINGDOM

London W8 4QQ (Tel. 7278090)
20, Kensington Palace Gardens

Cardiff CFL 9SG (Tel. 371631)
4, Cathedral Road
P.O. Box 15

Edinburgh EH 2 4PH (Tel. 2252058)
7, Alva Street

Belfast

Windsor House
Block 2, 7th floor
9/15 Bedford Street

II. NON-MEMBER COUNTRIES

CANADA

Ottawa Ont. KIR 7S8 (Tel.(613)-2386464)
Inn of the Provinces - Office Tower
(Suite 1110)
350 Sparks Street

CHILE

Santiago 9 (Tel. 250555)
Avenida Ricardo Lyon 1177
Casilla 10093

GREECE

Athens 134 (Tel. 743982)
2, Vassilissis Sofias
T.K. 1602

JAPAN

Tokyo 102 (Tel. 2390441)
Kowa 25 Building
8-7 Sanbancho
Chiyoda-Ku

PORTUGAL

1200 Lisbon (Tel. 66 75 96)
35 rua da Sacramento à Lapa

SPAIN

Madrid 1 (Tel. 410 02 00)
Hotel Castellana
Paseo de la Castellana 57

SWITZERLAND

1211 Geneva 20 (Tel. 349750)
Case Postale 195
37-39, Rue de Vermont

THAILAND

Bangkok (Tel. 282 1452)
34, Phya Thai Road
10th floor Thai Military Bank Building

TURKEY

Ankara (Tel. 276145)
13, Bogaz Sokak, Kavaklidere

USA

Washington DC 20037 (Tel. 202.8629500)
2100 M Street, NW
Suite 707

New York NY 10017 (Tel. 212.3713804)
1, Dag Hammarskjöld Plaza
245 East 47th Street

VENEZUELA

Caracas (Tel. 925056)
Quinta Bienvenida, Valle Arriba,
Calle Colibri, Distrito Sucre


OFFICE FOR OFFICIAL PUBLICATIONS
OF THE EUROPEAN COMMUNITIES

Boîte postale 1003 — Luxembourg

Catalogue number: DY-AA-79-004-EN-C